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**INTERNATIONAL LAW**  
**CHIEFLY AS INTERPRETED AND**  
**APPLIED BY THE UNITED STATES**  
**SECOND REVISED EDITION**

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**VOLUME ONE**



# INTERNATIONAL LAW

## CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES

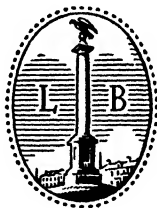
BY

CHARLES CHENEY HYDE

HAMILTON FISH PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY,  
COLUMBIA UNIVERSITY; FORMERLY THE SOLICITOR FOR THE  
DEPARTMENT OF STATE OF THE UNITED STATES OF  
AMERICA; ASSOCIATE OF THE INSTITUTE OF  
INTERNATIONAL LAW

*In Three Volumes*

VOLUME ONE



*Second Revised Edition*

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TO  
THE DEAR MEMORY  
OF MY WIFE  
MARY TILTON HYDE





## FOREWORD

To mirror the views of his own country on international law is still the chief endeavor of the author in this revised edition of a work first published in 1922. He seeks to portray them until the late summer of 1941, when the United States had made itself a participant, although not a belligerent, in the present war. In the course of so doing he has been forced to observe how States act, and may be expected to act, under certain conditions that confront them; how fantastic and unscientific are statements or conclusions which ignore such expectations or probabilities; and how unconvincing it is to the layman to hear proclaimed as the law rules which States under certain well-defined circumstances may be expected habitually to ignore. Such proclamations suggestive of preachments concerning what States should or should not do, shed little light on what they may at the time accept as correct standards of conduct to be respected as such. The thing to which they ascribe the quality of law contrasts sharply with a body of principles serving in fact to regulate inter-State conduct; it projects itself rather as a detached collection of precepts variously expressed, reflecting, moreover, no oneness of thought, and impervious to the possible contempt of States for what is laid down. If there be a law of nations that is held in higher esteem and which the United States regards as binding upon civilization, it must be approached from a different angle and gleaned primarily from what the United States declares that principle and practice have united to ordain.

That effort needs, however, to be supplemented by another. The official thinking of a State may not keep pace with the changes in the international life; it may be slow to apprehend the disintegrating effect of some of them upon what is assumed to be the law. It may misconceive the significance of persistent and oft-recurring breaches, regarding them as merely perverse instances of lawlessness, rather than as grim tokens of resolute effort never to heed certain restrictions which the law once appeared to exact of all. Accordingly, it is constantly necessary to observe with care how far repeated and widespread breaches of the law by numerous States are sure tokens of gradual modification. To that end it is imperative to endeavor to ascertain how States generally are to be expected to react when confronted with particular rules, and in the course of that endeavor to accept no guidance that is heedless of obvious propensities, or which shuns what experience has made the basis of reasonable expectation. The predictable conduct of States in many situations has become so obvious, that to ignore it betrays mental inertia or unconcern as to what the future may bring. When the parties to a treaty are guilty of such remissness, their basis of accord is not likely to register clearness of thought; and it may serve to retard the cause of international justice. To demand by force the acceptance of a convention

which the acceptor must be expected to repudiate whenever it can safely unleash itself, and simultaneously to proclaim the sanctity of treaties, are the comedies of the international stage. Yet States still blithely continue to bind themselves by ties which they must know are certain to snap whenever they press too hard upon a contracting party. To declare that *pacta sunt servanda* does not make them tougher. The saddest aspect of international treaty-making is the fact that contracting States remain persistently indifferent to corrosive influences which even at the time of contracting shatter the prospect of probable performance of what is agreed upon. If the treaty or treaties that shall embody the final settlement of the present war are to be the prolonger of peace, rather than the prelude to fresh conflict, the terms of settlement must register deference for the expectant conduct of all concerned, and fail in no wise to take cognizance of the probable effect of every provision upon the disposition and readiness of each party to carry out the arrangement. Aspects of the problem are dealt with in their place.

To the United States World War II brought home the fresh and vital question whether the obligations normally pressing upon a so-called neutral State were applicable to it when deference for them interfered with what were deemed to be the essential requirements of its own defense. The nation made a negative response. Its intervention was conceived to be legitimate. That conclusion reflected in a variety of activities, regardless of whether it hastened the day when the United States was to become a belligerent, served also to accentuate a still larger question — whether the essential interests of the international society still permit its several members to remain mere onlookers in a major conflict, and whether also some preventive participation is not to be the probable rôle of those members when war seems imminent. What magnifies that interest is the fact that the belligerent amply supplied with present-day implements of war, such as aircraft and submarines, and tanks, is subject to an irresistible temptation to use them in a fashion which it has proved to be idle to endeavor to restrain by agreement, and which renders the possessor a menace to the good order of the international society. This in turn inspires the suggestion that such weapons should be withheld from all but a single entity functioning as a common war-preventing agency in behalf of all. Sound as this may be, it remains to be seen whether the several powers which after the present conflict are to be the most influential in shaping the course of events, deem it to be their individual as well as common interest to proceed along such lines.

To distinguish between what the several members of the family of nations may be fairly deemed to have accepted or acquiesced in as the law governing their mutual relations, and what does not in fact appear to have received such acceptance is a never-ending task. The most delicate and elusive phase of the study of international law is that which exacts of the investigator a rigid examination of, and a judicial conclusion with respect to, the actual condition of the law at any given time. He may note the processes by which changes are wrought, the causes of evolution, current demands for particular modifications, and the probable influence of thought focused on the solution of defined prob-

lems; he may also never cease to be aware of the fact that international law is bound to respond to the changing needs of the international society, and he may prophesy the nature of some responses that the future may bring. Nevertheless, his primary task is to see things as they are, and if he attempts to mirror the law, to let no play of imagination or vision of the future mar the accuracy of the portrayal. The form of his utterance is relatively unimportant, so long as he remains a realist and grimly reflects the image that he sees. It may be that the very truthfulness of his pen and the very grotesqueness of what it records may serve in some small measure to hasten the day when the law of nations presents a lovelier aspect. With deference for this precept it is sought to make special application of it in picturing what the United States itself conceives to be the law of nations.

The work of the United States as an interpreter and applier of international law, although long and well under way, is still in its earliest stages. The value of that work in the future must depend upon the vigor and persistence of the effort to anticipate how States, under certain circumstances, are bound to conduct themselves, and upon the avoidance of exactions or commitments that defy necessary anticipations; upon an exact appreciation of considerations which cause States to repudiate as well as perform their international agreements; and upon a realization that deference for law can only flourish when all concerned share a sense of the reasonableness and justness of what it ordains. To help make the law of nations worthy of such a common estimate is a major task of the United States. But a bigger and a harder task may confront the nation — to pay whatever price may be exacted for the maintenance of what are conceived to be the international standards of justice, even though it involve participation in costly and bloody action far from home.

It is in the light of the several foregoing considerations that the following pages are offered.



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## LIST OF ABBREVIATIONS

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This list does not embrace titles which are sufficiently described when cited in the footnotes. It is not a bibliography of the several works to which reference is made in the text and footnotes. Nor does it purport to explain the well known abbreviations of the reports of American and British cases.

Alvarez.	Alvarez, Alejandro: <i>Le droit international américain</i> . Paris, 1910.
Am.	American.
Am. Hist. Rev.	American Historical Review. 1895—
Am. J.	American Journal of International Law. 1907—
Am. Law Reg.	See Univ. Penn. Law Rev.
<i>Am. Law Rev.</i>	American Law Review. 1866—. Continued as United States Law Review (Vol. LXIII) 1929, in combination with New York Law Review; continued as New York Law Review (Vol. LXXIV) 1940.
Am. Pol. Sc. Rev.	American Political Science Review. 1907—
Am. State Pap. For. Rel.	American State Papers, Class I, Foreign Relations. Documents Legislative and Executive of the Congress of the United States, 1789—1828. 6 folio vols. Washington, 1832—1859.
American White Book, European War.	United States, Department of State: European War. Diplomatic Correspondence with Belligerent Governments Relating to Neutral Rights and Duties, and Commerce. 4 White Books, May 27, 1915—May 18, 1918.
Annual Dig.	Annual Digest of Public International Law Cases; being a selection from the decisions of international and national courts and tribunals. 8 vols. London, 1919—1941. Years 1919—1922, edited by Sir John Fischer Williams and H. Lauterpacht; years 1923—1924, same editors; years 1925—1926, edited by Arnold D. McNair and H. Lauterpacht; years 1927—1928, same editors; years 1929—1930, edited by H. Lauterpacht; years 1931—1932, same editor; years 1933—1934, same editor; years 1935—1937, same editor.
<i>Annuaire.</i>	<i>Annuaire de l'Institut de Droit International</i> , 1877—1937. 40 Vols.
<i>Arch. Dip.</i>	<i>Archives Diplomatiques</i> . Founded in 1861. Three series. Paris, 1861—1913.
Baker.	Sir Sherston Baker: <i>First Steps in International Law</i> . Boston, 1899.
Bluntschli.	Johann Kaspar Bluntschli: <i>Le Droit International Codifié</i> . Translated from the German into French by C. Lardy, and preceded by a biography of the author by Alph. Rivier. Fifth edition. Paris, 1895.

- Bonfils-Fauchille.** Henry Bonfils: *Manuel de Droit International Public*. Seventh edition by Paul Fauchille. Paris, 1914.
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- Briggs.** Herbert W. Briggs: *The Law of Nations. Cases, Documents and Notes*. New York, 1938.
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- Brit. and For. St. Pap.** British and Foreign State Papers. Issued by the Foreign Office of Great Britain. London. 137 vols. to 1939.
- British Y. B.** The British Year Book of International Law. London, 1920-1921, -1939. 20 vols.
- Bulletin, Int. News.** The Bulletin of International News. London, 1925-1941, 18 vols.
- Calvo.** Charles Calvo: *Le Droit International théorique et pratique*. Fifth edition. 6 vols. Paris, 1896.
- Catalogue of Treaties.** United States, Department of State: *Catalogue of Treaties (1814-1914)*. Confidential document. Washington, 1919.
- Cd. or Cmd.** Great Britain, Parliament. Papers issued by command.
- Charles' Treaties.** Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other powers: Supplement, 1913, to Senate Document No. 357, Sixty-first Congress, Second Session. Compiled by Garfield Charles. Senate Document No. 1063, Sixty-second Congress, Third Session. Washington, 1913.
- de Clercq.** *Recueil des Traité de la France*. Published under the auspices of the Ministry of Foreign Affairs. Compiled by A. J. H. de Clercq and Jules de Clercq. 1864-1907. 23 vols.
- Clunet** *Journal du Droit International Privé et de la Jurisprudence Comparée*. Founded in 1874, by Edouard Clunet, and continued by A. Prudhomme. 65th year, 1938. From 1915 (42d year) entitled *Journal du Droit International*. Paris.
- Clunet, Tables Générales.** *Tables Générales du Journal du Droit International Privé*. Augmented by several reports and numerous documents concerning international law, 1874-1904. 4 vols. Paris, 1905-1906. 2 supp. vols. for years 1905-1925, Paris, 1926-1927.
- Pitt Cobbett, Cases.** Pitt Cobbett: *Cases and Opinions on International Law*. Third edition, 2 vols. London, 1909-1913.
- Collezione Celerifera.** *Collezione Celerifera delle Leggi, Decreti, Istruzione e Circolari*. Editor: Domenico Scacchi. Rome, 1915-
- C. C. H. War Law Service.** War Law Service. Vol. I; Statutes, Proclamations, Interpretations. Vol. II; Government Contracts. Vol. III; Foreign Supplement. Currently supplemented. Second edition. Published by Commerce Clearing House, Inc. Chicago, 1941.
- Cong. Record.** United States: Congressional Record.
- Crandall, Treaties.** Samuel B. Crandall: *Treaties, Their Making and Enforcement*. Second edition. Washington, 1916.

- "Cyc." Cyclopedia of Law and Procedure. Editor-in-Chief, William Mack. 40 vols. New York, 1901-1912.
- Dana's Wheaton. See Wheaton.
- Davis. George B. Davis: *Elements of International Law*. Third edition, New York, 1908.  
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Diplomatic Correspondence of the United States, published by the Department of State for the years 1861-1868. No volume was published for the year 1869.
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# VOLUME ONE

## PRELIMINARY

### Certain Aspects of International Law

§ 1. **Definition and Nature.** The term international law may be fairly employed to designate the principles and rules of conduct declaratory thereof which States feel themselves bound to observe, and, therefore, do commonly observe in their relations with each other.<sup>1</sup> From a sense of legal obligation to respect what is thus prescribed, States, notwithstanding grave and occasional lapses, have generally molded their practice. That which prevailed when the United States came into being manifested the existence of a body of law which, although long in the making, had undergone a development of barely a century and a half

§ 1.<sup>1</sup> "International law consists of those principles and rules of conduct which civilized States regard as obligatory upon them, and hence are generally observed in their relations with each other." (Charles E. Hughes, address before Canadian Bar Association, September 4, 1923, *The Pathway of Peace*, New York, 1925, 3, 8.)

"What is international law? It is the body of principles and rules which civilized States consider as binding upon them in their mutual relations. It rests upon the consent of sovereign States." (Same writer, address before the Association of the Bar of the City of New York, Jan. 16, 1930, *Am. Bar Assoc. Jour.*, XVI, 151, 153.)

"There is, indeed, no mystery about international law. It is nothing more than the recognition between nations of the rules of right and fair-dealing, such as ordinarily obtain between individuals, and which are essential for friendly intercourse." (Mr. Hull, Secy. of State, to the Mexican Ambassador at Washington, Aug. 22, 1938, Dept. of State Press Release, Aug. 25, 1938, 1.)

"International law consists of a body of rules governing the relations between States. It is a system of jurisprudence which, for the most part, has evolved out of the experiences and the necessities of situations that have arisen from time to time. It has developed with the progress of civilization and with the increasing realization by nations that their relations *inter se*, if not their existence, must be governed by and depend upon rules of law fairly certain and generally reasonable." (Hackworth. Dig., I, 1.) See also other definitions *id.*, I, 1-3.

"International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." Dana's *Wheaton*, § 14.

"We define international law to be the aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other, and to each other's subjects." Woolsey, 6 ed., § 5.

"International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement." Hall, Higgins' 8 ed., 1.

See also Fauchille, I, Part 1, § 1; Calvo, 5 ed. § 1; Martens, French translation by Léo (1883-1887), I, § 3; Rivier, I, § 3; Sir Frederick Pollock, "The Sources of International Law," *Columbia Law Rev.*, II, 511.

from the time when Grotius summoned the nations to follow the path which he blazed.<sup>2</sup>

§ 2. **Causes.** States would not have been disposed to unite, however loosely, in order to regulate their conduct with respect to each other by principles regarded as unresponsive to what were conceived to be the requirements of international justice; and there could have been no common zeal for that justice unless States were by their nature and composition intolerant of international disorder and incapable of remaining isolated from each other. Inasmuch as they were entities composed of human beings possessed as such with moral sensibilities and social instincts which grew in vigor and fineness as civilization strode forward, there was solid cause for a system of jurisprudence applicable to the requirements of the common life.<sup>1</sup> As soon as general acquiescence concerning those requirements became assured, an international law was capable of being and sprang into life.

The discovery and use of new methods of communicating intelligence, the development of means of transportation by sea and land and air, together with the transformation of instrumentalities employed in the military and naval operations of a belligerent, have, since the close of the eighteenth century, and particularly since the beginning of the twentieth, served to weld together the society of nations by fresh and enduring ties. The resulting growth of international social and commercial intercourse has not ceased to influence profoundly the trend of the law. Certain results seem to be already apparent. It has been perceived, for example, that rules of conduct, however definitely established, if applied under conditions differing sharply from those prevailing when they were laid down, fail to reflect, and may even oppose, the underlying principles to which their origin was due. Doubtless World War I served to bring home to peoples and statesmen alike a fresh sense of the oneness of interest binding the States of every continent, and a corresponding realization of the harm sustained by all through contempt by a single State for the obligations acknowledged by the international society to govern each of its members. That sense did not, however, suffice to prevent the recurrence of contemptuous acts that were productive of World War II. It remains to be seen how and to what extent the present conflict is to beget a broader vision and through it a concerted effort to thwart whatever is subversive of the common weal.

The international society or family of nations is as broad as civilization. Made up of the several States, its interests are theirs, and its conclusions the

<sup>2</sup> Grotius published his celebrated work *De Jure Belli Ac Pacis* in 1625. See, in this connection, Hamilton Vreeland, Jr., *Hugo Grotius the Father of the Modern Science of International Law*, New York, 1917.

"The system of international law, as we know it, has its beginning about the middle of the sixteenth century. It comes into full existence almost at a bound in 1625, and has its classical period from that date to the latter part of the eighteenth century." (Roscoe Pound, "Philosophical Theory and International Law," *Bibliotheca Visseriana*, I, 73, 76.)

§ 2. "The real appeal of Grotius was not to 'man in a state of nature' but to the sense of justice, humanity, righteousness, evolved under the reign of God in the hearts and minds of thinking men. His appeal was not to a 'contract made in the primeval woods,' but to the hearts, minds, and souls of men, developed under Christian civilization." Andrew D. White, "The Warfare of Humanity with Unreason: Hugo Grotius," *Atlantic Monthly*, XCIV, 105, 114

product of their thought. There can be no conflict between its opinion and that on which its members are substantially agreed. The former is the embodiment of the latter. If, therefore, it may be properly said that the welfare of the international society demands that the individual member thereof refrain from the commission of particular acts, it is because such a conclusion is that of substantially its entire membership. Conversely, it can not be maintained that the welfare of the society entails a sacrifice on the part of the individual State which the several members have not generally deemed it expedient to yield. Inasmuch as States have been governed by a self-interest in relinquishing freedom from restraint, they have demanded convincing proof of the benefits accruing to themselves as a condition essential to reciprocal concessions for the common weal. Hence it is impossible to point to the existence of a general interest of the international society which for any reason a substantial number of States is unable to recognize as such. When it is perceived, however, that the family of nations is not an entity extrinsic or foreign to its members, that its interests are invariably identical with their collective interests, and its conclusions the manifestation of their own, it becomes possible to approach intelligently the inquiry whether in a given case the well-being of the international society is at variance with the conduct of the individual State.

It is now realized in many quarters that the welfare of each member of the family of nations, and, therefore, of the international society itself, demands a fresh and penetrating inquiry concerning what the underlying principles of law must be deemed to demand, and what in particular they enjoin as applicable standards of the propriety of the conduct of a State in all phases of its contacts with the outside world. Moreover, it is widely perceived that differences between States within a very broad field, should, when diplomacy fails, be adjusted with strict regard for those principles, and by amicable processes, embracing when possible the use of judicial agencies. The sacrifices entailed by such a procedure no longer appear to be heavier than individual States are oftentimes prepared to make. Again, it has become apparent that States are increasingly disposed to unite generally to seek the recommendations, if not the decisions of appropriate non-judicial bodies as a means of adjusting controversies for the solution of which they are reluctant to have recourse to arbitration. In a word, it is increasingly felt that the exhaustion of modes of amicable adjustment, whether judicial or otherwise, should precede recourse to armed conflict, and that excuses for the waging of war should be confined to narrowest bounds. The treaty providing for the renunciation of war as an instrument of national policy, signed in behalf of the United States and numerous other parties on August 27, 1928, testified to the breadth and influence of this opinion at that time.<sup>2</sup>

The need of international law is never more obvious than when it is flouted by a powerful State or group of States bent on the endeavor to break it down and to build on the wreckage a new system that subjects to the will of such State or group the propriety of any acts wheresoever committed that seemingly

<sup>2</sup> U. S. Treaty Vol. IV, 5130.

concern it. Since 1939, civilization has witnessed such an endeavor which the United States has already sought to oppose.<sup>3</sup>

§ 2A. **The Acquiescence of States.** The growth of the law governing the relations between States has been characterized in practice by acceptance of the theory that the society of nations is comprised primarily of a number of so-called independent States, resembling each other in their acknowledgment of no obligation to recognize any common superior, and deemed accordingly to stand in law upon an equal footing.<sup>1</sup> The basis of the law, that is to say, what has given to some principles of general applicability the quality or character of law has been the acquiescence of the several independent States which were to be governed thereby.<sup>2</sup> As the Permanent Court of International Justice declared, September 7, 1927, in its judgment in the case of the S.S. "*Lotus*":

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>3</sup>

<sup>3</sup> See *infra*, § 5A.

<sup>2</sup> § 2A.<sup>1</sup> See The Equality and Similarity of Independent States, *infra*, § 11.

<sup>1</sup> The word "basis" as employed in the text does not refer to the causes productive of acquiescence on the part of States, or to the philosophy responsible for the enunciation of principles which gained general approval and which the earliest publicists sought to explain.

"They [the principles and rules of conduct which civilized States regard as obligatory upon them] are deduced by reason and exemplified by practice, and, resting on general consent, can be modified or added to only by consent." (Charles E. Hughes, address before Canadian Bar Association, September 4, 1923, *The Pathway of Peace*, New York, 1925, 3, 8.) "International Law rests on consent. It consists of the body of principles and rules which States consider as binding upon them, and thus the development of international law depends upon agreement." (Same writer, *Proceedings*, Am. Soc. Int. Law, 23rd Annual Meeting, 1929, 1, 2.)

"In the declaration of law on the strength of usage, it has never been supposed to be necessary to show that each particular nation had affirmatively adopted it. It appearing that the usage is general, all nations that profess to be law-governed are assumed at least tacitly to have accepted it." (J. B. Moore, *International Law and Some Current Illusions*, 289, 303.)

"International law grows out of negotiated agreements by means of which nations pledge themselves to the acceptance of definite rights and duties in those spheres of action with which the particular agreements deal." (Cordell Hull, in address at the University of Toronto, Oct. 22, 1937, *New York Times*, Oct. 23, 1937, p. 8.)

"Customary, as distinguished from conventional, international law is based upon the common consent of nations extending over a period of time of sufficient duration to cause it to become crystallized into a rule of conduct. When doubt arises as to the existence or non-existence of a rule of international law, or as to the application of a rule to a given situation, resort is usually had to such sources as pertinent treaties, pronouncements of foreign offices, statements by writers, and decisions of international tribunals and those of prize courts and other domestic courts purporting to be expressive of the law of nations." (Hackworth, *Dig.*, I, 1.)

<sup>3</sup> Judgment No. 9, Publications, Permanent Court of International Justice, Series A, No. 10, p. 18.

"This [international] law is for the most part unwritten and lacks sanctions; it rests on a general consensus of opinion; on the acceptance by civilized States, members of the great community of nations, of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither committed to writing nor confirmed by conventions. This body of rules is called international law." (Dissenting opinion by Judge Loder, *id.*, 34.)

"In reality the only source of international law is the *consensus omnium*. Whenever it appears that all nations constituting the international community are in agreement as regards

Acceptance has been manifested in a general yielding of, or acquiescence in, what the common needs of the several States constituting the community of nations were deemed to require, and under circumstances when opposition would have been subversive of what were perceived to be the imperative demands of international justice. The experience of States has shown that approval can not well be withheld, and is, therefore, not likely to be withheld, whenever there is a general understanding that the common weal of the society of nations necessitates fresh or broader concessions. Such a general understanding may, however, be slow in development and seemingly tardy in its fruition.

The requisite acquiescence on the part of individual States has not been reflected in formal or specific approval of every restriction which the acknowledged requirements of international justice have appeared, under the circumstances of the particular case, to dictate or imply. It has been rather a yielding to principle, and by implication, to logical applications thereof which have begotten deep-rooted and approved practices.<sup>4</sup> Moreover, such a yielding seems to be inferred from the absence of objections to recurrent acts assertive of freedom to commit particular forms of conduct, or to apply principles in a particular fashion.<sup>5</sup> Acceptance of the law is deemed to be given by each new State in return for its recognition as a member of the family of nations. Differences of opinion whether an alleged rule of restraint asserted or invoked by one State is a reasonable application of, or a necessary deduction from, an accepted principle, are not uncommon. This does not, however, indicate that one of the States at variance has not consented to that principle, but merely manifests a denial that the rule invoked is in fact declaratory of it.<sup>6</sup> The frequency of controversies

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the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law and becomes one of those rules the observance of which the Lausanne Convention recommends to the signatory States." (Dissenting opinion by Judge Weiss, *id.*, 40, 43-44.)

<sup>4</sup> "The rules [of international law] rest partly on the assent of the States and partly on generally approved practice, assent to which is either presumed or, in respect of a particular State declining adherence, immaterial." (Edwin M. Borchard, "International Law," *Encyclopaedia of the Social Sciences*, 1932, VIII, 167.)

<sup>5</sup> Judgment of the Court in the case of the S.S. "*Lotus*," Judgment No. 9, Publications, Permanent Court of International Justice, Series A, No. 10, p. 29.

<sup>6</sup> "The consent of the international society to the rules prevailing in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a State it is not necessary to show that the State in question has assented to the rule either diplomatically or by having acted on it, though it is a strong argument if you can do so. It is enough to show that the general consensus of opinion within the limits of European civilisation is in favour of the rule." Westlake, 2 ed., I, 16.

Story, J., in the case of *La Jeune Eugenie*, 2 Mason 409, 448, declared:

"What, therefore, the law of nations is, does not rest upon mere theory, but may be considered as modified by practice, or ascertained by the treaties of nations at different periods. It does not follow, therefore, that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations. Nor is it to be admitted, that no principle belongs to the law of nations which is not universally recognised as such, by all civilized communities, or even by those constituting, what may be called the Christian States of Europe. . . .

"But I think it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligations, may theoretically be said to exist in the law of nations; and unless it be relaxed or waived by the consent of nations which may be evidenced by their general practice and customs, it may be enforced by a court of justice whenever it arises in judgment."

in relation to the propriety of particular methods employed in the exercise of governmental authority doubtless breeds confusion of thought. It serves also to emphasize the need of authoritative judicial pronouncements by permanent international tribunals such as those at The Hague, indicating correct deductions from accepted principles, as well as reasonable applications of them, and measuring the extent and value of the approval exhibited by States with respect to particular acts of which the propriety is challenged.

The acquiescence of the family of nations reflected by the practice of its several members has been productive of an international law in a converse sense. It has acknowledged the freedom of the individual State with respect to numerous matters such as, for example, the control of its own territory and the exercise of jurisdiction therein, the withholding of consent to undesired treaties, and even the choice of modes of adjusting controversies.<sup>7</sup> The development of the life of the international community has thus registered general approval of the lodgment in its several members of a large "discretion" the retention and exercise of which have not been regarded as anti-social, and which has received fresh and authoritative recognition in the utterances of the Permanent Court of International Justice.<sup>8</sup> There has grown up a body of international law indicative of what individual States may do without being chargeable with internationally illegal conduct, and which foreign offices invoke and international tribunals duly apply. According to the nomenclature employed by both, the latitude accorded has begotten so-called rights which are recognized as such by statesmen and jurists, and generally respected by the family of nations.<sup>9</sup> The nature and extent of them call for close examination.<sup>10</sup>

<sup>7</sup> "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement." (Fifth Advisory opinion of the Permanent Court of International Justice, July 23, 1923, concerning the Status of Eastern Carelia, Publications, Permanent Court of International Justice, Series B, No. 5, p. 27.)

<sup>8</sup> "This discretion [in relation to the right of States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory] left to States by international law explains the great variety of rules which they have been able to adopt without objections or complaints on the part of other States; it is in order to remedy the difficulties resulting from such variety that efforts have been made for many years past, both in Europe and America, to prepare conventions the effect of which would be precisely to limit the discretion at present left to States in this respect by international law, thus making good the existing lacunæ in respect of jurisdiction or removing the conflicting jurisdictions arising from the diversity of the principles adopted by the various States." (Judgment of the Court in the case of the S.S. "*Lotus*," Judgment No. 9, Publications, Permanent Court of International Justice, Series A, No. 10, p. 19.)

<sup>9</sup> According to the "Declaration of the Rights and Duties of Nations," adopted by the American Institute of International Law at Washington, January 6, 1916:

"I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the State to protect itself or to conserve its existence by the commission of unlawful acts against innocent unoffending States.

"II. Every nation has the right to independence in the sense that, it has a right to the pursuit of happiness and is free to develop itself without interference or control from other States, provided that in so doing it does not interfere with or violate the rights of other States.

"III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, 'to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them.'

"IV. Every nation has the right to territory within defined boundaries and to exercise

There is a broad zone within which the activities of the individual State, even in respect to certain matters affecting the interests of others, have in practice been left so completely to the local control as to inspire the statement that they are not, in principle, regulated by international law.<sup>11</sup> There is suggested a distinction between matters which by virtue of the law of nations a State enjoys a broad right to control, and those respecting which it enjoys unmolested freedom because they fall within a domain where international law is not deemed to be applicable. Such a distinction may be useful in portraying or identifying special activities or situations wherein a State has long been permitted to be the sole judge of the propriety of its conduct, and where the absence of outside interference has revealed the remoteness of any general international interest. It fails, however, to offer a satisfactory explanation of the latitude accorded or enjoyed. If a State is unhampered in its activities that affect the interests of any other, it is due to the circumstance that the practice of nations has not established that the welfare of the international society is adversely affected thereby. Hence that society has not been incited or aroused to endeavor to impose restraints; and by its law none are imposed. The Covenant of the League of Nations takes exact cognizance of the situation in its reference to disputes "which arise out of a matter which by international law is solely within the domestic jurisdiction" of a party thereto.<sup>12</sup> It is that law which as a product of the acquiescence of States permits the particular activity of the individual State to be deemed a domestic one.

The development of international relations causes changing estimates of the effect of the conduct of the individual State upon the life of the international community. These may serve to attach a sinister significance to acts which in a previous decade or century were looked upon with unconcern, or, on the other hand, they may manifest approval of conduct once regarded as subversive of justice. While they must be invariably responsive to the re-

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exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.

"V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe." (J. B. Scott, *The American Institute of International Law: Its Declaration of the Rights and Duties of Nations*, Washington, 1916, 88.)

Declared Mr. Hughes, when Secretary of State, in the course of an address on "The Centenary of the Monroe Doctrine," delivered November 30, 1923, at a meeting under the auspices of The American Academy of Political and Social Science and the Philadelphia Forum, at Philadelphia, with respect to the foregoing declaration: "It can not be doubted that this declaration embodies the fundamental principles of the policy of the United States in relation to the Republics of Latin America. When we recognized these Republics as members of the family of nations we recognized their rights and obligations as repeatedly defined by our statesmen and jurists and by our highest court." (*The Pathway of Peace*, 141.)

<sup>10</sup> Such is the constant task of foreign offices where it is undertaken primarily without reference to the advancement of the theory which should, or is likely ultimately, to prevail in the society of nations, but rather in order to ascertain or enunciate the exact state of the law as it is, as the test of the propriety of conduct that is challenged or approved.

<sup>11</sup> Fourth Advisory Opinion of the Permanent Court of International Justice with regard to the Nationality Decrees issued in Tunis and Morocco (French zone), Publications, Permanent Court of International Justice, Series B, No. 4, p. 24.

See also, "The Shortcomings of International Law," by J. L. Brierly, *Brit. Y.B.*, 1924, 4.

<sup>12</sup> Paragraph 8, Article XV, U. S. Treaty Vol., III, 3340.



quirements of the international society and can never be obstructive of its progress, their ultimate effect upon the development of the law may be difficult to foresee. Inasmuch as changing estimates are to be anticipated, and as the evolution of thought in this regard appears to be constant and is perhaps now more obvious than at any time since the United States came into being, the circumstance that at any given period the solution of a particular question is by international law deemed to be solely within the control or jurisdiction of one State, gives frail assurance that it will always be so regarded.

§ 2B. **Modifications of the Law.** Difficulties are encountered when attempt is made to change the law in the face of substantial opposition. It is improbable that, for example, the United States would admit that a large and preponderant group of States could through its collective will amend the law and thereby broaden the obligations or curtail the rights of States belonging to another less powerful group without their acquiescence.<sup>1</sup> In a word, changes wrought in the law of nations must receive the approval of the several States affected thereby, that is, of substantially the full international community.<sup>2</sup> This requirement seemingly obstructive of modifications which a bare majority of States may, perhaps, wisely desire and reasonably propose, offers no practical barrier to improvement and is not to be regarded as an obstacle to progress.<sup>3</sup> While it necessarily reveals the logical basis of fresh restrictions that are to be imposed upon and respected by the entire community, it in no way retards the effect of influences calculated to inspire approval of proposals worthy of it. Those influences become potent not merely because they are in harmony with the will of States associated in an influential group, but rather for the reason that they support what is inherently sound and generally desirable. Such a group of States may agree to particular restraints applicable to the several members thereof; and in proportion as the common sacrifice serves to promote justice among them and thus to indicate what might well receive universal respect, the influence

§ 2B.<sup>1</sup> It is not suggested that the opposition of a strong and solitary State could ultimately prevail against the consensus of opinion of what, except for itself, might fairly be regarded as the entire civilized world, or that such a State would not be finally compelled to acquiesce in changes which it once opposed. The reason, however, for its impotence would doubtless be in part the unsoundness of its stand; for it is hardly probable that a single isolated State could rightly denounce as unjust a proposed change which had won the approval of all other members of the international community.

<sup>2</sup> Thus the States signatory to the Declaration of Paris of 1856 announced that "The present declaration shall not be binding except upon those Powers which have acceded, or shall accede to it." *Nouv. Rec. Gen.*, XV, 791.

"It [the development of international law] may be facilitated by conferences, and by international organization, but ultimately the legislative process does not go by majorities as in a national parliament, but awaits that international accord by which the law binding upon States may be extended or modified." (Charles E. Hughes, "Institutions of Peace," *Proceedings*, 23rd Annual Meeting, Am. Soc. Int. Law, I, 2.)

<sup>3</sup> "But, when we come to legislation, each nation must, it is held, give its assent, in order that it may be bound. Undoubtedly it would be going too far in the present state of things to propose a mere majority rule. But it is altogether desirable that a rule should be adopted whereby it may no longer be possible for a single state to stand in the way of international legislation. The adoption of such a rule could not be regarded as impairing in a proper sense the principle of the equality of nations. Nations have responsibilities as well as rights." (J. B. Moore, *International Law and Some Current Illusions*, 289, 303.)

See also dissenting opinion by Judge Loder in the Case of the S.S. "*Lotus*," Judgment No. 9, Publications, Permanent Court of International Justice, Series A, No. 10, p. 34.

of the achievement is strengthened, and outside States encouraged to acquiesce. Such acquiescence may, however, be slow in forthcoming; but the tendency to yield it may become apparent, and the vigor and actuality of the tendency sufficient to justify the belief that general approval is to be anticipated. Nevertheless, before it is in fact given, the action of the group remains a proposal for the modification of the law. It should be observed, however, that acquiescence in a proposal may be inferred from the failure of interested States to make appropriate objection to practical applications of it. Thus it is that changes in the law may be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary. Without conventional arrangement, and by practices manifesting a common and sharp deviation from rules once accepted as the law, the community of States may in fact modify that which governs its members.

The assembling of representatives of all interested States in conferences committed to the task of codification of the law serves to reveal the understandings of the participants concerning what the existing law prescribes. The revelations indicate the extent of differences of opinion as well as possible bases of accord, and so illuminate the pathway towards progress. Political barriers are seen in their true proportions, and the extent of their influence duly weighed. The value of proposals is ascertained by means of practical tests indicating whether a general approval, or one far short of it, or even widespread opposition is to be anticipated. The conclusions of such assemblages are thus likely to reflect the consensus of governmental opinion touching the desirability of suggested changes. Through such bodies the efficacy of the legislative function of the international society is realized. They afford opportunity to sound the opinion of its membership as to the sufficiency of the existing law and as to the significance of demands for restatement or modification. Because of the method by which it is welded together the constructive product of such conferences is likely to enjoy great and possibly lasting respect. If they convene at regular and not too infrequent intervals they breed a continuity of intelligent effort put forth in, and drafted from, every quarter for the loftiest purpose. For these reasons it is not improbable that through the exercise of the legislative function the international society may at times endeavor to mold and recast the form of the law that is to obtain among its members. Whether the effect thereof is to be more potent than that resulting from enunciations of international tribunals, and in particular from those of the Permanent Court of International Justice, must depend upon a variety of considerations the relative influence of which remains to be seen. The decisive factor will be the degree of success which attends the effort of the one agency rather than the other to make such delicate and reasonable adjustments between the interests of the individual State and those of the community of nations as will unceasingly appeal to civilization as truly responsive to the requirements of international justice.

The obligation of a State to observe a rule of conduct with respect to any other is incompatible with a right on its part to rid itself of such a burden. If States feel themselves bound to observe principles founded upon general

consent, and purport to do so from a sense of legal obligation, it is because they acknowledge that that consent can not be withdrawn at will by individual members of the family of nations. Such a theory has obtained in practice, forbidding the individual State to free itself from the operation of restrictions which the law of nations was deemed to impose.<sup>4</sup> The Department of State has on numerous occasions denounced attempts of delinquent States to invoke a looser doctrine.<sup>5</sup> International tribunals have taken a like stand.<sup>6</sup>

§ 3. **Sources. Evidence.** The sources of international law, that is, the places where the principles and rules governing the conduct of States first appear as such, as distinct from the causes responsible for that law and the evidence of what it is, are deemed to be primarily, custom, and secondarily, certain agreements or treaties.<sup>1</sup> Comparatively few bi-partite treaties have hitherto been regarded as sources of international law, because, apart from the design of the contracting parties, the provisions agreed upon were infrequently declaratory of fresh rules of conduct generally applicable to the needs of the international society. Some bi-partite agreements have, however, recorded the beginnings of rules of restraint in which States were generally prepared ultimately to acquiesce.<sup>2</sup> Bi-partite as well as multi-partite treaties are useful repositories and enlightening vehicles of ideas the acceptance of which by the international society may be anticipated when they are worthy of it and when the success of the contractual experiment encourages the assumption of like obligations throughout its membership. Agreements between States are thus becoming increasingly regarded as the sources of law as well as furnishing evidence of what the contracting parties are agreed that the law should be.

When fresh rules of conduct of general applicability find expression in a treaty accepted by numerous States, the instrument may well become a source of international law. The very breadth of the approval may justify the conclusion that general acquiescence is to be anticipated in the early future. It should be observed, however, that what causes a treaty to attain such a distinction is not necessarily the number or importance of the contracting parties, but rather the circumstance that it gives expression to a fresh rule of conduct which some

<sup>4</sup> The Schooner *Nancy*, 27 Ct. Cls. 99, 109.

<sup>5</sup> Declared the Dept. of State in the course of a Memorandum handed to the Cuban Minister on July 12, 1913: "A government is not permitted to set up, as a final answer to demands for the performance of international obligations, provisions of its municipal law, either constitutional or statutory. This principle has been clearly established on many occasions, and very notably in the settlement of the so-called Alabama claims by means of the award of the Geneva Tribunal." (For. Rel. 1913, 347, Hackworth, Dig., I, 28.) See also Mr. Bayard, Secy. of State, to Mr. Connery, Chargé to Mexico, Nov. 1, 1887, For. Rel. 1887, 751, 754, Moore, Dig., II, 232, 235.

See Duties of Jurisdiction, *infra*, § 267.

<sup>6</sup> See, for example, *Georges Pinson Case*, France and Mexico, Mixed Claims Commission, 1928, McNair and Lauterpacht, Annual Dig., 1927-1928, Case No. 4, Hackworth, Dig., I, 37; decision of the Arbitrator, July 24, 1930, in *Case of P. W. Shufeldt v. Republic of Guatemala*, Dept. of State, Arbitration Series, No. 3, 851, 876, Hackworth, Dig., I, 38.

§ 3.<sup>1</sup> Frantz Despagne, *Cours de Droit International Public*, 4 ed., §§ 55-60; Fauchille, § 46; Oppenheim, Lauterpacht's 5 ed., I, Chap. I, Part III.

<sup>2</sup> Possibly some of the provisions in relation to consular rights contained in the treaty between the United States and Germany, of December 8, 1923, U. S. Treaty Vol. IV, 4191, may, in the future, be regarded as within such a category.

States, however few, are prepared to respect as such, and which makes it appeal to, and is eventually accepted by the community of nations.<sup>3</sup>

States may through the medium of an international organization such as the League of Nations, itself the product of agreement, find it expedient to create and accept fresh restraints that ultimately win widest approval and acceptance as a part of the law of nations. The acts of the organization may thus in fact become sources of international law, at least in case the members thereof have by their general agreement clothed it with power to create and put into force fresh rules of restraint.<sup>4</sup> The procedure differs from that applied where States assemble in a conference from which emanate proposals which, when accepted by treaty become the sources of new rules. Whether the authority to create such rules be delegated to an international organization or reserved by the States associated in it or participating in an international conference, the fact requires emphasis that an agreement is the basis of the authority that imposes the new restraint or obligation. If, or when, it is generally accepted as international law, a treaty may be fairly deemed to be the source of it.

Custom as a source of international law must not be confounded, as Westlake has observed, "with mere frequency or even habit of conduct." It signifies rather "that line of conduct which the society has consented to regard as obligatory."<sup>5</sup> In such a sense international custom is indicative of a general practice which may be fairly accepted as law.<sup>6</sup>

The evidence of international law is to be found in many places. A variety of acts and documents bear testimony as to the principles which are deemed actually to govern the conduct of States. The views of text-writers or commentators are oftentimes cited as authoritative.<sup>7</sup> The Supreme Court of the United States has observed, however, that "such works are resorted to by judicial tribunals, not for the speculation of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."<sup>8</sup> Whenever such

<sup>3</sup> Whether the provisions of a treaty are to be regarded as the source of a principle of international law raises a different inquiry from that whether those provisions are to be deemed evidence of what that law prescribes. The former calls for ascertainment of the fact whether the undertaking of contracting parties, however few, marks the beginning of some international accord respectful of a principle or rule of conduct of general applicability. The latter requires examination of the fact whether the contractual undertaking is probative of general acquiescence in what the provisions ordain. The former relates to a matter of history, the latter to one of practice.

<sup>4</sup> See Fauchille, § 54<sup>3</sup>.

<sup>5</sup> Westlake, 2 ed., I, 14, where it is added: "In any state or other society in which customary law is admitted, custom as a part of law means the conduct which is enforced as well as the strict or loose nature of the society allows—not always very well, even in the case of national law in the ruder stages of national existence—and which is followed as well from the fear of such enforcement as from the persuasion that the received rule requires such conduct to be followed."

<sup>6</sup> Article XXXVIII of the Statute of the Permanent Court of International Justice announces that the Court shall apply: "2. International custom, as evidence of a general practice accepted as law."

<sup>7</sup> Diplomatic correspondence concerning questions of international law, as well as written pleadings filed before international tribunals, abound in such citations.

<sup>8</sup> Mr. Justice Gray, in the opinion of the Court, in *The Paquete Habana*, 175 U. S. 677, 700.

According to Art. XXXVIII of the Statute of the Permanent Court of International Justice, approved December 13, 1920, that Court shall apply, fourthly (in order of importance): "Subject to the provisions of Article 59, judicial decisions and the teachings of

writers do not evince a disposition to mirror the practice of their time, the views expressed lack evidential value.

Doubtless treaties may afford evidence of international law. They do so when they give expression to rules of conduct in which States generally acquiesce, embracing those which have not formally adhered to the particular contractual arrangement.<sup>9</sup> Oftentimes, however, treaties fail to afford such evidence and can not be regarded as representing the practice of nations.<sup>10</sup>

The Permanent Court of International Justice is called upon to apply, in the course of its adjudications, first, "International conventions, whether general or particular, establishing rules expressly recognized by the contesting States."<sup>11</sup> Some of the conventions of The Hague Peace Conferences of 1899, and of 1907, may be fairly deemed to fall within such a category.

Official acts or declarations of individual States are at times referred to as evidence of international law. They may serve to indicate the understanding of the governments thereof with respect to the nature and scope of particular rights and obligations. The diplomatic correspondence of the United States has oftentimes revealed the precise views of those in charge of its foreign relations touch-

the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

"Valuable as the opinions of learned and distinguished writers must always be, as aids to a full and exact comprehension of a systematic law of nations, Prize Courts must always attach chief importance to the current of decisions, and the more the field is covered by decided cases the less becomes the authority of commentators and jurists." (Lord Sumner in the judgment of the Judicial Committee of the Privy Council in the case of *The Kronprinsessan Margareta*, Dec. 17, 1920, 8 Lloyd's Prize Cases 241, 253.)

<sup>9</sup> "There is no doubt that, when all or most of the great Powers have deliberately agreed to certain rules of general application, the rules approved by them have very great weight in practice even among States which have never expressly consented to them. It is hardly too much to say that declarations of this kind may be expected, in the absence of prompt and effective dissent by some Power of the first rank, to become part of the universally received law of nations within a moderate time. As among men, so among nations, the opinions and usage of the leading members in a community tend to form an authoritative example for the whole. A striking proof of this tendency was given in the war of 1898 between Spain and the United States. Neither belligerent was a party to the article of the Declaration of Paris of 1856 against privateering; the United States had in fact refused to join in it. Moreover, the Declaration of Paris was not, in point of form, an instrument of the highest authority. Nevertheless, when the war of 1898 broke out, the United States proclaimed its intention of adhering to the Declaration of Paris, and the rules thereby laid down were in fact observed by both belligerents. It is quite possible that some of the recommendations recorded at the Peace Conference at the Hague in 1899, may sooner or later, in like manner, be adopted as part of the public law of civilized nations by general recognition without any formal ratification." Sir Frederick Pollock, in *Columbia Law Review*, II, 511, 512.

<sup>10</sup> Declared Mr. Lansing, Secy. of State, in the course of a Memorandum for communication to the British Minister for Foreign Affairs, Dec. 1, 1916: "It can hardly be said that these treaties demonstrate a practice of nations to remove 'enemy subjects employed in the service of an enemy state' from neutral ships without bringing them before the Prize Courts. If these treaties can be regarded as representing a practice of nations, as the British Government suggest, it was a practice recognized as permissible only under treaty agreement. The Government of the United States is not aware of any proof that these treaty provisions were declaratory of international law, or that they were so considered at the time of their signature or subsequently. The more reasonable view to take of them is that they represent an exception to the general practice of nations, just as the rule of 'free ships, free goods,' provided for in many of the same treaties, was an exception to the practice of nations and was not generally adopted until about the middle of the last century. This view is borne out by the consistent practice of Great Britain and the United States during the very period when these treaties were in force." (For. Rel. 1916, Supp., 667, 669.)

<sup>11</sup> Art. XXXVIII of the Statute of the Permanent Court of International Justice, approved December 13, 1920.

ing the requirements of the law of nations. Enunciations of legal principle emanating from the Department of State are to be respected when they purport to express what the United States officially declares to be the general usage or practice establishing a rule of international law.<sup>12</sup> American state papers have from time to time shed much light because they have embodied the testimony of witnesses zealous for the truth and sensitive to injustice. Notwithstanding occasional yieldings to the temptation to assert in diplomatic discussions pretensions at variance with accepted principle, as by way of defense of conduct denounced by a foreign power, the United States has throughout its experience manifested a strong disposition to observe and inculcate respect for international justice. Its Constitution, its statutory laws, its diplomatic correspondence, the codifications of its army and navy, as well as the decisions of its courts, afford abundant illustration.<sup>13</sup> For that reason the views of American statesmen have been heeded by the outside world and still exert a corresponding influence. The testimony borne by the United States deserves scrutiny because it has proved worthy of acceptance.

The decisions of local tribunals oftentimes afford evidence of international law. Those of American courts, both Federal and State, abound in opinions manifesting a careful and impartial effort to enunciate the principles observed by States generally. The decisions of the prize courts of a belligerent are oftentimes commended as entitled to great respect because of the function of such tribunals to determine, according to the requirements of international law, the propriety of acts of capture and others incidental thereto.<sup>14</sup> It has been found, however, that even when not restrained by the influence of local statutory or other regulations the natural prejudices of the most enlightened and scrupulous tribunal established under belligerent authority tend to weaken its impartiality and to diminish foreign respect for its conclusions.<sup>15</sup>

Awards of international tribunals such as courts of arbitration possessed of a

<sup>12</sup> It is not suggested that interpretations of international law given by those responsible for the conduct of the foreign relations of the United States are invariably sound, or above criticism, if shown to be at variance with the principles generally obtaining among States. Such interpretations deserve close attention because, with respect to the principle or rule involved, they are, in a sense, the views of the nation, and as such attain larger international significance than those expressed unofficially by private individuals, at least as evidence of requirements recognized in fact by the society of nations. In a word, if the propriety of national conduct is to be tested according to principles and rules which States observe in practice from a sense of legal obligation, the views of the Department of State as to the requirements of that practice are believed to be entitled to great respect, and to closer consideration than the utterances of writers whose purpose is to emphasize what, in their judgment, and regardless of current practices, the law of nations ought to be.

<sup>13</sup> "Founded upon the idea of law, and existing under the protection of law, the United States of America, more perhaps than any other sovereign power, has aimed to establish its relations with other governments on the basis of law; and has instinctively shrunk from extending them, even when provoked by the turbulence and insolence of comparatively impotent neighbors, on a basis of preponderant power. In all the international councils in which we have as a nation hitherto participated, our government has endeavored to establish law as a standard for the conduct of sovereign states. Being itself a creation of law, it has appeared natural to base its foreign relations upon it." David Jayne Hill, "The Nations and the Law," *Reports of American Bar Association*, 1919, XLIV, 171, 179.

<sup>14</sup> See Dana's Wheaton, Dana's Note No. 11. In this connection, see judgment by Lord Parker of Waddington in *The Zamora*, [1916] 2 A. C. 77; 4 Lloyd's Prize Cases, 84.

<sup>15</sup> See John Chipman Gray, *The Nature and Sources of the Law*, 2 ed., 127.

neutral umpire (if not of entire neutral membership) afford impressive evidence of the requirements of international law. The impartiality and learning and acumen of the neutral members of such bodies have oftentimes been productive of decisions entitled to the respect of States generally.<sup>16</sup> The awards of the Permanent Court of Arbitration at The Hague have afforded conspicuous examples.<sup>17</sup> The judgments and advisory opinions of the Permanent Court of International Justice bear testimony of the highest order as to what the law of nations really is.<sup>18</sup>

**§ 4. Absence of a Legal Sanction.** The domestic laws of a State are commonly enforced by the territorial sovereign. There is a sanction which, although not essential to the existence of the law, is of a strictly legal character, inasmuch as it is established and applied by the law-giver, and because in theory it is enforced only when a legal obligation has been violated, with close regard for the extent of the harm publicly or privately sustained.

With respect to international law the situation is hardly parallel. The society of States doubtless approves of the enforcement of that law by appropriate means and by a variety of processes.<sup>1</sup> That society does not as yet, however, itself undertake to make hard the way of the transgressor by fixing penalties and imposing them. Powerful forces, nevertheless, unceasingly operate to produce respect for international law. There is, as Mr. Elihu Root pointed out in 1908, "an indefinite and almost mysterious influence exercised by the general opinion of the world" regarding the character and conduct of every State. "The greatest and strongest governments recognize this influence and act with reference to it; they dread the moral isolation that accompanies it and they desire general approval and the kindly feeling that goes with it."<sup>2</sup> Again, the fear of war also serves frequently to restrain States from violating international obliga-

<sup>16</sup> That the umpire is a national of one of the States which is a party to a claims agreement is impressive evidence of the opinion of those States that he is possessed of the requisite impartiality and acumen. Such was the view of the Governments of both the United States and Germany with respect to the American umpire — Judge Edwin B. Parker, who served in that capacity on the Mixed Claims Commission established under the agreement between those powers of August 10, 1922, U. S. Treaty Vol. III, 2601.

<sup>17</sup> See, for example, the award in the Pious Fund Case between the United States and Mexico, Oct. 14, 1902, For. Rel. 1902, Appendix II, 15; J. B. Scott, Hague Court Reports, 3; also award in the North Atlantic Coast Fisheries Arbitration between the United States and Great Britain, Sept. 7, 1910, *Proceedings*, North Atlantic Coast Fisheries Arbitration, Senate Doc. No. 870, 61 Cong., 3 Sess., I, \*103; J. B. Scott, Hague Court Reports, 146.

<sup>18</sup> See, for example, judgment in the case of the S.S. "*Lotus*," Judgment No. 9, Publications, Permanent Court of International Justice, Series A, No. 10.

§ 4.<sup>1</sup> It may welcome the conclusion of multi-partite treaties whereby the contracting parties concede to each other the right to penalize the State which has recourse to forbidden conduct in contempt of its covenant.

<sup>2</sup> "The Sanction of International Law," *Proceedings*, American Soc. Int. Law, II, 14, 19-20, where it is added: "The real sanction which enforces those rules is the injury which inevitably follows nonconformity to public opinion; while, for the occasional and violent or persistent lawbreaker, there always stands behind discussion the ultimate possibility of war, as the sheriff and the policeman await the occasional and comparatively rare violators of municipal law."

"The sanction which makes them [the rules of international law] operative as between nations is not a physical sanction; it is the sanction arising from the opinion of civilized nations that the rules are right, and that civilized nations are morally bound to obey them." (John Chipman Gray, *The Nature and Sources of the Law*, 2 ed., 131.)

"International law to-day is a system recognized by states. We may hardly say that its rules for the government of the relations of states with each other are enforced. In this connection, the ideas of the Historical School are much nearer the truth. The rules of in-

tions. A weak State, however strongly inclined to disregard a legal duty with respect to a powerful neighbor, is reluctant to test its strength on unequal terms with such an adversary. Nevertheless, it should be observed that a weak State may, on the other hand, anticipate with certainty that its adherence to a lawful and commendable course which opposes the designs of an unscrupulous and stronger State will invite attack upon its own domain.<sup>3</sup> Thus if war ensues because of the breach of international law, or because of fidelity to the principles of that law, the consequences may prove to be in fact identical. For that reason the fear of war, which may serve in a particular case to encourage disregard of an international obligation as well as respect for it, is not to be deemed a sanction possessed of a legal character.<sup>4</sup>

Although without what may fairly be described as a legal sanction, the principles and rules governing the conduct of States do not lack the quality of law. It is no longer seriously or widely maintained that the existence of law is necessarily dependent upon the presence of a power to enforce it.<sup>5</sup> Nor have States as a result of their intercourse been disposed to take such a view.<sup>6</sup>

Acknowledgment that the progress and welfare of the international society are retarded by the absence of both appropriate and generally recognized means of securing respect for its collective will by a member that is contemptuous of it, involves no admission that until a strictly legal sanction is devised and generally accepted the principles of international law are entitled to less respect as law

international law are practiced rather than enforced. In other words, an imperative theory which may be made to fit the civil law of modern states will not fit international law." (Roscoe Pound, "Theories of Law," *Yale L. J.*, XXII, 114, 142.)

"Whether the answer to the question as to how international law is made effective is to be found in the will of the State, in the State's ultimate responsibility for its own action or failure to act, in its fear of war or reprisals, in the effect of world opinion, or in a combination of any two or more of these, it is certain that States, sovereigns, parliaments, and public officials usually feel either bound by the commonly accepted precepts of international law or under the necessity of explaining their departure from those precepts. Whatever be the sanction upon which the enforcement of international law rests, its effectiveness increases as the nations of the world find it not only to their benefit but also to the benefit of the community of nations to conduct their relations according to certain generally accepted standards possible of performance and at the same time fair and reasonable." (Hackworth, *Dig.*, I, 12.)

<sup>3</sup> Belgium was confronted with such a difficulty in 1914. It was given sharp warning that attempts to maintain the inviolability of its territory against Germany would subject that territory to the full opposition of German belligerent force.

<sup>4</sup> It is not suggested that the fear of war is as strong or frequent an incentive to violations of international law as to acts in pursuance thereof. It seems necessary to observe, however, that the fear of measures which may be undertaken to thwart lawful as well as unlawful conduct, and by a State controlled by conscienceless rulers, with an unjust purpose, cannot be regarded as an agency of the law designed to enforce respect for its precepts.

"The sanction of public opinion, if such there be, attaches equally to principles of purely moral obligation; to identify such a sanction with the sanction of law is to sacrifice the distinction between positive law and ideal morality. War as a sanction is analogous to the act of an individual in a community in enforcing his rights by brute force." Note, *Harvard Law Rev.*, XVIII, 476.

See also Pradier-Fodéré, I, § 23, p. 77.

<sup>5</sup> Fauchille, § 29; Rivier, Vol. I, p. 21.

See, also, J. B. Scott, "The Legal Nature of International Law," *Am. J.*, I, 831.

<sup>6</sup> "The general opinion of States approves certain rules, not as expressing conduct to be recommended without being enforced, like telling the truth or being charitable, but to be enforced by such means as exist.

"The conduct directed by those rules is in fact generally observed by States and that, not as freely choosing it in each instance, but as obeying the rules; not necessarily from fear of enforcement, but at least from the persuasion that the rules are law." (Westlake, 2 ed., I, 7.)



than is accorded the domestic statutes of the individual State. It is a cheering and certain token of the advance of civilization that countries which long remain indisposed or impotent to respect as legal obligations those which international law is acknowledged to impose upon the entire membership of the family of nations, are regarded with increasing intolerance, and are looked upon as unfit for the acquisition or permanent retention of normal privileges of independent statehood.

**§ 5. Relation to Each State as the Law Thereof.** If there exists a body of international law which States, from a sense of legal obligation do in fact observe in their relations with each other, and which they are unable individually to alter or destroy, that law must necessarily be regarded as the law of each political entity deemed to be a State, and as prevailing throughout places under its control. This is true although there be no local affirmative action indicating the adoption by the individual State of international law.<sup>1</sup>

International law, as the local law of each State, is necessarily superior to any administrative regulation or statute or public act at variance with it. There can be no conflict on an equal plane. The precise relationship of a recognized rule of international law to a local statute in contravention thereof is oftentimes obscured by occurrences which take place before the superiority of the former is ultimately established. A local court may be obliged, on account of the nature and the limits of the powers conferred upon it, to enforce the statute; and even a domestic tribunal of last resort may be compelled to affirm such action. This merely signifies that no local forum is possessed of jurisdiction to pass upon the propriety of the conduct of the State in enacting the law; it does not imply that that conduct is internationally defensible, or that the judges approve of it. Moreover, the finality of the local adjudication does not indicate that the conflict has passed through more than a preliminary stage.<sup>2</sup> If the controversy be pressed further, through the diplomatic channel, the State whose enactment is denounced by another as at variance with international law may in fact deny the truth of the allegation. It cannot, however, admit the charge without acknowledging responsibility to make reparation. If disagreement as to the nature of the statute or the extent of the harm produced by it proves incapable of adjustment by negotiation, and the issue be referred to an international tribunal clothed with requisite jurisdiction, it will denounce the statute (if deemed to violate international law) and formulate its award accordingly. Observance of the award by the delinquent State (possibly entailing amendatory legislation) will terminate the conflict and establish the supremacy of the international obligation.<sup>3</sup>

§ 5. <sup>1</sup> See J. B. Moore, *International Law and Some Current Illusions*, 289, 303.

<sup>2</sup> Concerning the difficulty confronting The Netherlands Government in consequence of a decree by a Dutch court in 1916, in the so-called *De Booi Case*, through which the German Reich was ordered to satisfy a judgment against it and also informed that were the judgment not complied with there would be execution upon its property in Netherland territory, see Eleanor W. Allen, *The Position of Foreign States Before National Courts, Chiefly in Continental Europe*, New York, 1933, 110-138.

<sup>3</sup> It is the absence of a local court possessed of requisite jurisdiction which is productive of confusion of thought. Difficulty has been encountered in perceiving how an international obligation, contractual or otherwise, which cannot be locally enforced in a domestic forum

It is important to observe, however, that States are not commonly disposed to defy by local statute recognized obligations imposed by international law, and that they are instinctively reluctant to admit that domestic enactments manifest such a design. International controversies growing out of the form or substance of domestic legislation are not sufficiently numerous in times of peace to manifest a chronic or habitual conflict between the requirements of international law and legislative action.<sup>4</sup> Normally, it is taken for granted that international law prevails throughout the domain of a State and will be respected in the course of all the activities of its several agencies. This is true in the case of the United States.<sup>5</sup> Its tribunals, and in particular the Supreme Court, are reluctant to impute to the Congress or the Executive an intention to violate the law of nations.<sup>6</sup> Moreover those tribunals, when unrestricted by statutory limitations, apply and enforce the principles of international law as a part of the law of the land.<sup>7</sup>

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is the local law. The fact is that the obligation is locally enforced when the controversy is pressed to a conclusion resulting in an international adjudication, and in an award which is respected by the delinquent State.

*Cf.* The Ship *Rose v. The United States*, 36 Ct. Cl. 290, 301, where a tribunal in the United States was clothed with the requisite jurisdiction.

<sup>4</sup> According to Art. XVII of the Treaty of Conciliation and Judicial Settlement between Italy and Switzerland, of September 20, 1924 (L.N. Treaty Series, No. 834): "Should the Permanent Court of International Justice find that a decision of a court of law or other authority of one of the Contracting States is wholly or partly at variance with international law, and should the constitutional law of that State not allow, or only inadequately allow, the cancellation of this decision by administrative procedure, the Party prejudiced shall be granted equitable satisfaction in some other form."

<sup>5</sup> See, for example, Art. I, Section 8, of the Constitution conferring on the Congress power "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Other paragraphs and sections contemplate acts by various departments of the Government, executive, legislative and judicial, pertaining to the foreign relations of the nation, and contemplating by implication, respect for international law. This is manifest, for example, in the provisions of Art. III, Section 2, with respect to the lodgment and exercise of the judicial power of the nation, and in those of Art. II, Section 2, with respect to the treaty-making power. See also Duties of Jurisdiction, *infra*, § 267.

See Cyril M. Picciotto, *The Relation of International Law to the Law of England and of the United States of America*, New York, 1915; W. W. Willoughby, "The Legal Nature of International Law," *Am. J.*, II, 357; T. E. Holland, *Studies in International Law*, Oxford, 1898, Chap. X.; John Westlake, "Is International Law a Part of the Law of England?" *Law Quar. Rev.*, XXII, 14.

<sup>6</sup> Marshall, C. J., in the case of *The Charming Betsy*, 2 Cranch, 64, 118; opinion of Mr. Justice Day in *MacLeod v. United States*, 229 U. S. 416, 434. See Acts of Congress at Variance with Treaties, *infra*, § 529.

<sup>7</sup> Declared Mr. Justice Gray, in *The Paquete Habana*, 175 U. S. 677, 700: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."

See Marshall, C. J., in *The Nereide*, 9 Cranch, 388, 423; Fuller, C. J., in *Kansas v. Colorado*, 185 U. S. 125, 146. *The Steamship Appam*, 243 U. S. 124.

"In the light of the obvious purpose of the two Governments to provide for the plaintiff a 'day in court' for the determination of its claim, and of the express agreement that the plaintiff, if invoking 'any principle of international law as applicable thereto' should have the principle passed upon by a tribunal 'having ample jurisdiction to do so,' we think the jurisdiction of this court to pass upon the issue in this case, as an international question, to be decided under the principles of international law, is clear." (*Royal Holland Lloyd v. U. S.*, 73 Ct. Cl., 722, 735.)

See Philip Quincy Wright, *The Enforcement of International Law through Municipal Law in the United States*, 1915, 227; Simeon E. Baldwin, "The Part Taken by Courts of

It may be needless to remark that the statutes of a State bearing upon its foreign relations may register an effort on its part to impose upon persons or vessels under its control restraints which are not required by the law of nations, and notably as a means of lessening the danger of its being drawn into a war between prospective belligerents. As Secretary Lansing announced in 1916: "If the municipal statutes of the country should be in advance of the requirements of international law, I understand that it is not for a foreign government to protest against their infraction so long as the infraction does not extend to the Law of Nations and so long as the municipal laws are impartially administered."<sup>8</sup>

When States at variance with each other elect to solve their controversy by recourse to an international tribunal clothed with authority to pass judgment upon the propriety of the conduct of either or both or all of the parties concerned, the tribunal tests the lawfulness of their respective acts, unless fettered by the terms of the agreement to adjudicate, by what it conceives to be the requirements of international law. In so doing it should, if faithful to its task, remain uninfluenced by assertions of any litigant that those requirements are at variance with its own laws, its traditions or its interests.

**§ 5A. The Growth or Diminution of Respect for International Law in the Life of the International Society.** The growth or diminution of respect for international law in the prospective life of the international society must depend upon a variety of considerations. A few may be noted. The sensitiveness of the conscience of civilization is of first moment. If flagrant and persistent violations of commonly acknowledged obligations that spring from basic principles are looked upon with indifference and are permitted to become the means of enabling the wrongdoer to acquire and demand respect for the fruits of internationally illegal conduct, the law of nations must lose its grip.<sup>1</sup> The chief issue which now confronts civilization, in so far as concerns the character of its structure and common life, is whether a powerful State may, by virtue of its sheer strength and without regard for the injunctions of the law, not only compel an unoffending neighbor to do its bidding, but also in consequence of that achievement, gain respect for, and recognition of, the accomplishment. The question is not a new one; it is rooted in antiquity. Its very age, together with the numerous instances from the remote past where the evidence has revealed the triumph of power, howsoever exercised, make it remarkable that a law of nations challenging the rightfulness of much that was attributable to the exercise of force could ever have come into being and have exerted an influence upon the thought of civilization sufficient to thwart and impair the value of the

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Justice in the Development of International Law," *Int. Law Association*, 19th Report, 35; Evans, Cases, 18, Note, and cases there cited. See also this author, "The Supreme Court of the United States as an Expositor of International Law," *Brit. Y.B.*, XVIII, 1.

<sup>8</sup> For. Rel. 1915, Supp., 818, Hackworth, Dig., I, 30.

See documents in Hackworth, Dig., I, § 7, illustrative of the treatment of the problem concerning the relationship of international law to the domestic law as set forth in the decisions of judicial tribunals and the views of publicists in a series of foreign countries.

§ 5A.<sup>1</sup> In such a situation that law must deteriorate in quality by reason of the relinquishment of standards that test the propriety of conduct and which have been commonly accepted for that purpose.

pretensions of a powerful wrongdoer. Yet such an influence oftentimes did in fact assert itself and decide what the consequence of particular acts should be. Obviously, no system of law, worthy of the name, could survive conflicts and be a potential deterrent of aggression unless the power within the community of nations were behind what reason and good sense appeared to decree. In a word, whether there was to be a law of nations that could be truly said to govern the conduct of individual States or members of the international community depended upon whether the possessors of the requisite power were on the side of the law.<sup>2</sup>

The same condition will remain the decisive factor in the future. If the preponderance of power in both hemispheres is lodged in entities or States which, acting collectively or otherwise, are both able and determined to maintain, regardless of cost, what they conceive to be the principles of international law, the severity of occasional breaches such as those witnessed within the past decade need occasion no alarm.<sup>3</sup> Whether that preponderance of power is there lodged, and whether the possessors of it are so determined raise questions of fact the answers to which must, in a strict sense, await the conclusion of the existing war.<sup>4</sup> There are, however, impressive reasons for expectations concerning what those answers may be. They reveal themselves in the attitude of the United States and its neighbors of the Western Hemisphere, together with that of Britain and its Empire, as well as of numerous other countries of Europe and Asia. Their thinking and philosophy and strength inspire hope that the requisite conditions will be met. Even if they are, the States so endowed must by some means attain a clear vision of what needs to be done in order to uphold and nurture the law to which they profess devotion. It is not sought to discuss methods by which that vision may be clarified. It suffices to observe that upon the success of that accomplishment depends the welfare of the human race. Nor is it here sought to intimate what may be the character of the process by which the international society will seek to vindicate its rights and endeavor to safeguard its law as against the lawless.

As an obvious means of increasing deference for the law of nations the States which seek to uphold it must be prepared to make fresh and effective efforts to rid themselves as well as others of temptations to break down the legal system which it is sought to maintain. In a word, excuses that sustain and inspire the individual State to employ force and even to resort to war must be perceived; and with such perception the full resourcefulness of the international society

<sup>2</sup> See *supra*, § 2.

<sup>3</sup> This is true despite the fact that those breaches may prove to be in some cases sinister modes of loosening standards as in situations where internationally illegal conduct stubbornly persisted in is allowed, not only to go unchecked, but also to be invoked and relied upon in support of the propriety of subsequent recourse to like conduct and to become the means of modifying requirements that were previously accepted as such.

<sup>4</sup> "The security of America is predicated upon international law. International Law can only exist where the rights of nations are respected. Those rights will not be respected unless the force of the United States is such as to save the world from the most brutal, the most complete and the most scientific imperialism that has ever been known. International Law can exist only when there is enough strength and independence among the nations to prevent such imperialism." (Frederic R. Coudert, in *Am. J.*, XXXV, 429, 434.)

must be applied to the eradication of them. Doubtless the way of the transgressor must be made hard. On the other hand, the desirability of deference for a reasonable law must be made clear to countries which have previously been contemptuous of it. Such achievements are within the reach of the States which today seek to maintain international law. Because they are, there is a basis for the expectation that the growth rather than the diminution of respect for that law may be anticipated.

# PART I

## States. Their Classification

### TITLE A

### SUBJECTS OF INTERNATIONAL LAW

#### 1

#### STATES

##### a

§ 6. **Significance of the Term in International Law.** It is necessary to observe what are the political entities described as States which are deemed to constitute the members of the family of nations and to be governed as such in their relations with each other by the principles of international law.

Both Peru and Illinois are doubtless properly referred to as States. Yet the latter is not a person of international law. If the term State is fairly descriptive of political bodies such as the several commonwealths of the United States, the States which enjoy membership in the international society and which are recognized by it as persons of international law are confined to those which possess certain well-defined qualifications, and which comprise a relatively small number of those which are given the same appellation.<sup>1</sup> Thus any definition of the term State in its generic sense must fail, because of its very breadth, to point out the distinctive elements which characterize every political entity deemed to be a subject or person of international law.<sup>2</sup>

§ 6.<sup>1</sup> Westlake, 2 ed., I, 1-5.

<sup>2</sup> Thus Mr. Justice Miller, in *Keith v. Clark*, 97 U. S. 454, 459-463, in referring to the status of Tennessee during the Civil War, was concerned merely with the problem of describing the nature of a State of the Union rather than a State of international law. See, also, *Texas v. White*, 7 Wall. 700, 720-721.

"Most of the definitions of the publicists may, however, be traced back, in substance if not in form, to Cicero, who, in his *De Republica*, defines the '*populus*' as a numerous society united by a common sense of right and a mutual participation in advantages. In almost the same words Grotius defined the state (*civitas*) as a perfect society of free men, united for the promotion of right and the common advantage. Pufendorf propounded the idea, which has been so generally adopted, of treating the State as a moral person, endowed with a collective will. According to Vattel, a nation or State is a body politic or society of men who seek their well-being and common advantage in the combination of their forces. This definition is substantially adopted by Wheaton. But it must be admitted that all the foregoing definitions are imperfect, and that they can be accepted only with certain limitations." Moore, Dig., I, 14.

Cf. Dana's Wheaton, § 17.

## b

§ 7. **Requisites of a State of International Law.** A State or person of international law should according to existing practice, possess the following qualifications:

First, there must be a people. According to Rivier, it must be sufficient in numbers to maintain and perpetuate itself. This requirement could not, he declares, be met by a casual gathering of individuals or by a chance group of bandits or by a society of pirates.<sup>1</sup>

Secondly, there must be a fixed territory which the inhabitants occupy. Nomadic tribes or peoples are thus excluded from consideration.<sup>2</sup>

Thirdly, there must be an organized government exercising control over, and endeavoring to maintain justice within, the territory.<sup>3</sup>

Fourthly, there must be capacity to enter into relations with the outside world.<sup>4</sup> The management of foreign affairs may, however, be lodged in any appropriate quarter, and even confided to a State that is other than, and foreign to, the country that professes to be one.<sup>5</sup> Independence is not essential.<sup>6</sup> In a word, the existence of statehood is not dependent upon the possession by a country of a right to maintain contacts with others through agencies of its own choice, or within its own control, or exercising their functions from a place within its own territory. The requisite personality, in an international sense, is seen when the entity claiming to be a State has in fact its own distinctive

§ 7.<sup>1</sup> Rivier, I, 46. For an abstract of the views of that author, see Moore, Dig., I, 16-17, 18. See, also, Fauchille, § 162.

<sup>2</sup> Rivier, *supra*; also Phillimore, 2 ed., I, 81.

<sup>3</sup> See Phillimore, *supra*; Fauchille, *supra*; Hall, Higgins' 8 ed., § 1; Hershey, 2 ed., § 88.

<sup>4</sup> According to Art. 1 of the Convention on the Rights and Duties of States, concluded at the Seventh International Conference of American States, Dec. 26, 1933; "The State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other States." (U. S. Treaty Vol. IV, 4808.)

<sup>5</sup> See, for example, The Free City of Danzig in its special juridical status growing out of Art. 104 (6) of the Treaty of Versailles of June 28, 1919. See *infra*, § 16.

See also Art. 6, of German decree of March 16, 1939, pertaining to the assumption by the Government of the Reich of a protectorate over the provinces of Bohemia and Moravia, Dept. of State Press Releases, March 25, 1939, 220. Also *infra*, § 16A.

Declared Viscount Finlay, in 1924, in the case of Duff Development Company Ltd. v. Government of Kelantan: "It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another Power; the control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or treaties which limit the powers of the sovereign even in internal affairs without entailing a loss of the position of a sovereign Power. In the present case it is obvious that the Sultan of Kelantan is to a great extent in the hands of His Majesty's Government." (L.R. [1924] A.C. 797, 814.)

<sup>6</sup> "It is not necessary for a State to be independent in order to be a 'State of international law.'" Westlake, 2 ed., I, 21.

"As international law deals with actual conditions, it recognizes the fact that there are states not in all respects independent that maintain international relations, to a greater or less extent, according to the degree of their dependence." Moore, Dig., I, 18, *citing* Rivier, I, 52.

If independence be regarded as a necessary possession of a State of international law, the existing practice of treating as persons or subjects of that law various types of so-called dependent States is incapable of explanation. Even those who assert that independence is a necessary attribute of a State, are frequently unwilling to employ the term "State" to designate what they believe that it fairly signifies, and are impelled to utilize the adjective "independent" or "sovereign" in order to make clear their meaning.

association with the members of the international society, as by treaties, which, howsoever concluded in its behalf, mark the existence of definite relationships between itself and other contracting parties. It is the possession and enjoyment of this capacity, with or without restriction, and regardless of the instrumentality through which it is utilized, which distinguishes the State of international law from the large number of political entities also given that name, and yet which do not appear to be endowed with it.<sup>7</sup> It differentiates Guatemala from Alaska and Spain from South Carolina.

Fifthly, the inhabitants of the territory must have attained a degree of civilization such as to enable them to observe with respect to the outside world those principles of law which are deemed to govern the members of the international society in their relations with each other.<sup>8</sup>

### c

## Excluded Associations or Entities

### (1)

§ 8. **American Commonwealths. Colonies. Corporations.** Political entities lacking the qualifications above set forth are regarded as ineligible for statehood. The several States of the United States, by reason of their inability to enter into diplomatic relations with the outside world as distinctive entities in the family of nations, are not persons of international law. Such is the situation also of a colony or other possession likewise under such a disability, and that regardless of the autonomy which it may enjoy in respect to domestic affairs. The United States has not as yet endowed any political entity within its domain, embracing the Philippine Islands, with the privilege of statehood in an international sense.<sup>1</sup>

A State may in fact permit the people occupying a portion of its territory

<sup>7</sup> The Swiss Minister at Washington informed the Secretary of State on June 2, 1931, in relation to the adherence of Syria and the Lebanon to the Universal Postal Convention, that under the organic law which became effective in May, 1930, Syria and the Lebanon "must, henceforth, in the opinion of the French Government be considered as States enjoying international legal personality." (U. S. Treaty Information Bulletin No. 20, May 31, 1931, 18.)

<sup>8</sup> See *infra*, § 33.

"Replying to an inquiry as to the status of the Principality of Liechtenstein, the Department of State, on Oct. 16, 1925, said that "While the Principality of Liechtenstein is recognized as an independent State, this Government has no diplomatic representative to the Government of that Principality.'" (Hackworth, Dig., I, 49, citing Under Secy. of State Grew, to Henry W. Carlisle, Oct. 16, 1925.) See other documents concerning the status of the Principality of Liechtenstein in Hackworth, Dig., I, 48-50.

§ 8.<sup>1</sup> According to the Philippine Independence Act of March 24, 1934, the constitution which the Philippine legislature was authorized to formulate and draft for the Government of the Commonwealth of the Philippine Islands should, either as a part thereof or in an ordinance appended thereto make provision to the effect that pending the final and complete withdrawal of the sovereignty of the United States over those Islands, "foreign affairs shall be under the direct supervision and control of the United States." (§ 2, 48 Stat. 456, 48 U.S.C.A. § 1232.) The Constitution that was duly adopted and approved by the President of the United States, March 23, 1935, followed the injunction. See Philippine Islands, Public Laws, XXX, 371.

See also *Cincinnati Soap Co. v. United States*, 301 U. S. 308, 313-314, 319-320; also Hackworth, Dig., I, § 76, and documents there cited.



within well-defined administrative and geographical limits to hold diplomatic intercourse with the outside world through an appropriate agency, and by so yielding capacity for statehood acknowledge by implication the birth of a new and distinctive member of the international society which remains none the less, in a domestic sense, a part of the State that makes the concession. In such case, the beneficiary is not to be regarded as an entity that is excluded from eligibility for statehood by reason of its relationship to that State.<sup>2</sup>

Great corporations, such as the East India Company, or the Hudson's Bay Company, or the Russian-American Company, notwithstanding the scope of the political and other powers delegated to them, have necessarily been excluded from the category of States of international law.<sup>3</sup> The same conclusion is believed to be warranted with respect to the Netherlands East India Company (*Generale Geoctroyeerde Nederlandsch Oost-Indische Compagnie*).<sup>4</sup>

(2)

§ 9. **Religious Societies.** Religious societies are not regarded as States of international law save when circumstances combine to enable them to satisfy all of the requisites of statehood which have been noted.<sup>1</sup>

(3)

§ 10. **American Indians.** The American Indians have never been regarded as constituting persons or States of international law. Chief Justice Marshall, in 1821, thus described them:

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile they are in a state of pupillage. . . . They

<sup>2</sup> See State Members of The British Empire, *infra*, § 18B.

<sup>3</sup> See, in this connection, Dana's Wheaton, § 17, where it is said: "Thus the great association of British merchants incorporated, first, by the crown, and afterwards by Parliament, for the purpose of carrying on trade to the East Indies, could not be considered as a State, even whilst it exercised the sovereign powers of war and peace in that quarter of the globe, without the direct control of the crown, and still less can it be so considered since it has been subjected to that control." See, also, Westlake, *Collected Papers*, Chap. X; Hershey, revised ed., § 89.

Also *Salaman v. Secretary of State in Council of India* [1906], 1 K.B. 613, *Hudson's Cases*, 1 ed., 17.

<sup>4</sup> Award of Huber, Arbitrator, April 4, 1928, in *Island of Palmas (or Miangas) Arbitration*, under convention between the United States and the Netherlands, of January 23, 1925, Publication of International Bureau of the Permanent Court of Arbitration, 44, *Am. J.*, XXII, 867, 897.

"This Government, however, is strongly opposed to granting the International Red Cross or the Sovereign Order of Malta plenipotentiary status at the Conference in question, and since these organizations are not sovereign States it would oppose any proposal destined to allow either of them to vote in the Conference or to sign any instrument emanating from the Conference. Moreover it feels that since these organizations are not sovereign States they should not be given any function in the administration of the code after its adoption by the powers. In its note of February 18, 1929, this Government so informed the Swiss Government." (Mr. Clark, Acting Secy. of State, to Mr. Wadsworth, June 17, 1929, *Hackworth*, Dig., I, 50.)

§ 9.<sup>1</sup> See *Requisites of a State of International Law*, *supra*, § 7.

Concerning the position of the Pope during the interval from 1870 to 1929, see *infra*, § 10A.

and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.<sup>1</sup>

Foreign States are not, therefore, concerned with the domestic relationship between the United States and its wards inhabiting its domain,<sup>2</sup> and which is governed by its Constitution, and by American treaties and laws in accordance therewith.<sup>3</sup>

d

§ 10A. **The Pope, 1870–1929.** The position of the Pope after the annexation by Italy in 1870, of the Papal States, and during the long years when his exercise of temporal power was suspended, became anomalous.<sup>1</sup> As the head of the Roman Catholic Church, to which numerous States officially avowed attachment, he possessed international political significance and wielded international power.<sup>2</sup> He held diplomatic intercourse with the governments of various States through the medium of representatives whom he both accredited and received.<sup>3</sup> As head of the Church he concluded with certain States arrangements known as concordats, pertaining to ecclesiastical matters.<sup>4</sup> By reason of its institutions,

§ 10.<sup>1</sup> *Cherokee Nation v. Georgia*, 5 Pet. 1, 17. See, also, *Holden v. Joy*, 17 Wall. 211; *Jones v. Meehan*, 175 U. S. 1, 10; Mr. Adams, Secy. of State, to Mr. Dallas, July 26, 1856, MS. Inst. Great Britain, Moore, Dig., I, 34–35.

"The obligee was the 'Cayuga Nation,' an Indian tribe. Such a tribe is not a legal unit of international law. The American Indians have never been so regarded." (*Award, Cayuga Indians Case, American-British Pecuniary Claims Arbitration, Convention of 1910, Nielsen's Report*, 307, 309.)

<sup>2</sup> It has been a matter of concern, however, to neighboring States that the control exercised by the United States over the American Indians was sufficient to prevent incursions by them into the territories of those States. Moore, Dig., II, 808–809, and documents there cited. In several of its early treaties with foreign States the United States agreed to provisions with respect to the Indians. See, for example, Art. III of the Jay Treaty of Nov. 19, 1794, Malloy's *Treaties*, I, 592; explanatory Article thereof, May 4, 1796, *id.*, 607; Art. IX of the Treaty of Ghent of Dec. 24, 1814, *id.*, 618; Art. V of the treaty with Spain of Oct. 27, 1795, *id.*, II, 1642; Art. VI of the treaty with France of April 30, 1803, *id.*, I, 510; Art. XXXIII of treaty with Mexico of April 5, 1831, *id.*, 1095.

<sup>3</sup> See, generally, Moore, Dig., I, 30–39, and documents there cited.

§ 10A.<sup>1</sup> Concerning the Italian law of guaranties of May 13, 1871, see Fauchille, 8 *ed.*, §§ 377–385; also *id.*, §§ 386–396, concerning diplomatic relations of the Papacy, and the international personality of the Pope; also extensive bibliography, *id.*, § 370. See, also, Oppenheim, 5 *ed.*, I, §§ 104–107; Hershey, revised *ed.*, 164–165; G. Gidel, "*Quelques Idées sur la Condition Internationales de la Papauté*," *Rev. Gén.*, XVIII, 589; A. Pearce Higgins, "*The Papacy and International Law*," *International Law and Relations*, 1928, 46; Clunet, *Tables Générales*, I, 440, 443, 873.

<sup>2</sup> It should be observed, however, in this connection that the Pope was not permitted to participate in the First Hague Peace Conference of 1899, and was not a participant in that of 1907.

It will be recalled that in 1917, the Pope urged the opposing groups of belligerents to make an endeavor to negotiate peace. See *Am. J.*, XI, *Supplement*, 212; also reply of the United States, *id.*, 216.

<sup>3</sup> With respect to the privileged rank of papal nuncios, see Arts. I, II, and IV of Rules of the Congress of Vienna of March 9, 1815, Instructions to the Diplomatic Officers of the United States (1897), § 18.

<sup>4</sup> "In our day, this term [concordats] is applied to conventions concluded between the Holy Apostolic See and the governments of certain States whose population, in whole or in part, is Catholic, and not in regard to questions of faith or dogma, but concerning ec-

which divorce political from religious matters, the United States was deterred from maintaining diplomatic relations with the Pope throughout this period.<sup>5</sup>

e

§ 10B. **The State of the City of the Vatican.** "For the purpose of assuring to the Holy See absolute and visible independence and of guaranteeing to it indisputable sovereignty also in the field of international relations," a treaty concluded between the Vatican and Italy on February 11, 1929, made announcement that it had been "deemed necessary to establish the State of the Vatican, and to recognize so far as the latter is concerned, complete ownership, exclusive and absolute power and sovereign jurisdiction on the part of the Holy See."<sup>1</sup> Italy accordingly recognized "the State of the Vatican under the sovereignty of the Supreme Pontiff."<sup>2</sup> Moreover, a geographical area or entity with specified boundaries, known as the Vatican City was "established" with respect to which Italy recognized the "full possession and exclusive and absolute power and sovereign jurisdiction of the Holy See."<sup>3</sup> Thus through treaty Italy recognized not only the international personality of the Holy See, but also the statehood through which that personality might claim membership in the family of Nations.<sup>4</sup> The Holy See on its part, declaring the "Roman Question" to be

clesiastical discipline, organization of the clergy, diocesan circumscriptions, the nomination of bishops, priests, etc. The conventions concluded with Protestant States are called Bulls of Circumscription." Fauchille, 8 ed., § 896 (translation from the French).

<sup>5</sup> Mr. Fish, Secy. of State, to Mr. Cushing, Minister to Spain, June 4, 1875, For. Rel. 1875, 1119, Moore, Dig., I, 39; Mr. Bayard, Secy. of State, to Mr. Dwyer, Nov. 7, 1887, For. Rel. 1887, 642, Moore, Dig., I, 40.

Concerning the mission of Hon. William H. Taft, Civil Governor of the Philippines, to the Vatican in 1902, see Non-Diplomatic Missions, *infra*, § 416.

§ 10B. <sup>1</sup> Preamble, *Am. J.*, XXIII, *Supplement, Official Documents*, 187.

Concerning the treaty see R. P. Yves de la Brière, "*La question romaine et le traité du Latran*," *Rev. Droit Int.*, 3 sér., III, 13; C. G. Fenwick, "The New City of the Vatican," *Am. J.*, XXIII, 371; L. Le Fur, "*Le Saint-Siège et le Droit International*," *Rev. Droit Int.*, 3 sér., III, 25; *Le Statut International du Saint-Siège d'après les accords de Latran*," *Académie Dip. Int., Séances et Travaux*, December, 1929, 56; Carlton J. H. Hayes, "Italy and the Vatican Agree," *The Commonwealth*, March 27 and April 3, 1929, Commonwealth Pamphlets, No. 6, 1929; Vera A. Micheles, "The Lateran Accord," For. Policy Assn., Information Service (July 10, 1929), V, No. 9; J. B. Scott, "The Treaty between Italy and the Vatican," *Proceedings, Am. Soc. Int. Law*, 1929, 13; Karl Strupp, "*Die Regelung der römischen Frage durch die Lateranverträge*" (vom II, Februar, 1929), reprinted, 1930, from *Zeit. Völk.*, XV, part 4; Camille Piccioni, "*Les Accords de Latran*," *Académie Dip. Int., Séances et Travaux*, No. III, July-Sept., 1930, 189; Gordon Ireland, "The State of the City of the Vatican," *Am. J.*, XXVII, 271.

See also Marcel Brazzola, *La Cité du Vatican est-elle un État?*, preface by R. P. Delos, Paris, 1932; Pierre Dilhac, *Les Accords de Latran, Leurs origines, leur contenu, leur portée*, preface by M. L. Cavaré, Paris, 1932; Jean-Honoré Fragonard, *La Condition des Personnes dans la Cité du Vatican*, preface by R. P. Yves de la Brière, Paris, 1930; August Hagen, *Die Rechtsstellung des Hl. Stuhles nach den Lateranverträgen*, Stuttgart, 1930; René Jarrige, *La Condition Internationale du Saint-Siège Avant et Après Les Accords du Latran*, preface by L. Le Fur, Paris, 1930; Karl Kliem, *Der Papst im Völkerrecht*, Berlin, 1932.

<sup>2</sup> Art. 26. According to Art. 4: "The sovereignty and exclusive jurisdiction which Italy recognizes on the part of the Holy See with regard to the State of the Vatican implies that there can be no interference on the part of the Italian Government therein, nor any other authority than that of the Holy See."

<sup>3</sup> Art. 3.

<sup>4</sup> It should be observed that the City of the Vatican is the territorial entity constituting the domain over which the Holy See is supreme. It is co-extensive with the territorial limits of the Vatican State. It is, however, the Vatican State rather than the City of the Vatican which in consequence of the treaty attained membership in the family of nations.

"definitely and irrevocably settled, and, therefore, eliminated," recognized the Kingdom of Italy under the dynasty of the House of Savoy with Rome as the capital of the Italian State.<sup>5</sup>

Elaborate provision was made in respect to a variety of matters growing out of the peculiar geographical and political relationship between the two States.

Of general international significance were the following provisions, set forth in Article 24:

With regard to the sovereignty pertaining to it in the field of international relations, the Holy See declares that it wishes to remain and will remain extraneous to all temporal disputes between nations, and to international congresses convoked for the settlement of such disputes, unless the contending parties make a joint appeal to its mission of peace; nevertheless, it reserves the right in every case to exercise its moral and spiritual power.

In consequence of this declaration, the State of the Vatican will always and in every case be considered neutral and inviolable territory.<sup>6</sup>

## 2

### THE EQUALITY AND SIMILARITY OF INDEPENDENT STATES

§ 11. **Observance of the Principle.** Independent States are equal in the sense that they resemble each other in possessing and enjoying the same privilege of freedom from external control in the management of their domestic or foreign affairs.<sup>1</sup> This is a matter of law.<sup>2</sup> They are alike, moreover, in that each, irrespective of its inability to enforce its claim, may justly demand that that freedom be not invaded or curtailed without its consent.<sup>3</sup> Thus each is concerned primarily

<sup>5</sup> Art. 26. It was also here declared that "The Law of May 13, 1871, No. 214, is abrogated, as well as any other decree or decision contrary to the present treaty."

<sup>6</sup> *Am. J.*, XXIII, *Supplement*, *Official Documents*, 194.

§ 11.<sup>1</sup> See generally, Julius Goebel, Jr., *The Equality of States*, New York, 1923; Edwin D. Dickinson, *The Equality of States in International Law*, Cambridge (Mass.), 1920.

Also, S. W. Armstrong, "The Doctrine of the Equality of Nations in International Law and the Relation of the Doctrine to the Treaty of Versailles," *Am. J.*, XIV, 540; P. J. Baker, "The Doctrine of Legal Equality of States," *Brit. Y.B.*, 1923-1924, I; J. L. Brierly, *Law of Nations*, Oxford, 1928, § 4; Philip Marshall Brown, "The Theory of the Independence and Equality of States," *Am. J.*, IX, 305; Butler and Maccoby, *Development of International Law*, London, 1928, Chap. VIII; Fauchille, 8 ed., §§ 272-278; F. C. Hicks, "The Equality of States and The Hague Conferences," *Am. J.*, II, 530; A. D. McNair, "Equality in International Law," *Mich. Law Rev.*, XXVI, 131; Lauterpacht's 5 ed. of *Oppenheim*, I, § 115, with bibliography; Westlake, 2 ed., I, 321-325.

<sup>2</sup> "The equality of sovereign States is merely their independence under a different name." Westlake, 2 ed., I, 321.

<sup>3</sup> Declared Chief Justice Marshall, in *The Antelope*, 10 Wheat. 66, 122: "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent; and this trade [the slave trade with Africa], in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it."

See Mr. Root, Secy. of State, address before Third Conference of American Republics, at Rio de Janeiro, July 31, 1906, contained in *Latin America and The United States: Addresses*

with the maintenance of respect for all that independence of statehood necessarily implies, and secondarily, by way of confirmation of its assertions, with what the practice of the time reveals to be the full scope of the privileges asserted and enjoyed by other States within the same category. A State which habitually contents itself with less ceases to be the equal of independent States and finds itself in an inferior class.

Of impressive significance in the growth of the international society and in that of the law governing the relations of its members has been the circumstance that freedom from external control has been left to small and weak countries as their rightful portion, and that the States fairly to be regarded as independent have not in reality been confined to a small group possessed of superior power and influence, and determined as well as able to withhold equal privileges in that regard from weaker neighbors.<sup>4</sup> Accordingly, the full privileges of independent statehood are the possession of numerous countries differing widely in material strength, political power, and relative importance in international organization. Nor is this concession necessarily violated when in the working out of schemes for international coöperation, tests of what is equitable take cognizance of the factual differences that distinguish independent States one from another.<sup>5</sup> Such cognizance, may, however, serve to breed confusion of thought concerning the law. When material strength, manifested and applied in large or combined units of political power becomes the decisive influence in carrying out a fixed policy of international import, that very strength may be in fact invoked as a reason for banishing opposition; and dissent may be deemed arbitrary in proportion as it emanates from relatively weak or uninfluential sources. The number of independent States now existing bears witness to the fact that the law of nations has not sanctioned such a theory.

In 1923, The Permanent Court of International Justice, proclaiming the "principle of the independence of States" to be "a fundamental principle of international law," declared that it was "well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."<sup>6</sup> In 1925, the Government of the United States asserted that in order

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by Elihu Root, collected and edited by Robert Bacon and James Brown Scott, Cambridge (Mass.), 1917, 3, 10.

"Power or weakness," said the great Swiss publicist, Vattel, 'does not in this respect produce any difference.' And, incidentally, as this principle was maintained, the monstrous supposition that power is the measure of right would tend to disappear, and the claims of predatory conquest become less and less capable of realization." J. B. Moore, *International Law and Some Current Illusions*, New York, 1924, 302-303.

<sup>4</sup> "It is one of the striking features of the relations of States in the Middle Ages that their legal status as to each other was effected substantially without reference to the question of power. Hence it was that in the later Middle Ages even the free cities and the independent dukes were treated as equals by the rulers of States possessing greater political and economic power. This was made inevitable by the very immutability of the law at the time." Julius Goebel, Jr., *The Equality of States*, 57.

<sup>5</sup> It is not suggested that for purposes of international coöperation such tests are inequitable. See in this connection, A. D. McNair, "Equality in International Law," *Mich. Law Rev.*, XXVI, 131, 152; also Charles E. Hughes, "The Permanent Court of International Justice," *The Pathway of Peace*, New York, 1925, 65, 75.

<sup>6</sup> Fifth Advisory Opinion in relation to Eastern Carelia, Publications, Permanent Court

to retain its rights it could not be compelled by the Allied Powers to ratify a treaty containing unacceptable terms, such as that of Versailles.<sup>7</sup>

Nevertheless, the privilege of dissent is constantly challenged. Strongest pressure is at times exerted to thwart opposition and to cause technical acquiescence. Thus the practical value of the privilege of freedom from external control is weakened by the success of not infrequent attempts to compel independent States to agree to their own demotion, that is to say, to give up a measure of freedom from such control which other States within the same group habitually exercise and cherish. Various considerations produce such attempts, such as, for example, fear of the consequences of the recuperation of a vanquished foe compelled to yield territory as the penalty of its failure, or intolerance of protracted conditions of disorder characterizing a long and unsuccessful experiment with independent statehood. Other factors may be decisive. When a State bends its own will and, yielding to compulsion, formally agrees to relinquish its freedom from external control and so differentiates itself from countries asserting that privilege as of right, it is looked upon as simply having lost its former heritage. The element of compulsion is not deemed to vitiate the transaction or to give the relinquisher the right to repudiate the arrangement.<sup>8</sup>

Upon the attainment by Germany of ascendancy over Czechoslovakia in March, 1939, the Government of the United States did not hesitate to make the following declaration:

The Government of the United States has on frequent occasions stated its conviction that only through international support of a program of order based upon law can world peace be assured.

of International Justice, Series B, No. 5, p. 27. The Court added: "As concerns States not members of the League, the situation is quite different; they are not bound by the Covenant. The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent. Such consent, however, has never been given by Russia." (*Id.*, 27-28.)

<sup>7</sup> Declared Ambassador Kellogg to the British Secretary of State for Foreign Affairs (Sir Austen Chamberlain), on January 4, 1925: "My Government is unable to perceive the cogency of the reasoning by which it is admitted that it was not open to Powers who negotiate an earlier Treaty lawfully to deprive third parties of their rights and yet it is attempted to assert that effect for the Treaty of Versailles. The argument appears to be that the United States was compelled to ratify the Treaty of Versailles in order to retain its rights; or that the Allied Powers could accomplish the result of securing all the assets and revenues of Germany for their exclusive benefit by inviting the United States to join in a Treaty containing unacceptable terms." (American War Claims Against Germany, Senate Doc. No. 173, 69th Cong., 2 Sess., 66, 67.)

<sup>8</sup> "It may be said that the reference to the making of a treaty with Haiti, in such conditions as those which existed in 1915, is ironical; that it was an agreement imposed by our will and represented our wishes. If this be so, these wishes, as the treaty discloses and the event has proved, were in the interest of the Haitian people. Further, will any defender of the Treaty of Versailles be heard to say that a treaty is without obligation because it is imposed?" (Charles E. Hughes, *Our Relations to the Nations of the Western Hemisphere*, Princeton, 1928, 79-80.)

The Munich agreement of Sept. 29, 1938, signed by Messrs. Hitler, Chamberlain, Daladier and Mussolini, and providing for the acquisition of portions of the territory of Czechoslovakia by Germany, constituted an arrangement which the sovereign of the areas concerned was obliged to heed, and which to that extent deprived it of political independence. See correspondence respecting Czechoslovakia, September, 1938, Misc. No. 7(1938), Cmd. 5847; Further Documents respecting Czechoslovakia, including the Agreement concluded at Munich on September 29, 1938, Misc. No. 8 (1938), Cmd. 5848.

See Agreements Between States, Manifestation of Assent, Compulsion, *infra*, § 493.

This Government, founded upon and dedicated to the principles of human liberty and of democracy, cannot refrain from making known this country's condemnation of the acts which have resulted in the temporary extinguishment of the liberties of a free and independent people with whom, from the day when the Republic of Czechoslovakia attained its independence, the people of the United States have maintained specially close and friendly relations.

The position of the Government of the United States has been made consistently clear. It has emphasized the need for respect for the sanctity of treaties and of the pledged word, and for non-intervention by any nation in the domestic affairs of other nations; and it has on repeated occasions expressed its condemnation of a policy of military aggression.

It is manifest that acts of wanton lawlessness and of arbitrary force are threatening world peace and the very structure of modern civilization. The imperative need for the observance of the principles advocated by this Government has been clearly demonstrated by the developments which have been taking place during the past 3 days.<sup>9</sup>

Moreover, in response to a communication from the German Embassy at Washington of March 17, 1939, announcing the assumption of a protectorate over the provinces of Bohemia and Moravia, the Department of State observed that "the Government of the United States does not recognize that any legal basis exists for the status so indicated."<sup>10</sup>

Again, in October, 1939, in the course of the war in which Poland was a belligerent, Secretary Hull declared:

Poland is now the victim of force used as an instrument of national policy. Its territory has been taken over and its government has had to seek refuge abroad. Mere seizure of territory, however, does not extinguish the legal existence of a government.

The United States therefore continues to regard the government of Poland as in existence, in accordance with the provisions of the Constitution of Poland, and continues to recognize Count Jerzy Potocki as its Ambassador in Washington.<sup>11</sup>

Still again, on December 1, 1939, President Roosevelt denounced vigorously the effort of Russia to crush Finland. He said:

<sup>9</sup> Statement by Mr. Welles, Acting Secy. of State, March 17, 1939, Dept. of State Press Releases, March 18, 1939, 199.

<sup>10</sup> Dept. of State Press Releases, March 25, 1939, 221.

<sup>11</sup> Dept. of State Bulletin, Oct. 7, 1939, 342.

See Press Release of July 30, 1941, concerning relations with the Provisional Government of Czechoslovakia, Dept. of State Bulletin, Aug. 2, 1941, 88. It was here announced that the American Ambassador to Great Britain had been instructed to inform the Foreign Minister of the Provisional Government of Czechoslovakia that "The American Government has not acknowledged that the temporary extinguishment of their liberties has taken from the people of Czechoslovakia their rights and privileges in international affairs, and it has continued to recognize the diplomatic and consular representatives of Czechoslovakia in the United States in the full exercise of their functions." This statement, together with that quoted above in the text are illustrative of the fact that in the mind of the American Government the life of a State was not necessarily terminated through the circumstance that the Government thereof was forced for the time being to remain in exile.

The news of the Soviet naval and military bombings within Finnish territory has come as a profound shock to the government and people of the United States. Despite efforts made to solve the dispute by peaceful methods, to which no reasonable objection could be offered, one power has chosen to resort to force of arms. It is tragic to see the policy of force spreading and to realize that wanton disregard for law is still on the march. All peace-loving peoples in these nations that are still hoping for the continuance of relations throughout the world on the basis of law and order will unanimously condemn this new resort to military force as the arbiter of international differences.

To the great misfortune of the world, the present trend to force makes insecure the independent existence of small nations in every continent and jeopardizes the rights of mankind to self-government. The people and government of Finland have a long, honorable and wholly peaceful record which has won for them the respect and warm regard of the people and government of the United States.<sup>12</sup>

In these ways the United States freshly proclaimed its sense of the significance of independent statehood, as well as its unwillingness to acknowledge that that of Poland or of Finland had been in fact, or could lawfully be, snuffed out by measures such as those applied against them.

Not until the family of nations concludes that the requirements of justice forbid that an independent State be compelled to relinquish its position as such save for chronic delinquency in the performance of its international obligations, and that the mere success of the attempt to force such a State formally to agree to such relinquishment does not serve to destroy the foundation of its claim to independence, will the underlying principle afford a solid barrier of the weak against the strong.<sup>13</sup> Some considerations fortify the view that that conclusion may sometime be reached. They are seen in the importance to the international society of having the largest possible number of members possessed of the same fullest measure of permitted freedom from external control. They are apparent also in the consciousness of the persistent menace to the general peace that must result from frequent applications of the theory that might makes right, and from a realization that opportunities for such application must be expected to increase if a relatively few States are acknowledged to enjoy a degree of freedom from external control that is withheld from most of their neighbors. Moreover, the avowal of attachment to the cause of independent statehood expressed by the American Republics may be expected to exert a long-continued influence in such a direction.<sup>14</sup>

<sup>12</sup> Dept. of State Bulletin, Dec. 2, 1939, 609.

<sup>13</sup> See in this connection, A. D. McNair, "Equality in International Law," *Mich. Law Rev.*, XXVI, 131, 149.

<sup>14</sup> Arts. II and III of the "Declaration of the Rights and Duties of Nations" adopted by the American Institute of International Law at Washington, January 6, 1916, J. B. Scott, *The American Institute of International Law: Its Declaration of the Rights and Duties of Nations*, Washington, 1916, 88.

According to Art. 4 of the Convention on Rights and Duties of States concluded at the Seventh International Conference of American States at Montevideo, Dec. 26, 1933: "States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise,



The practice of nations has revealed the fact that a State cannot be permitted to retain its independence after it has become impotent to fulfill the international obligations that are incidental to its status. When it has sunk into such a condition, it forfeits the right thereafter to claim that measure of freedom from external control which is the portion of an independent State, and must anticipate as a probable consequence at least a temporary subordination to some foreign power.<sup>15</sup> It is perceived that the maintenance of justice is of greater concern to the international society than the continued independence of any member thereof; and justice among nations is obstructed whenever a State which loses its power or disposition to perform its common duties towards the outside world is long permitted to continue its existence without external restraint. This principle is believed to be relentless in its operation. Circumstances justifying the application of it, as well as the methods and agencies by which it should be enforced need, however, fresh consideration. The normal interest of the international society in maintaining the position of its independent members suffices to warrant the suggestion that demotion of any one of them should call for more than the determination of a single aggrieved State, and that it should never be arbitrarily wrought as an incident of external caprice or ill-will. Accordingly, it would appear desirable to permit the State charged with unfitness or incapacity for the retention of independent statehood to defend itself before some impartial international body, and to cause the final decision as to demotion to rest with that body. Such safeguards have not as yet, however, been deemed essential.

As has been observed, differences with respect to the power and influence of independent States are heeded in establishing what are generally deemed to be fair and workable bases of international co-operation. This is seen, for example, in the structure of the League of Nations,<sup>16</sup> the election of Judges of the Permanent Court of International Justice<sup>17</sup> and the cost of administration of the Universal Postal Union.<sup>18</sup> These and a variety of other instances emphasize two considerations which the growth of the coöperative instinct of the family of nations has respected: first, that the right of the independent State to decline

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but upon the simple fact of its existence as a person under international law." (U. S. Treaty Vol. IV, 4808. The Convention was accepted by the United States under reservations. See *id.*, 4810.)

See also Art. 1 of Additional Protocol on Non-Intervention concluded at the Inter-American Conference for the Maintenance of Peace, at Buenos Aires, Dec. 23, 1936, U. S. Treaty Vol. IV, 4822. Also Art. 1 of Convention to Coördinate, Extend and Assure the Fulfillment of the Existing Treaties between the American States, concluded at the same Conference, Dec. 23, 1936, *id.*, 4831.

See The Principle of Self-Determination, *infra*, §§ 109E and 109F.

<sup>15</sup> The establishment of a guardianship for such a State does not signify opposition to its interests, but rather an attempt to protect and preserve it for its own good as well as that of the international society, and with a view also to its ultimate restoration to a normal condition such as to justify its claim to the resumption of independent statehood.

<sup>16</sup> The text of the Covenant of the League of Nations is contained in U. S. Treaty Vol. III, 3336.

<sup>17</sup> See Art. IV, Statute of Permanent Court of International Justice, Publications, Permanent Court of International Justice, Series D, No. 1, Third Edition (March, 1936).

<sup>18</sup> See Art. XXIV, Universal Postal Union Convention of Stockholm, August 28, 1924, Post Office Department Publication, Government Printing Office, Washington, 1925.

to accept an arrangement to which it finds objection does not and should not necessarily deter other independent States from uniting in approval of that arrangement in so far as the objector is not bound by its terms; and secondly, that it may be of advantage to an independent State to participate in an arrangement through which its relative influence or part roughly corresponds with its relative influence or part in the life of the international society. The existing practice at least reveals a mode whereby States which justly claim an equal degree of freedom from external control also acknowledge common benefits in working together on a basis that is closely responsive to the actual differences which serve to distinguish them.

## 3

## THE RELATION OF INTERNATIONAL LAW TO PRIVATE INDIVIDUALS

## a

§ 11A. **In an Objective Sense.** The commission of particular acts, regardless of the character of the actors, may be so detrimental to the welfare of the international society that its international law may either clothe a State with the privilege of punishing the offender, or impose upon it the obligation to endeavor to do so. The offender may be a private individual; and when he is subjected to the imposition of a penalty, he comes into close contact with the law of nations. Whenever he commits acts on account of which a country not his own may not unlawfully proceed to punish him even though they are consummated beyond the limits of its territory and have no connection therewith, or whenever he commits acts which the territorial sovereign of the place where they are committed is under an obligation to endeavor to prevent or penalize, he feels the direct consequence of what that law permits an offended sovereign to do, or enjoins a law-respecting sovereign to do. In both situations, it is not unscientific to declare that he is guilty of conduct which the law of nations itself brands as internationally illegal. For it is by virtue of that law that such sovereign acquires the right to punish and is also burdened with the duty to prevent or prosecute.<sup>1</sup>

§ 11A.<sup>1</sup> In the course of the opinion of the Court in the case of *United States v. Arjona*, 120 U. S. 479, Chief Justice Waite declared: "It remains only to consider those questions which present the point whether, in enacting a statute to define and punish an offence against the law of nations, it is necessary, in order 'to define' the offence, that it be declared in the statute itself to be 'an offence against the law of nations.' This statute defines the offence, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offence against the law of nations. . . . Whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress. As has already been seen, it was incumbent on the United States as a nation to use due diligence to prevent any injury to another nation or its people by counterfeiting its money, or its public or *quasi* public securities. This statute was enacted as a means to that end, that is to say, as a means of performing a duty which had been cast on the United States by the law of nations, and it was clearly appropriate legislation for that purpose. Upon its face, therefore, it defines an offence against the law of nations as clearly as if Congress had in express terms so declared." (488) The indictment in this case was under the Act of May 16, 1884, 23 Stat. 22, to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign governments.

In places outside of the control of a State, as on the high seas, the private individual finds himself forbidden to commit acts of piracy.<sup>2</sup> Again, if he is the national of a neutral State or the master of a neutral merchant vessel, he is warned against the consequences of transportation of, or traffic in contraband articles on the high seas, and of penalties which the law of nations permits an offended belligerent itself to apply.<sup>3</sup>

The injunctions of international law that may be applicable to the private individual do not necessarily disappear when he enters the territory of his own or of any other State. He learns that there are acts of which that law itself forbids the commission by any one whomsoever. Evidence of this has long been reflected in the statutory law of the United States, which subjects to penalties one who in any manner "offers violence to the person of a public minister, in violation of the law of nations,"<sup>4</sup> and which confers upon the United States District Courts original jurisdiction of "all suits brought by any alien for a tort only, in violation of the law of nations or of a treaty of the United States."<sup>5</sup> American judicial opinion has at times borne its testimony to the same fact. Thus Chief Justice McKean, in the early case of *Respublica v. De Longchamps*, declared that the house of a foreign minister "is to be defended from all outrage; to invade its freedom is a crime against the State and all other nations."<sup>6</sup> To defame or impersonate such an officer might also be

<sup>2</sup> See Piracy, In General, *infra*, § 231.

Declares Dr. Lauterpacht: "Persons engaging in piracy are subject to duties imposed, in the first instance, not by the municipal law of various States but by International Law." (Oppenheim, 5 ed., I, 20.) See also *id.*, 6 ed., II, 518, footnote 2.

"Piracy, trade in negroes and slave traffic, white slavery, the destruction of submarine cables, and all other offenses of a similar nature against international law committed on the high seas, in the open air, and on territory not yet organized into a State, shall be punished by the captor in accordance with the penal laws of the latter." (Art. 308 of de Bustamante Code of Private International Law, adopted by Sixth International Conference of American States, Feb. 13, 1928, Report of Delegates of the United States, Appendix 6.)

<sup>3</sup> See President Washington, Proclamation of Neutrality, April 22, 1793, Am. State Pap. For. Rel. I, 140.

Also, Contraband, Nature of the Traffic, *infra*, § 814.

<sup>4</sup> Rev. Stat. § 4062, Act of April 30, 1790, 1 Stat. 118.

It will be recalled that Art. I, Section 8 of the Constitution of the United States confers power upon the Congress "To define and Punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."

<sup>5</sup> Paragraph 17, Federal Judicial Code, 36 Stat. 1093.

See also statute of Holland of March 29, 1651, de Wicquefort, *L'Ambassadeur et son Fonctions*, Cologne, 1690, section 27; preamble of Act for preserving the privileges of Ambassadors, and other Public Ministers of Foreign Princes and States, 7 Anne, c. 12, 1708.

<sup>6</sup> In this case the defendant was convicted of unlawfully and violently threatening and menacing bodily harm and violence to the person of the Secretary of the French Legation in the House of the French Minister to the United States, and also for an assault upon the Secretary in the streets of Philadelphia. In sentencing the prisoner the Chief Justice declared: "The first crime is an infraction of the Law of Nations. This law, in its full extent, is part of the law of this State, and is to be collected from the practice of different Nations, and the authority of writers. The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations;—he is guilty of a crime against the whole world. . . ."

"You then have been guilty of an atrocious violation of the law of nations." (1 Dall. 111, 116, 117.) It should be noted that the defendant had served as an officer in the French armies, and appeared in the house of the French Minister in the uniform of a French regiment.

Also, *United States v. Hand*, 2 Wash. C. C. 435, Moore, Dig., IV, 627.

See also *Lord Mansfield, in Triquet v. Bath*, 3 Burr., 1478, *Scott's Cases*, 2.

regarded as conduct falling within a like category. Without, however, attempting to indicate the scope of the prohibitions imposed by international law, it suffices to observe that they project themselves with greatest clearness in denouncing the propriety of acts directed against, or constituting attacks upon, certain public agencies of a foreign State, or which serve to compromise the very safety of such a State itself.<sup>7</sup>

Numerous multi-partite treaties reflect the sense of groups of States of the need of restricting the freedom of private individuals with respect to conduct which if left unchecked would serve to thwart the achievement of a common end. That is at times sought to be accomplished by the imposition upon the contracting parties of burdens of prevention, accompanied by supplementary denunciations of particular activities of which the suppression is desired.<sup>8</sup> In some instances, however, the treaties register commands, prohibitive or otherwise, addressed to private individuals connected by various ties with the contracting States.<sup>9</sup> In both situations there is seen the expression of a common will which for a common end exerts direct pressure upon private as well as public individuals, and demands respect for its injunctions by both. The effectiveness of this method suggests that the society of nations may gradually employ it with increasing frequency, and by such process broaden the scope, and accentuate the internationally illegal aspect, of particular acts by whomsoever committed.

The obligations of which international law demands the performance by a State in order that it may escape responsibility for the consequence of acts of private individuals directed against foreign life and property, and committed within places subject to its control, reveal the causes of preventive and punitive measures that are there locally applied. They account for the zeal of the territorial sovereign to endeavor to prevent the actors from achieving their ends, or to punish them on account of what they have done, or to permit alien victims to pursue them in the local courts. They signify even more. They show that the international society deems such acts on the part of private individuals to be so adverse to its welfare that they are not to be connived at, or regarded with unconcern by the particular sovereign of the place where they occur. Accordingly, when that sovereign is not remiss in that respect and faithfully performs its duty, it presses, as the instrument of that society, upon the individual actors, those deterrents or penalties which its concern and influence demand. Thus, in

<sup>7</sup> See Art. VIII, of the Resolutions adopted by the Institute of International Law, Sept. 7, 1883, with respect to the Conflict of Penal Laws, *Annuaire*, abridged edition, I (1875-1883), 1185, 1186.

Also, *United States v. Arjona*, 120 U. S. 479.

<sup>8</sup> See, for example, Convention between the United States, Great Britain, Russia, and Japan for The Preservation and Protection of Fur Seals, of July 7, 1911, U. S. Treaty Vol. III, 2966; Convention for Control of Trade in Arms and Ammunition, of Sept. 10, 1919, U. S. Treaty Vol. III, 3752; Convention Relating to Liquor Traffic in Africa, of Sept. 10, 1919, U. S. Treaty Vol. III, 3746, League of Nations Treaty Series, VIII, 13; Convention between the United States and Other Powers to suppress the Slave Trade and Slavery, of Sept. 25, 1926, U. S. Treaty Vol. IV, 5022.

<sup>9</sup> See, for example, North Sea Convention concerning Liquor Traffic, between Great Britain, Belgium, Denmark, France, Germany and The Netherlands, of Nov. 16, 1887, Brit. and For. State. Pap., LXXIX, 894; Convention for Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, of Sept. 23, 1910, U. S. Treaty Vol. III, 2943.

this way, again, there is brought home to the private individual a sense of what the law of that society generally disapproves.

Referring to the general situation in terms of fact, it may be said that the acts of private individuals may be and are not infrequently defiant or contemptuous of principles that States in the development of their relations with each other have found it expedient and necessary to regard as the law of nations; that some States, such as the United States, are inclined to denounce through local statutes, as contrary to that law some acts that are deemed to possess such a character, and to penalize the actors; that the society of nations is disposed to permit rather than forbid such action provided the decision of the particular State as to the character of the acts of the private individual be not unsound; that the reasonableness of the decision in that regard is not likely to be challenged when the conduct of the actors is directed against the safety of a State or certain of its agencies; that the society of nations imposes upon each of its members, with respect to places under its control, certain duties to prevent the occurrence of some acts therein that are themselves necessarily defiant of the principles of international law, or which may be productive of a situation at variance with what those principles appear to demand; that in general these duties vary, however, in scope according to the public or private character of the actors, and according to the public or private character of their objectives.

b

**Privileges Accruing to Private Individuals**

(1)

**§ 11B. In Relation to Foreign States.** Private individuals are the recipients of a variety of substantial benefits created in their behalf through the influence of international law. This is obvious when, for example, there is yielded to the individual subjected to ill treatment at the hands of a foreign State a local judicial remedy. Such action according to the prevailing views of foreign offices, manifests, however, an endeavor on the part of the offending sovereign to satisfy an obligation due from it to that other State of which the aggrieved individual is a national, rather than an obligation due to him. Thus, in so far as international law is concerned, he finds himself in a helpless condition if such a remedy is withheld and his own State proves to be unwilling to espouse his cause and interpose in his behalf. A like situation seemingly presents itself whenever a private individual endeavors to obtain from a foreign State the benefit of privileges conferred in his behalf by that State in satisfaction of an obligation due to his own. When no such obligation is to be met, the private individual encounters great difficulty in establishing that the law of nations permits him to maintain that any essentially international duty on the part of a foreign State towards him himself remains unfulfilled. This may be due to the circumstance that as yet the family of nations has been content to confide the protection of the interests of private individuals in their varying relations with the outside world to the States of which they are nationals, and has, accordingly remained

generally indifferent as to their fate when those States have been indisposed to vindicate the claims of their nationals or otherwise to act in their behalf. There has been reluctance to conclude that in such a situation the interests of the international society as such are affected adversely to a degree sufficient to justify the imposition upon one of its members of an international obligation to accord to a national in his contacts with the outside world a protection which there is unwillingness to yield. This conclusion may not, however, remain unchanged. It is conceivable, that the international society may evince a distinct interest in the protection of the private individual who although subjected by a foreign State to conduct regarded as internationally illegal and denied every form of relief, continues to be neglected by his own. As yet, however, such instances have not recurred with a frequency sufficient to create a general sense of the insufficiency of the theory on which the law has been permitted to develop.

When privileges accorded private individuals in their relationships with foreign States are recorded in, or based upon treaties, no different situation presents itself. As the Permanent Court of International Justice had occasion to declare in its fifteenth Advisory Opinion, "It may be readily admitted that, according to a well established principle of International Law, the *Beamtenabkommen* [an accord between Danzig and Poland, of October 22, 1921], being an international agreement, cannot, as such, create direct rights and obligations for private individuals."<sup>1</sup> This is true even though a treaty reflects the design of each contracting party to undertake, with respect to every other, the burden and duty of creating privileges for the immediate benefit of the nationals of every other.<sup>2</sup> There is no necessary restriction of the application of this principle when the terms of an agreement accentuate the importance of the private individual, as, for example, by yielding to him the privilege of subjecting, under appropriate and specified circumstances, a contracting party alien to himself to the jurisdiction of an international tribunal,<sup>3</sup> or by imposing upon a claims commission the duty so to formulate the terms of its awards that they shall enure to the sole benefit of the nationals of a claimant State.<sup>4</sup>

§ 11B.<sup>1</sup> Publications, Permanent Court of International Justice, Series B, No. 15, 17. "But it cannot be disputed," declared the Court, "that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts." (*Id.*)

<sup>2</sup> See, for example, as an illustration from a bi-partite arrangement, the provisions of Art. II of the Treaty of Friendship, Commerce and Consular Rights, concluded between the United States and Germany, Dec. 8, 1923, U. S. Treaty Vol. IV, 4191.

<sup>3</sup> See Arts. IV, V, and XXVI of the unratified International Prize Court Convention signed at the Second Hague Peace Conference, Oct. 18, 1907, Charles' Treaties, 248, 251, and 255.

See also Art. II of the Convention for the establishment of a Central American Court of Justice, concluded Dec. 20, 1907, The Central American Peace Conference held at Washington D. C., 1907, Report of Mr. William I. Buchanan, Washington, 1908, 43, 44.

Also Art. 304 of the Treaty of Versailles of June 28, 1919, in respect to the contemplated mixed arbitral tribunals, U. S. Treaty Vol. III, 3477.

<sup>4</sup> See Interposition in Behalf of a Domestic Corporation, *infra*, § 278.

Also Parker, Umpire, in Administrative Decisions Nos. V and VII, Consolidated Edition, Decisions and Opinions, Mixed Claims Commission, United States and Germany, 1925, 190-192, and 324-325, respectively.

## (2)

§ 11C. **Relationship with the State of which the Individual is a National.** The family of nations is not unconcerned with the life and experience of the private individual in his relationships with the State of which he is a national. Evidence of concern has become increasingly abundant since World War I, and is reflected in treaties through which that conflict was brought to a close, particularly in provisions designed to safeguard the racial, linguistic and religious minorities inhabiting the territories of certain States,<sup>1</sup> and in the terms of Part XIII of the Treaty of Versailles, of June 28, 1919, in respect to Labour,<sup>2</sup> as well as in Article XXIII of that treaty embraced in the Covenant of the League of Nations.<sup>3</sup> It should be borne in mind, however, that the possession by a foreign State or group of States or agency thereof of a privilege of interference due to treaty or to the law of nations does not indicate that the private individual is himself endowed as such in an international sense with any privilege of interference as against his own country of which that law takes cognizance. Oftentimes when such a person is subjected by his sovereign to seemingly harsh or arbitrary treatment, he is unable to establish that any international obligation in respect to himself has been violated;<sup>4</sup> and unless some foreign State deeming the acts of that sovereign to constitute internationally illegal conduct and injurious to itself essays to interpose in his behalf, he is in fact helpless.

This is illustrated in the numerous treaties placing minorities under the guarantee or protection of the League of Nations. There was not yielded to corporate entities or individuals belonging to aggrieved minorities the privilege of becoming parties to any action. The Council of the League accordingly, regards any petitions from them solely as sources of information, the only parties to any action arising therefrom being the particular Government concerned and the Governments of individual members of the Council or the Council itself.<sup>5</sup> The

§ 11C. <sup>1</sup> See, for example, Arts. 62-69 of the Treaty of Saint-Germain-en-Laye, of Sept. 10, 1919, between the Allied and Associated Powers and Austria, U. S. Treaty Vol. III, 3176-3177.

<sup>2</sup> U. S. Treaty Vol. III, 3503-3514.

<sup>3</sup> It is here declared that the members of the League "undertake to secure just treatment of the native inhabitants of the territories under their control."

<sup>4</sup> "The cause of action herein arose where the act of confiscation occurred, and it must be governed by the law of Soviet Russia. According to the law of nations, it did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia to the defendants." (*M. Salimoff and Co. v. Standard Oil Co.*, 262 N. Y. 220, 227.)

<sup>5</sup> "The Chief question was whether the right to appeal for protection to the Council of the League and to the Court of International Justice should be confined to States, or whether it would be open to minorities themselves, as corporate entities or individuals belonging to minorities, to appear before and invoke the jurisdiction of the Permanent Court. Certain delegations proposed a draft which, while leaving the final determination on this point to the Court of International Justice itself, would in effect have left it open to the Court to allow minorities or individuals to appear before it as principals in the case. Other delegations, proposed a draft which made it clear that it was only States Members of the Council which could appeal to the jurisdiction of the Court. The difference was fundamental. The decision was given in favour of the restrictive right, since, in a previous discussion of the general principle involved, the view had been taken that nothing should be done which would give the appearance of making a minority organisation politically independent of the State or of giving such a minority political rights distinct from those of the majority. . . .

"The authors of the treaties deliberately rejected any proposal which could give counte-

procedure developed by the Council for the examination of petitions in behalf of minorities paid close heed to this principle.<sup>6</sup>

Interested States may, however, elect to pursue a different course, as did Germany and Poland through their convention relating to Upper Silesia concluded at Geneva, May 15, 1922, by the terms of which the Council of the League of Nations was rendered competent to pronounce on all individual or collective petitions relating to the protection of minorities.<sup>7</sup>

The obvious tendency on the part of States to safeguard by treaty the private individual against restrictions to which he might otherwise be subjected by a contracting party, such as his own country, is of significance. It does not obscure the basis of what is wrought in his behalf, or belittle his helplessness when unsupported by an interested State or an agency thereof. It suggests, however, that the international society may gradually through the aid of multi-partite treaties, proceed to amend the law of nations so as to confer upon the private individual privileges respecting his own or other States resembling in kind those that States are acknowledged to possess and invoke in their relations with each other. Upon such an event appropriate reference to the relationship of such an individual to States would call for a statement unlike any that reflects faithfully what existing practices appear to ordain. These, as has been noted, accentuate generally the burdens recognized between State and State in respect to private individuals. If the family of nations is to be disposed to go farther and to place such persons upon a firmer foundation in respect to their relations to its several members, it will be due primarily to a general conviction that the welfare of that society as such is jeopardized by failure to take that step, and that the peaceful and orderly progress of States in their intercourse with each other leaves no alternative.<sup>8</sup> In the meantime close examination of current practices reflected in the terms of conventional arrangements and elsewhere must

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nance to the conception of any minority forming a separate corporation within the State. If the Council decided that petitions relating to the treatment of minorities, whether received from members of a minority or not, should under certain conditions, be communicated to its members, it made it clear that it regarded these petitions solely as sources of information, and that the only parties to any action which might arise therefrom would be the Government concerned and the Governments of individual members of the Council or the Council itself. Here, again, we have a principle which is not only clearly a part of the system as laid down in the treaties, but whose maintenance is essential to their satisfactory working on behalf of the Governments and the minorities concerned." (Report of Dr. Adatci, *Rapporteur*, with collaboration of British and Spanish representatives, to the Council of the League, 1929 [Document C.C.M.I.], League of Nations, *Official Journal, Special Supplement*, No. 73, "Documents Relating to the Protection of Minorities," 46 and 61.)

<sup>6</sup> Same Report, *id.*, 50-53, 56-61; also Resolution of the Council, June 13, 1929, *id.*, 35.

Also J. S. Roucek, "Proceedings in Minorities Complaints," *Am. J.*, XXIII, 538; Julius Stone, *International Guarantees of Minority Rights*, Oxford, 1932, 246-249.

See, Certain Minor Impairments of Independence through the Medium of the League of Nations. Protection of Minorities, *infra*, § 27.

<sup>7</sup> Brit. and For. St. Pap., CXVIII, 365, 412. See Julius Stone, *Regional Guarantees of Minority Rights, A Study of Minorities Procedure in Upper Silesia*, New York, 1933, 7.

<sup>8</sup> Declared President Wilson at a Plenary Session of the Peace Conference at Paris, on May 31, 1919: "Take the case of minorities. Nothing, I venture to say, is more likely to disturb the peace of the World than the treatment which might in certain circumstances be meted out to minorities. And, therefore, if the Great Powers are to guarantee the peace of the World in any sense, is it unjust that they should be satisfied that the proper and necessary guarantee has been given?" (Temperley, V, 130.)



serve to challenge the accuracy of statements that intimate that the family of nations has already reached such a conclusion.<sup>9</sup>

<sup>9</sup> The "Declaration Concerning the International Rights of Man" (*Déclaration des droits internationaux de l'Homme*), adopted by the Institute of International Law at New York, in 1929, *Annuaire*, XXXV, Vol. II, 298, must, as the terms of the preamble imply, be regarded as an expression of faith—"the substance of things hoped for, the evidence of things not seen"—rather than as a statement of what the family of nations acknowledges to be the law to which its several members are obliged to conform.

See, in this connection, André Mandelstam, "*La déclaration des droits internationaux de l'homme, adoptée par l'Institut de Droit International*," *Rev. Droit Int.*, IV, 59; J. B. Scott, "*La déclaration internationale des droits de l'homme, adoptée à la Session de New-York*," *id.*, 79; André Mandelstam, "*La généralisation de la protection internationale des Droits de l'homme*," *Rev. Droit Int. et Lég. Comp.*, 3 sér., XI, 297 and 698.

Also, Jean Spiropoulos, *L'Individu en Droit International*, Paris, 1928.

## TITLE B

### CLASSIFICATION OF STATES OF INTERNATIONAL LAW

#### 1

#### STATES IN RELATION TO THEIR FREEDOM FROM EXTERNAL CONTROL

##### a

§ 12. **In General.** The chief concern of the international society respecting the character of a person or State of international law pertains to the degree of freedom from external control with which it conducts its foreign relations or otherwise lives its life. Of less consequence is the method by which such a person or State came into being, or the cause which was productive of it, or the nature of its structure. To the family of nations whatever circumstances serve to deny to one of its members the right to deal as it may see fit with the outside world, or to exercise in other ways such rights of political independence as are the common possession of those of its members least subjected to external restraint must, however, remain a matter of importance.<sup>1</sup>

##### b

§ 13. **Independent States.** The law of nations has grown up from and through an age when most of the entities to which it was designed to be applicable acknowledged no duty of subordination one to another. Hence the burden of that law was to regulate the obligations between such unsubordinated entities, as well as to accentuate the nature and extent of the freedom of each. These unsubordinated entities or States, admitting no superior, were not inclined to sacrifice through general agreement for a common end privileges that each was acknowledged to possess. When the United States came into being the description of any one of them as independent was not a misnomer.

The agreement-making policy of a world that slowly awakened to a realization of the need of respect for the common interests that welded its society together, underwent, however, and is still undergoing a change. Since the World

§ 12.<sup>1</sup> "When it is proposed to place a community under the head of those which are capable of entering into some only of the relations with other States which are contemplated by international law, the only questions which require to be settled are whether its independence is in fact impaired, and if so, in what respects and to what degree. The nature of the bond derogating from independence which unites the community to another society is a matter, not of international, but of public law; because in so far as the former is identified with that society in its relations with other States, it is either a part of it, or in common with it is part of a composite State." Hall, Higgins' 8 ed., 23-24.

War initiated in 1914, States that regard themselves as independent have become increasingly disposed to accept through multi-partite treaties broad restrictions upon the exercise of privileges concerning which there was previously intolerance of restraint. Agreements limiting the occasions for the adjustment of international differences by the sword are instances.<sup>1</sup> Doubtless such arrangements serve to accentuate the differences between adhering and non-adhering States; for the latter enjoy a freedom which the former have relinquished. Nevertheless, the fact of adherence may not necessarily call for a yielding of control of foreign or domestic affairs to an external entity.<sup>2</sup> In such case the adhering State does not lose a quality or privilege that has always been the distinctive mark of what may roughly be described as the most-favored-nation class. At the present time there continues to stand out in the international society this large and primary group of States each of which asserts and enjoys freedom from the control of any other in the management of its domestic and foreign affairs. Each continues to be called an independent State.<sup>3</sup> The United States, Japan, Ecuador and Spain are examples.

The use of the word independent as descriptive of the particular class of States to which it is commonly applied, and as a means of distinguishing such States from others is not unreasonable, despite the fact that the employment of it has not always been productive or expressive of clearness of thought. In a strict

§ 13.<sup>1</sup> See, for example, Treaty for the Renunciation of War (known as the Briand-Kellogg Pact) signed at Paris, August 27, 1928, U. S. Treaty Vol. IV, 5130; also the Covenant of the League of Nations, U. S. Treaty Vol. III, 3336.

<sup>2</sup> "Restrictions on its liberty of action which a State may agree to do not affect its independence, provided that the State does not thereby deprive itself of its organic powers. Still less do the restrictions imposed by international law deprive it of its independence.

"The difference between the alienation of a nation's independence and a restriction which a State may agree to on the exercise of its sovereign power, *i.e.* of its independence, is clear. This latter is, for instance, the position of States which become Members of the League of Nations. It is certain that membership imposes upon them important restrictions on the exercise of their independence, without its being possible to allege that it entails an alienation of that independence.

"Practically, every treaty entered into between independent States restricts to some extent the exercise of the power incidental to sovereignty. Complete and absolute sovereignty unrestricted by any obligations imposed by treaties is impossible and practically unknown." (Dissenting Opinion of Judges Adatci, Kellogg, Rolin-Jaequemyns, Hurst, Schücking, Van Eysinga and Wang, in Case of Customs Régime between Germany and Austria, Advisory Opinion of the Permanent Court of International Justice, Sept. 5, 1931, Publications, Permanent Court of International Justice, Series B, No. 41, p. 77.)

<sup>3</sup> "Independence means freedom from control, and a State like the United Kingdom or France is independent because it is free from all control either over its internal government or over its foreign relations." Westlake, 2 ed., I, 20.

"The proper usage of the term 'independence' is to denote the status of a state which controls its own external relations without dictation from other states; it contrasts such a status with that of a state which either does not control its own external relations at all, and is therefore of no interest to international law, like the State of New York, or controls them only in part, like Cuba. The exact significance of the term appears most clearly in such a phrase as 'declaration of independence.'" J. L. Brierly, *The Law of Nations*, Oxford: 1928, 63-64.

"Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." (Huber, Arbitrator, in *Island of Palmas Arbitration*, *Am. J.*, XXII, 867, 875.)

sense, no member of the international society is or can be independent. When, therefore, the term is used to refer to those members of the international society which enjoy the largest measure of freedom from external control, it becomes necessary to take note of the fact that they do not cease to belong to that category as a consequence of certain restraints which they perhaps voluntarily accept as practicable sacrifices for their common and individual interest. Thus, it is not regarded as inconsistent with its status for a State regarded as independent to burden itself with various contractual restraints that do not render it subordinate to, or dependent upon, the will of any external power such as a foreign State. Again limitations upon freedom of action which are imposed by the law of nations are not defiant of the concept which the term independent is employed to reflect. The adjective is, however, offensive to those who believing that its use buttresses the cause of States opposed to international arrangements, would eliminate a term that seemingly emphasizes a right of dissent. Again, diplomacy is wont to blur a distinction which the term serves to accentuate when, in order to save the face of a country accepting the wardship of another, the treaty embodying the arrangement refers to the former as an independent State.<sup>4</sup> Moreover, statesmen at times labor to convince a country subjected to temporary or protracted periods of subordination, that the acts productive thereof mark no impairment of independence.<sup>5</sup> Despite the lack of candor that oftentimes pervades diplomatic discussions, the term independent still serves a useful purpose, as a linguistic instrumentality in the singling out of the principal class of States that today exist, and which are in fact differentiated from others by reason of the enjoyment of freedom from external control in what pertains to foreign or domestic affairs. The word when so employed appears to have a distinctive signification which is respected and utilized in the utterances of the Permanent Court of International Justice.<sup>6</sup>

It may be doubted whether international law endows a State not in fact independent with any privilege of attaining independence. That law is rather concerned with the conduct of a country which has acquired such a status, and lays claim to the privileges appertaining to it.

<sup>4</sup> The reference to the Ionian Islands as a "single, free and Independent State," in the treaty concluded by Great Britain, Austria, Prussia and Russia, Nov. 5, 1815, is illustrative. Brit. and For. State Pap., III, 250, 254-255.

See also the British declaration of Feb. 28, 1922, in respect to Egypt, Egypt No. 1 (1922), [Cmd.] 1592, 29.

<sup>5</sup> Cf. preamble of Convention of Ratification between the United States and the Dominican Republic, of June 12, 1924, U. S. Treaty Vol. IV, 4077.

Also, preamble of Convention and Protocol of January 9, 1930, concluded by the United States with Great Britain and Iraq, U. S. Treaty Vol. IV, 4335.

<sup>6</sup> "International law governs relations between independent States." (Judgment of the Court in the case of the S.S. "*Lotus*," Publications, Permanent Court of International Justice, Series A, No. 10, 18.) "The family of nations consists of a collection of different sovereign and independent States." (Dissenting opinion of Judge Loder, in same case, *id.*, 34.) In his dissenting opinion in the same case, Judge Moore adverted to "all independent and sovereign States," and to "the equality of independent States." (*Id.*, 68 and 69.)

## c

## Dependent States

## (1)

§ 14. **Preliminary.** A dependent State is one which by reason of its subordination to another State or States or other foreign entity is subjected to external restraint in the control of its domestic or foreign affairs, and thus deprived of a freedom in that regard which is the common possession of the large class of States which brook no such interference and constitute what are known as independent States.<sup>1</sup> Dependence manifests itself in a variety of forms. These differ greatly with respect to the extent and character of the restraint that is applied; and it may be doubted whether any classification of them preserves or indicates with precision useful distinctions of legal value. Broad and general terms are roughly and equivocally employed to describe relationships manifesting the dependence of one State upon another, without a common design of attaching to such terms a signification descriptive of any particular or distinctive degree of subordination. For that reason it is believed to suffice to note some of the actual and yet differing forms of dependence which have been wrought, with a view to observing in each case the nature and scope of the restriction. Inasmuch as the United States has, by virtue of treaties, undertaken in various ways to become the protector of certain States of which it may be said to be the neighbor, the relationships thus established deserve close examination.

Whether a particular State is dependent or otherwise may be always determined by ascertaining whether in fact it is by any process habitually subjected to any external restraints in the control of its domestic or foreign affairs from which the States acknowledged to possess the largest measure of political independence are free.

## (2)

## CERTAIN SO-CALLED PROTECTORATES AND PROTECTED STATES

§ 15. **The Ionian Islands.** A relationship may be established whereby one State, on account of the protection afforded by another, is unable to enter into

§ 14.<sup>1</sup> "The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it with the exceptional and, to some extent, abnormal class of States known as dependent States. These are States subject to the authority of one or more other States. The idea of dependence therefore necessarily implies a relation between a superior State (suzerain, protector, etc.) and an inferior or subject State (vassal, protégé, etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such relation of superiority and subordination, it is impossible to speak of dependence within the meaning of international law." (Individual Opinion by Judge Anzilotti, in Case of Customs Régime between Germany and Austria, Advisory Opinion of the Permanent Court of International Justice, September 5, 1931, Publications, Permanent Court of International Justice, Series B, No. 41, p. 57.)

"A State would not be independent in the legal sense if it was placed in a condition of dependence on another Power, if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, i.e. if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails." (Dissenting Opinion in same

foreign relations without the consent of its protector. The large restraint imposed upon the inferior State may serve to burden its superior with a proportional responsibility in the according of protection,<sup>1</sup> and for the conduct of its ward.<sup>2</sup>

As the Permanent Court of International Justice declared in 1923, in the course of its Fourth Advisory Opinion concerning the Nationality Decrees issued in Tunis and Morocco (French Zone):

The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.<sup>3</sup>

The Ionian Islands, placed under the protection of Great Britain by virtue of the treaty concluded by that Power with Austria, Prussia and Russia, November 5, 1815, and until annexation to Greece in 1864, are commonly mentioned as illustrative of a relationship which is described as a protectorate.<sup>4</sup> Apart from the right to receive commercial agents or consuls, and to display a distinctive trading flag,<sup>5</sup> the Islands possessed no right to control their foreign relations.<sup>6</sup>

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Case, of Judges Adatci, Kellogg, Rolin-Jaequemyns, Hurst, Schücking, Van Eysinga and Wang, *id.*, p. 77.)

§ 15.<sup>1</sup> "The word *protectorate* usually describes the relation between a protecting and a protected State, although the term is sometimes used with reference to the relation between a protecting State and an area or people not possessing the status of a State." (Hackworth, *Dig.*, I, 77.)

See also Westlake, 2 ed., I, 22-23.

<sup>2</sup> "A protectorate, however qualified, assumes a greater or less degree of responsibility on the part of the protector for the acts of the protected State, without the ability to shape or control these acts, unless the relation created be virtually that of colonial dependency, with paramount intervention of the protector in the domestic concerns of the protected community." (Mr. Sherman, Secy. of State, to Mr. Powell, Minister to Haiti, No. 97, Jan. 11, 1898, MS. Inst. Haiti, III, 629, Moore, *Dig.*, VI, 475, 476.)

<sup>3</sup> Publications, Permanent Court of International Justice, Series B, No. 4, 27.

<sup>4</sup> Brit. and For. State Pap., III, 250; The Ionian Ships, 2 Spinks, 212, 221.

<sup>5</sup> Art. VII of the treaty of Nov. 5, 1815, Brit. and For. State Pap., III, 257.

<sup>6</sup> Declares Hall: "The head of the government was appointed by England, the whole of the executive authority was practically in the hands of the protecting power, and the state was represented by it in its external relations. In making treaties, however, Great Britain did not affect the Ionian Islands unless it expressly stipulated in its capacity of protecting power; the vessels of the republic carried a separate trading flag; the state received consuls, though it could not accredit them; and during the Crimean War it maintained a neutrality the validity of which was acknowledged in the English Courts." Higgins' 8 ed., 29.

Concerning the Republic of San Marino, under the protection of Italy, see Fernand Daguin, *La République de Saint-Marin*, Paris, 1904; E. Engelhardt, *Les Protectorats Anciens et Modernes*, Paris, 1896, 102-105; A. Sottile, *La République de Saint Marino*, 1924. It may be observed that the United States concluded an extradition treaty with San Marino June 6, 1906. Malloy's Treaties, II, 1598.

Concerning the Republic of Andorra in the Pyrenees under the co-protection of France and Spain (exercised through the Bishop of Urgel) see Joseph Roca, *De la Condition Internationale des Vallées d'Andorre*, Antibes, 1908; also Fauchille, 8 ed., § 177,<sup>2</sup> and works there cited.

Concerning the Principality of Monaco, see treaty between Monaco and France, confirming the relations between them, of July 17, 1918, Brit. and For. St. Pap., CXI, 727, Hudson's

§ 16. **The Free City of Danzig.** "The Peace Treaty signed at Versailles on June 28th, 1919 (Articles 100-108), constituted the City of Danzig with its territory as a Free City under the protection of the League of Nations, and placed its constitution under the League's guarantee. A High Commissioner of the League of Nations, residing at Danzig, was entrusted with the duty of dealing in the first instance with all differences arising between Poland and the Free City, in regard to the Treaty of Versailles itself or any arrangements or agreements made thereunder."<sup>1</sup> Under Article 104(6) of the Treaty of Versailles the Principal Allied and Associated Powers agreed "to negotiate" a convention between the Polish Government and the Free City of Danzig whereby the former should undertake among other things the conduct of the foreign relations of the Free City, as well as the protection of its nationals when abroad.<sup>2</sup>

As the Permanent Court of International Justice in its Eighteenth Advisory Opinion of August 26, 1930, declared:

"The Treaty referred to in Article 104 was in fact concluded between Poland and Danzig and is dated November 9th, 1920. It is known as the Treaty or Convention of Paris. Its provisions repeat and amplify in some respects the stipulations of Article 104 of the Treaty of Versailles; but, so far as concerns provisions which are to be found in both Treaties, their repetition in the Treaty of Paris does not vary the fact that the Treaty of Versailles is the source of the rights conferred on Poland in accordance with Article 104, nor does it alter the fact that, so far as these rights involve a limitation on the independence of the Free City, they constitute organic limitations which are an essential

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Cases, 2 ed., 52, and reference thereto in Article 436 of Treaty of Versailles, U. S. Treaty Vol. III, 3519. Also, Hall, Higgins' 8 ed., 29-30; Fauchille, 8 ed., § 178, with bibliography; W. W. Willoughby, and C. G. Fenwick, Types of Restricted Sovereignty and of Colonial Autonomy, Dept. of State, confidential document, Jan. 10, 1919, 59. See also Hackworth, Dig., I, § 17, and documents there cited.

§ 16.<sup>1</sup> The language of the paragraph of the text is that of the Permanent Court of International Justice in the Eleventh Advisory Opinion concerning the Polish Postal Service in Danzig, Publications, Permanent Court of International Justice, Series B, No. 11, 10.

See U. S. Treaty Vol. III, 3383-3386, for the relevant articles of the Treaty of Versailles.

For an English text of the constitution of Danzig adopted August 11, 1920, see McBain and Rogers, New Constitutions of Europe, New York, 1920, 429.

<sup>2</sup> See L. N. Treaty Series, No. 153, Vol. VI, 191. According to Art. II: "Poland shall undertake the conduct of the foreign relations of the Free City of Danzig as well as the protection of its nationals abroad."

See Eleventh Advisory Opinion of the Permanent Court of International Justice, interpretative of these agreements; also Fifteenth Advisory Opinion of the Court concerning the Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials Who Passed into the Polish Service, against the Polish Railways Administration), Publications, Permanent Court of International Justice, Series B, No. 15.

See decisions of General R. Haking, High Commissioner, of Dec. 17, 1921, and Dec. 18, 1921, Decisions of the High Commissioner (Danzig), League of Nations, 1921, 70 and 74.

Also G. Levesque, *La situation internationale de Dantzig*, Paris, 1924; bibliography in footnote<sup>3</sup>, of Lauterpacht's 5 ed. of Oppenheim, I, 170; Malcolm M. Lewis, "The Free City of Danzig," *Brit. Y.B.* 1924, 89; P. E. Corbett, "What is The League of Nations?" *id.*, 119, 138-141; H. Strasburger, "*La Ville de Dantzig et la Situation par Rapport à la Pologne*," *Académie Dip. Int., Séances et Travaux*, Vol. III, July-Sept. 1930, 184; John B. Mason, "Status of the Free City of Danzig Under International Law," *Rocky Mountain Law Review*, V, 85; Robert Redslob, "*Le Statut International De Dantzig*," *Rev. Droit Int.*, 3 Sér., VII, 126; Jan Hostie, "*Questions de Principe Relatives au Statut International de Dantzig*," *Rev. Droit Int.*, 3 Sér., XIV, 572, and XV, 77.

feature of its political structure. The special juridical status of the Free City is seen from the above to comprise two elements; the special relation to the League of Nations, by reason of its being placed under the protection of the League and by reason of the guarantee of the constitution, and the special relation to Poland, by reason of the conduct of the foreign relations of the Free City being entrusted to the Polish Government."<sup>3</sup>

It should be noted that in an address before the Reichstag, April 28, 1939, Chancellor Hitler announced the submission to the Polish Government of a proposal embracing the return of Danzig "as a free State into the framework of the German Reich."<sup>4</sup>

On September 1, 1939, the American chargé d'affaires at Berlin informed the Department of State of the issuance of a proclamation by Herr Hitler declaring that the Polish State had rejected a peaceful solution of neighborly relations with Germany, which, after enumerating offenses committed by Poland against German rights and territory, stated that force must be met by force and that the battle would be fought in defense of German territory and honor; and it was also announced that the *anschluss* of Danzig to the Reich had been declared and had been communicated by Herr Forster to Herr Hitler.<sup>5</sup> On that day the latter, accepting the proclamation of Danzig's union with Germany, declared that "the law for reunion is ratified forthwith," and appointed Herr Forster head of the civil administration of Danzig.<sup>6</sup> As an early incident of the war then initiated against Poland, Germany gained a military control over Danzig that served to encourage Chancellor Hitler to announce that the soil of Danzig would "remain German."<sup>7</sup>

<sup>3</sup> Advisory Opinion concerning the Free City of Danzig and the International Labour Organisation, Publications, Permanent Court of International Justice, Series B, No. 18, 11.

See Advisory Opinion concerning the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Publications, Permanent Court of International Justice, Feb. 4, 1932, Series A./B., No. 44. See also Advisory Opinion concerning the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Dec. 4, 1935, Publications, Permanent Court of International Justice, Series A./B., No. 65.

See Agreement effected by Exchange of Notes, Feb. 10, 1925, between the United States and Poland to which the Free City of Danzig was a party, in respect to mutual unconditional most-favored-nation treatment in customs matters, U. S. Treaty Vol. IV, 4558.

According to Art. XXIX of the Treaty of Friendship, Commerce and Consular Rights between the United States and Poland, of June 15, 1931: "The Polish Government which is entrusted with the conduct of the foreign affairs of the Free City of Danzig under Article 104 of the Treaty of Versailles and Articles 2 and 6 of the Treaty signed in Paris on November 9, 1920, between Poland and the Free City of Danzig, reserves hereby the right to declare that the Free City of Danzig is a Contracting Party to this Treaty and that it assumes the obligations and acquires the rights laid down therein. This reservation does not relate to those stipulations of the Treaty which the Republic of Poland has accepted with regard to the Free City in accordance with the Treaty rights conferred on Poland." U. S. Treaty Vol. IV, 4585. See Declaration of March 9, 1934, by which the Free City of Danzig became a contracting party to the foregoing treaty, *id.*, 4593. See also documents in Hackworth, Dig., I, § 17.

<sup>4</sup> Int. Conciliation, No. 351, June, 1939, 297, 322; also text of German Memorandum of like date, to the Polish Government, *id.*, 350, 353. See Polish Memorandum to Germany, of May 5, 1939, *id.*, 361; also speech of Mr. Beck, Polish Foreign Minister, May 5, 1939, *id.*, 355.

<sup>5</sup> Dept. of State Bulletin, Sept. 2, 1939, 184.

<sup>6</sup> *The Manchester Guardian Weekly*, Sept. 8, 1939, 191.

<sup>7</sup> Address at Danzig on Sept. 19, 1939, in which he added: "I was determined to come to Danzig only as a liberator. I now take Danzig into the great German community with a firm determination never to allow her to be taken away." (United Press Despatch, *New York Times*, Sept. 20, 1939, p. 18.)



§ 16A. **Protectorates out of Czechoslovakia, 1939. Slovakia. Bohemia and Moravia.** The dissolution of Czechoslovakia in March, 1939, was followed and almost accompanied by the establishment of certain protectorates under the German Reich. On March 14, 1939, Slovakia proclaimed its independence.<sup>1</sup> On that date the Prime Minister of the new Slovak State sought the immediate assistance of the German Reich Chancellor;<sup>2</sup> and on March 16, 1939, informed the latter that the Slovak State placed itself under his protection, and requested him to assume such protection.<sup>3</sup> On the following day the latter replied that he thereby assumed the protection of the Slovak State.<sup>4</sup> On March 23, 1939, a treaty was concluded placing Slovakia under the protection of the German Reich.<sup>5</sup>

On March 15, 1939, the German Reich Chancellor announced his decision to order German troops to march on that date into Bohemia and Moravia.<sup>6</sup> In an Army Order of like date he announced that Czechoslovakia was in a state of dissolution.<sup>7</sup> On March 16, 1939, he issued a decree announcing the assumption by the Government of the Reich of a protectorate over the provinces of Bohemia and Moravia. Under Article 6 thereof the Reich assumed the management of the foreign affairs of the Protectorate and in particular, of the protection of its nationals in foreign countries.<sup>8</sup> It was declared, moreover, that the former diplomatic representatives of Czechoslovakia in foreign countries were no longer qualified for official acts.<sup>9</sup>

## (3)

## SO-CALLED SUZERAINITIES

## (a)

§ 17. **Bulgaria, 1878–1908.** A relationship manifesting the dependence of one State upon another has, in particular cases, been described as a suzerainty.<sup>1</sup> Until it proclaimed its independence on October 5, 1908,<sup>2</sup> Bulgaria was a vassal State, and, according to the Treaty of Berlin of July 13, 1878, constituted an

§ 16A.<sup>1</sup> *Völkerbund, Journal for International Politics*, Geneva, VIII, No. 12, March 23, 1939, 153.

<sup>2</sup> *Id.*

<sup>4</sup> *Id.*

<sup>6</sup> *Id.*, 151.

<sup>3</sup> *Id.*

<sup>5</sup> *Id.*, 154.

<sup>7</sup> *Id.*

<sup>8</sup> Note from the German Chargé d'Affaires at Washington, to Secy. Hull, March 17, 1939, Dept. of State Press Releases, March 25, 1939, 220.

<sup>9</sup> *Id.*

In his address before the Reichstag of April 28, 1939, the Chancellor referred to the "course of the reincorporation of Bohemia and Moravia within the framework of the German Reich." (Int. Conciliation, No. 351, June, 1939, 297, 319.)

Concerning the attitude of the United States towards the German achievement, see *The Equality and Similarity of Independent States*, *supra*, § 11.

§ 17.<sup>1</sup> Declares Professor Moore with respect to the relationship of suzerainty: "The extent of the authority or subordination comprehended by this term is not determined by general rules, but by the facts of the particular case. The foreign relations of a subject State may be wholly and directly conducted through the ministry of foreign affairs of the suzerain. It may, on the other hand, maintain diplomatic relations, and, subject to the veto of the suzerain, conclude treaties of all kinds; but, more frequently, its right of initiative, if it possesses any, is confined to a limited sphere; and a consul-general accredited to it, though he may also bear the title of agent or even of diplomatic agent, exercises only consular powers." Dig., I, 27.

<sup>2</sup> For. Rel. 1908, 57.

"autonomous and tributary Principality, under the suzerainty of His Imperial Majesty the Sultan" of Turkey.<sup>3</sup> That agreement provided that the treaties previously concluded between the Powers and Turkey were to be maintained in the Principality, and that no change should be made in them with regard to any Power without its previous consent. Privileges and immunities of foreigners and rights of consular jurisdiction and protection, "as established by the capitulations and usages," were to remain in force until modified with the approval of the parties concerned. To the suzerain the Principality was to pay an annual tribute. Save for provisions substituting the Principality for the Sublime Porte in specified engagements in relation to certain railways, and contemplating further conventions in that regard, no arrangement was made for the conclusion of treaties by the Principality.<sup>4</sup> Nevertheless, it proceeded to exercise such a right, and maintained direct diplomatic relations with foreign States.<sup>5</sup>

## (b)

§ 18. **Egypt, 1840-1914.** Prior to the establishment of the protectorate proclaimed by Great Britain on December 18, 1914, Egypt was said to be subject to the suzerainty of the Sultan of Turkey. By the treaty of July 15, 1840, concluded by Great Britain, Austria, Prussia, Russia and Turkey,<sup>1</sup> and the so-called firman of June 1, 1841,<sup>2</sup> Egypt became an hereditary Pashalic under the rule of the family of Mehemet Ali.<sup>3</sup> The ruler of the country, who bore the title of Khedive, paid annual tribute to the Sultan. The former was authorized to negotiate with foreign powers non-political treaties not interfering with the political treaties of the Sultan, or with his sovereignty over Egypt. It was required, however, that treaties negotiated by the Khedive should, prior to their promulgation by him, be communicated to the Sultan.<sup>4</sup>

<sup>3</sup> *Nouv. Rec. Gén.*, 2 sér., III, 449; Brit. and For. State Pap., LXIX, 749; U. S. For. Rel. 1878, 895; T. E. Holland, *The European Concert in the Eastern Question*, 277; F. Despagne, *Essai sur les Protectorats*, Paris, 1896; Auguste Chaunier, *La Bulgarie*, Paris, 1909; W. D. David, *European Diplomacy in the Near Eastern Question, 1906-1909*, Illinois Studies in the Social Sciences, Urbana, Illinois, 1940.

<sup>4</sup> Arts. I-XII of the Treaty of Berlin, Brit. and For. State Pap., LXIX, 751-755; For. Rel. 1878, 895, 896-899.

<sup>5</sup> The United States accredited a diplomatic agent to Bulgaria in the person of its minister to Greece. See *Am. J.*, I, *Supplement*, 86-87, containing List of Diplomatic Officers of the United States, corrected to Jan. 1, 1907.

G. Scelle, "*La situation diplomatique de la Bulgarie avant la proclamation de son indépendance le 5, Octobre 1908*," *Rev. Gén.*, XV, 524.

Concerning the relationship of Outer Mongolia to China subsequent to December, 1911, and until 1936, see Hackworth, *Dig.*, I, § 16, and documents there cited.

§ 18.<sup>1</sup> *Nouv. Rec. Gén.*, I, 156.

<sup>2</sup> "*L'Egypte et les firmans*," *Rev. Gén.*, III, 291.

<sup>3</sup> For texts of the firmans of the Sultan from 1841 to 1879, illustrative of the international position of Egypt, see T. E. Holland, *European Concert in the Eastern Question*, 110-205.

<sup>4</sup> See firman of June 8, 1873, *Nouv. Rec. Gén.*, XVII, 629; also that of Aug. 14, 1879, *Nouv. Rec. Gén.*, 2 sér., VI, 508.

It should be observed, however, that for many years prior to 1914, the territory of Egypt was occupied by Great Britain, whose influence was predominant in the administration of the government. See generally Fauchille, 8 ed., § 189, with extensive bibliography; E. Engelhardt, *Les Protectorats Anciens et Modernes*, 66-70. See, also, The Charkieh [1873] L. R. 4 Adm. and Eccl. 59.

Concerning the diplomatic relations of the United States with Egypt during this period, see Moore, *Dig.*, V, 584-586, and documents there cited.

## (c)

§ 18A. **Egypt after 1914.** The British Protectorate of December 18, 1914, was recognized by Germany in the Treaty of Versailles,<sup>1</sup> by Austria in the Treaty of Saint-Germain-en-Laye,<sup>2</sup> by Hungary in the Treaty of Trianon,<sup>3</sup> and by Bulgaria, in the Treaty of Neuilly.<sup>4</sup> On April 22, 1919, the American Diplomatic Agent and Consul General at Cairo informed the British Special High Commissioner in that city that the President recognized the British Protectorate.<sup>5</sup> By the Treaty of Lausanne of July 23, 1924, Turkey made renunciation of all rights and titles over Egypt and the Sudan as of November 5, 1914.<sup>6</sup>

A British declaration of February 28, 1922, made announcement that the protectorate was terminated, and that Egypt was "an independent sovereign State."<sup>7</sup> The declaration stated, however, that certain matters were absolutely reserved to the discretion of His Majesty's Government until it might be possible to conclude agreements in regard thereto with the Egyptian Government. These concerned (a) the security of the communications of the British Empire in Egypt; (b) the defense of Egypt against all foreign aggression or interference, direct or indirect; (c) the protection of foreign interests in Egypt and the protection of minorities; and (d) the Sudan. It was added that pending the conclusion of such agreements the *status quo* in all these matters would remain intact.<sup>8</sup> These reservations, manifesting as they did a retention of British control, forbade the inference that the declaration constituted an acknowledgment that Egypt was then to enjoy the freedom of an independent State. It was in fact the continuance of the special relationship of Great Britain to Egypt as the protector thereof on which, in 1924, the British Government relied in denying that its controversy with Egypt arising from the murder of Sir Lee Stack, Governor-General of the Sudan, and Sirdar of the Egyptian Army, was one which should invite or suggest the intervention of the League of Nations.<sup>9</sup>

§ 18A. <sup>1</sup> Art. 147, U. S. Treaty Vol. III, 3396.

<sup>2</sup> Art. 102, U. S. Treaty Vol. III, 3184.

<sup>3</sup> Art. 86, U. S. Treaty Vol. III, 3571.

<sup>4</sup> Art. 63, Peace Treaties, Senate Doc. No. 7, 67 Cong., 1 Sess., 69.

<sup>5</sup> For. Rel. 1919, Vol. II, 204.

<sup>6</sup> Art. 17, *Am. J.*, XVIII, *Official Documents*, 10.

<sup>7</sup> "When Turkey came into the War, the British army were in occupation and His Majesty's Government were exercising a role of control in a territory nominally under the suzerainty of an enemy of the United Kingdom. The incompatibility of these things had to be terminated, and in December 1914 a British protectorate was established over Egypt and the Turkish suzerainty declared terminated. At the same time the then Khedive, who had shown anti-British sympathies, was deposed, and his uncle Hassein Kamel ascended the Khedivial Throne with the title of Sultan of Egypt." ("The Treaty of Alliance Between His Majesty in Respect of the United Kingdom and His Majesty the King of Egypt, Cmd. 5370," *Brit. Y.B.*, XVIII, 79, 85.)

<sup>8</sup> Egypt No. 1 (1922) [Cmd. 1592], 29; Mr. David Lloyd George, Colonial Secretary, to the Governor-General of Canada, et al., Feb. 27, 1922, *id.*, 30; Despatch to His Majesty's Representatives Abroad respecting the Status of Egypt, March 15, 1922, Egypt No. 2 (1922) [Cmd. 1617].

<sup>9</sup> It was also declared that "So soon as the Government of His Highness shall pass an Act of Indemnity with application to all inhabitants of Egypt, martial law as proclaimed on the 2nd November, 1914, shall be withdrawn."

See Lauterpacht's 5 ed. of Oppenheim, I, footnote 1, p. 167.

<sup>9</sup> See Toynbee's Survey of International Affairs, 1925, Oxford, 1927, I, 197, 220-222;

It should be observed, however, that on April 25, 1922, instructions were sent to the American representative in Cairo to inform the Egyptian Minister for Foreign Affairs of the decision of the President "to recognize the independence of Egypt this recognition being subject to the maintenance of the rights of the United States of America as they have hitherto existed."<sup>10</sup>

The conclusion on August 26, 1936, of a Treaty of Alliance between His Majesty, in respect of the United Kingdom, and His Majesty the King of Egypt, greatly modified the existing Anglo-Egyptian relationship and enlarged the freedom of Egypt.<sup>11</sup> The British occupation of the country was terminated; application for Egyptian membership in the League of Nations to be supported by the United Kingdom Government was provided for; Egypt was recognized "as a sovereign independent State"; an alliance was declared to be established between the high contracting parties with a view to consolidating their friendship, cordial understanding and good relationship, and undertakings of both under various contingencies were specified.<sup>12</sup> Article 8 contained the following statement:

In view of the fact that the Suez Canal, whilst being an integral part of Egypt, is a universal means of communication as also an essential means of communication between the different parts of the British Empire, His Majesty the King of Egypt, until such time as the high contracting parties agree that the Egyptian Army is in a position to ensure by its own resources the liberty and entire security of navigation of the Canal, authorizes His Majesty The King and Emperor to station forces in Egyptian territory in the vicinity of the Canal, in the zone specified in the annex to this article, with a view to ensuring in coöperation with the Egyptian forces the defence of the Canal. The detailed arrangements for the carrying into effect of this article are contained in the annex hereto. The presence of these forces shall

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Charles de Visscher, "*Le Conflit Anglo-Égyptien et La Société des Nations*," *Rev. Droit Int.*, 3 sér., V, 564.

See also Papers regarding Negotiations for a Treaty of Alliance with Egypt, Egypt No. 1 (1928) [Cmd. 3050].

<sup>10</sup> Mr. Hughes, Secy. of State, to the Agent and Consul General at Cairo, April 25, 1922, where it was added that "the qualification above stated is intended to leave no room for doubt of the maintenance of capitulatory and commercial rights and most-favored nation treatment of the United States." (For. Rel. 1922, Vol. II, 105.) See also documents in Hackworth, Dig., I, § 40.

<sup>11</sup> Great Britain, Treaty Series, No. 6, 1937, *Am. J.*, XXXI, *Official Documents*, 77.

<sup>12</sup> The treaty embracing 17 articles and certain annexes was accompanied by an "Agreed Minute" signed on the date of signature of the treaty, notes of like date, notes exchanged in Egypt Aug. 12, 1936, an Oral Declaration of Aug. 10, 1936, as well as a convention of Aug. 26, 1936, Concerning the Immunities and Privileges to be Enjoyed by the British Forces in Egypt.

According to Art. 2 and to a note of Aug. 26, 1936, diplomatic representation by both parties was to be effected by ambassadors duly accredited, British ambassadors to be considered senior to the other diplomatic representatives accredited to the Court of His Majesty the King of Egypt.

It is not sought to marshal the contents of the treaty or to discuss the significance of some of its other highly important provisions such as those pertaining to the administration of the Sudan (Art. 11), the devolution upon Egypt of responsibility for the lives and property of foreigners in Egypt (Art. 12), and arrangements looking to the ultimate abolition of the capitulatory régime (Art. 13 and annex).

not constitute in any manner an occupation and will in no way prejudice the sovereign rights of Egypt.<sup>13</sup>

This article expressed Egyptian acknowledgment of the propriety of British dominance in the matter of safeguarding on Egyptian soil an essentially British interest. To that extent the alliance appeared to withhold from Egypt complete freedom from external control.<sup>14</sup> It is believed that events of World War II have accentuated the fact.

(d)

**§ 18B. States Within the British Empire.**<sup>1</sup> The British Empire enjoys the full privileges of an independent State. In behalf of every portion of it there is asserted that measure of freedom from foreign control which such an entity is acknowledged to possess and rightfully to claim.<sup>2</sup> Foreign affairs are conducted in behalf of particular parts of the Empire, rather than in behalf of the whole as an Imperial unit.

As a result of a series of Imperial Conferences there has come into being within the framework of the Empire a group of communities known as the British Commonwealth of Nations. This group consists of the United Kingdom of Great Britain and Northern Ireland and the following self-governing Dominions: the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Eire (formerly known as the Irish Free State). All these entities project themselves into the life of the international society as seemingly possessed of the attributes and claiming the privileges of statehood,<sup>3</sup> and were described in the Balfour Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926, as "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external

<sup>13</sup> There was added the statement: "It is understood that at the end of the period of twenty years specified in article 16 the question whether the presence of British forces is no longer necessary owing to the fact that the Egyptian Army is in a position to ensure by its own resources the liberty and entire security of navigation of the Canal may, if the high contracting parties do not agree thereon, be submitted to the Council of the League of Nations for decision in accordance with the provisions of the Covenant in force at the time of signature of the present treaty or to such other person or body of persons for decision in accordance with such other procedure as the high contracting parties may agree."

<sup>14</sup> "In this article, therefore, the Egyptian Government have admitted the vital importance of the Suez Canal to the British Empire and the right of the United Kingdom to be assured that it is adequately protected at all normal times in the future, either by British and Egyptian forces together or by a sufficiency of Egyptian forces alone, and in times of emergency by the forces of both countries (see under Article 7). Further, in this way the right of the United Kingdom (instead of the Ottoman Porte) to take action to defend the Canal in the second resort, which had already been recognized under the peace treaties (see paragraphs 15 and 19 above), is now recognized by Egypt, the territorial sovereign of the Canal." ("The Treaty of Alliance Between His Majesty in Respect of the United Kingdom and His Majesty the King of Egypt, Cmd. 5270," *Brit. Y.B.*, XVIII, 79, 91-92.)

<sup>1</sup> § 18B. <sup>1</sup> The author acknowledges his great indebtedness to his friend Dr. Arnold D. McNair, the Vice-Chancellor of the University of Liverpool, for valued suggestions as to the form and content of this section, and of which advantage has been taken with much satisfaction.

<sup>2</sup> See Sir Cecil J. B. Hurst, *The British Empire as a Political Unit in Great Britain and the Dominions*, Chicago, 1928; Lauterpacht's 5 ed. of *Oppenheim*, I, 182-183.

<sup>3</sup> See Imperial Conference, 1921, Summary of Proceedings, Cmd. 1474, 3-5; *id.*, 1923, Cmd. 1927, 10-15; *id.*, 1926, Cmd. 2768; *id.*, 1930, Cmd. 3717; *id.*, 1937, Cmd. 5482.

affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.”<sup>4</sup> The control and direction of the foreign relations pertaining to the portions of the Empire outside of the British Commonwealth of Nations are exercised through the agency of the Government of the United Kingdom of Great Britain and Northern Ireland.<sup>5</sup> In general, in treaties concluded between heads of States, it is customary, regardless of the portion of the Empire for which the agreement is made, to refer to His Majesty the King as follows: “His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India.”<sup>6</sup>

The exercise at the present time of the British treaty-making power serves to accentuate the following facts of which foreign States are obliged to take cognizance: first, that the United Kingdom of Great Britain and Northern Ireland speaks in an imperial capacity in behalf of a considerable portion of the Empire; secondly, that for one portion thereof — India — the Crown, in an imperial capacity, through the officers of the Government of the United Kingdom, speaks for a particular unit having unique and special relations with the outside world; and thirdly, that within the Empire there exists a Commonwealth of Nations, each of which speaks for itself oftentimes through the voice of the Crown. The

<sup>4</sup> Imperial Conference, 1926, Summary of Proceedings, Cmd. 2768, 14.

See also, The Statute of Westminster, 22 George V, c. 4, Dec. 11, 1931, and in this connection, Manley O. Hudson, “Notes on The Statute of Westminster, 1931,” *Harv. Law Rev.*, XLVI, 261; Registrar A. Stiebel, “The Statute of Westminster and Its Effect,” *Grotius Society*, XIX, 1934, 32; K. C. Wheare, *Statute of Westminster and Dominion Status*, 1938.

See generally, Lauterpacht's 5 ed. of Oppenheim, I, 173–183, with bibliography; A. B. Keith, *Responsible Government in the Dominions*, 2 ed., Oxford, 1928; *Speeches and Documents on the British Dominions, 1918–1931, From Self-Government to National Sovereignty*, edited with an introduction and notes by A. B. Keith, *The World's Classics Series*, CDIII, Oxford, 1932; A. B. Keith, *The Dominions as Sovereign States*, London, 1938; same author, *The King, the Constitution, the Empire and Foreign Affairs*, London, 1938; *The British Empire, Report on its Structure and Problems by study group of the Royal Institute, 1937*; W. Y. Elliott, “The Riddle of the British Commonwealth,” *Foreign Affairs*, VIII, 442. (April, 1930); same author, *The New British Empire*, New York, 1932; P. J. Noel Baker, *The Present Juridical Status of The British Dominions in International Law*, London, 1929; *British Commonwealth Relations, Proceedings of the First Unofficial Conference at Toronto, 11–21, September, 1933*, edited by Arnold J. Toynbee, with a foreword by Sir Robert L. Borden, Oxford, 1934; R. B. Stewart, “Treaty-making Procedure in the British Dominions,” *Am. J.*, XXXII, 467; same author, *Treaty Relations of the British Commonwealth of Nations* (with a foreword by W. Y. Elliott), New York, 1939.

<sup>5</sup> See, in this connection, exchange of notes between His Majesty's Government in the United Kingdom and the Italian Government regarding the Boundary between Kenya and Italian Somaliland, Nov. 22, 1933, *British Treaty Series No. 1* (1934), Cmd. 4491; convention between His Majesty in respect of the United Kingdom and the President of the United States of America regarding the boundary between the Philippine Archipelago and the State of North Borneo, with exchange of notes, Jan. 2, 1930, and July 6, 1932, *British Treaty Series No. 2* (1933), Cmd. 4241.

See, also, notification by the United Kingdom that the International Convention relating to International Exhibitions, signed at Paris, Nov. 22, 1928, *British Treaty Series No. 9* (1931), Cmd. 3776, applied to non-self-governing British colonies, protectorates and mandated territories, as set forth in *British Treaty Series No. 43* (1931), Cmd. 4015.

<sup>6</sup> See, for example, convention between the United States and the Dominion of Canada, for the Preservation of Halibut Fishery of Northern Pacific Ocean and Bering Sea, May 9, 1930, *U. S. Treaty Vol. IV*, 3999.

It may be observed that the word “Dominions” in the phrase quoted in the text does not mean British Self-governing Dominions, but British territory and possessions in the widest sense; also that the word “India” in that phrase is the title adopted by a proclamation of May 13, 1927 (*Statutory Rules and Orders 1927, No. 422*), made under the Royal and Parliamentary Titles Act, 1927.

latitude that gives play to the preferences of the individual members of that Commonwealth enables each of them to pursue a distinctive policy of its own;<sup>7</sup> and in so doing one Dominion, Eire, appears to elect, whenever possible, to avoid the employment of the Crown as its agent or representative in concluding agreements with outside States.<sup>8</sup>

It is not here sought to discuss the question whether and to what extent the imperial bond that unites the members of the British Commonwealth of Nations serves in any way to subject any one of them, in relation to its foreign affairs, to a measure of restraint which, although British in character is, in a domestic sense, external to each. The significant fact is that in the exercise of each function in the making of treaties, the Crown, in so far as it is a participant, is understood to follow the advice of the particular entity in behalf of which agreement is sought. Moreover, the grave consequences to be anticipated from a refusal of the Crown to follow that advice serve to render interference from outside the particular entity concerned, highly improbable.<sup>9</sup>

To the outside world, therefore, it suffices that the power to conclude agreements pertaining to any part of the British Empire is exercised by the agency appropriate to that part, and that when the power is employed on behalf of any of the aforesaid "autonomous communities," the will of that "community" thus duly manifested is capable of producing an international obligation binding upon the Crown in relation to that "community."<sup>10</sup> Moreover, each of these "au-

<sup>7</sup> Concerning the procedures by which Ireland avoids the use of the King when concluding agreements, see R. B. Stewart, "Treaty-Making Procedure in the British Dominions," *Am. J., XXXII*, 467, 484-485.

"Ireland and the Union of South Africa, in so far as they continue to employ His Majesty in treaty-making, communicate with His Majesty directly without using any Minister of the United Kingdom even as a channel of communication. In the Union, treaty-making authority is still vested in the King, while in the Irish State the King merely acts as agent in treaty-making. Both Ireland and the Union possess their own Royal Great Seals, which are released solely on the authority of their respective governments. With respect to the treaty-making of these two Dominions both the use of the Great Seal of the Realm and the intervention of a British Secretary of State have now been abolished. The last vestige of diplomatic unity throughout the British Commonwealth has thus disappeared for them.

"Australia, Canada, and New Zealand continue to employ the Dominions Office and the Foreign Office in their treaty-making. The Great Seal of the Realm is still used to authenticate the King's signature to their treaty documents. The royal warrant authorizing the affixing of the Great Seal to these documents is in every instance countersigned by a United Kingdom Secretary of State who thus bears the legal responsibility for the use of the Great Seal. By this procedure, at least the appearance of diplomatic unity with the United Kingdom is maintained." (*Id.*, 486.)

It may be observed that the Dominion of Canada similarly acquired its own Great Seal in May, 1939.

<sup>8</sup> This is subject, however, to the established practice of consultation upon foreign affairs, which was laid down in particular by the Imperial Conference of 1926.

<sup>9</sup> "Once a Dominion government has advised His Majesty to issue a full power for the negotiation and conclusion of a particular treaty or to issue an instrument of ratification of the treaty, the Government of the United Kingdom is not at liberty to advise His Majesty to a contrary effect. Legally, it might do so. It is unthinkable, considering present-day constitutional convention, that it would do so in practice. Any inter-imperial question which may arise in connection with the treaty and in which the United Kingdom may have an interest at variance with that of the Dominion concerned, should have been previously disposed of by consultation according to the procedure outlined at the Imperial Conference of 1926." (Robert B. Stewart, "Treaty-making Procedure in the British Dominions," *Am. J., XXXII*, 467, 486-487.)

<sup>10</sup> Declared Lord Atkin in delivering the judgment of the Privy Council in *Attorney-*

onomous communities" is entitled to exchange diplomatic representatives with foreign States, and several of them exercise this right.<sup>11</sup>

With respect to India, the following facts are significant. It is a member of the League of Nations and a signatory of the Treaty of Versailles.<sup>12</sup> Foreign affairs are conducted in its behalf as for a distinctive entity within the British Empire.<sup>13</sup> The United Kingdom of Great Britain and Northern Ireland is the medium through which foreign relations are had, and represents India through a plenipotentiary specially empowered to speak and sign for it when effort is made to conclude a treaty designed to be applicable to, and binding upon, that country.<sup>14</sup> Foreign States, such as the United States, when inviting India to become a party to treaties, make known their desires through the medium of the Foreign Office of the United Kingdom.<sup>15</sup> In these ways, the relationship of India to the outside world is seen to manifest itself and to raise the pertinent question whether that country has attained statehood in the international society.

The growth of international personalities within the British Empire that produces States of international law therein is an interesting and important aspect in the life of the larger entity. Moreover, it is prophetic of a gradual increase in the number of British members of the international community.<sup>16</sup>

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General for Canada *v.* Attorney-General for Ontario and Others, L.R. (1937) A.C. 326, 349, in referring to certain treaty obligations contracted by Canada in 1935: "The obligations are not obligations of Canada as part of the British Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries."

<sup>11</sup> In 1938, Canada, Ireland, and the Union of South Africa had diplomatic representation at Washington. See in this connection documents in Hackworth, Dig., I, § 14. On Jan. 8, 1940, announcement was made of the establishment of diplomatic relations between the United States and Australia. See Dept. of State Bulletin, Jan. 13, 1940, 49. The establishment of such relations between the United States and New Zealand was to follow in February, 1942.

<sup>12</sup> U. S. Treaty Vol. III, 3332, 3345, 3523.

<sup>13</sup> This is well illustrated by Exchange of Notes between the Government of India and the Turkish Government regarding Commercial Relations between India and Turkey, Sept. 3, 1930, British Treaty Series No. 37 (1930), Cmd. 3685.

<sup>14</sup> See, for example, Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, U. S. Treaty Vol. IV, 5130; also, convention between His Majesty, in respect of India, and the President of the Polish Republic, concerning the Commercial Relations between India and Poland, May 8, 1931, British Treaty Series No. 20 (1932), Cmd. 4119.

<sup>15</sup> In a note of June 23, 1928, Secretary Kellogg made inquiry through the British Foreign Office whether the Government of India would be disposed to join in signing the proposed Treaty for the Renunciation of War. In a note made public by the Department of State in a press release of July 19, 1928, Sir Austen Chamberlain, British Foreign Secretary, declared: "I now beg leave to inform you that the Government of India associate themselves wholeheartedly and most gladly with the terms of the note which I have had the honour to transmit to you today notifying you of the willingness of His Majesty's Government in Great Britain to sign a multilateral treaty for the Renunciation of War as proposed by the Government of the United States."

<sup>16</sup> On numerous occasions antedating the appointment of a Canadian diplomatic representative at Washington, British conventions with the United States in respect to Canadian-American affairs were signed in behalf of Canada solely by Canadian Ministers. See, for example, Convention between the United States and Great Britain for the Preservation of the Halibut Fishery of the Northern Pacific Ocean including Bering Sea, of March 2, 1923, U. S. Treaty Vol. IV, 3982; Convention between the United States and Great Britain in respect of Canada, to Suppress Smuggling, of June 6, 1924, U. S. Treaty Vol. IV, 3984; Convention between the United States and Great Britain in respect of Canada, concerning Extradition on Account of Crimes or Offenses against Narcotic Laws, of January 8, 1925, U. S. Treaty Vol. IV, 3986; Treaty and Protocol between the United States and Great



Whether such a member has in fact come into being depends upon the functions or powers which the particular country purports to exercise through some appropriate agency in relation to the outside world. In these are seen the tests of its statehood.

## (4)

RELATIONSHIPS ESTABLISHED BETWEEN THE UNITED STATES AND  
CERTAIN NEIGHBORING STATES

## (a)

§ 19. **Cuba.** Upon the close of the Spanish-American War, the United States continued to occupy the Island of Cuba; Major-General Leonard Wood became the Military Governor. In 1901, when the Cubans were proceeding through a Constitutional Convention to establish a Constitution and a government designed to succeed the American régime, the United States was giving careful thought to its own interests and privileges as well as its obligations in respect to the Island. The United States had, according to Mr. Root, then Secretary of War, by virtue of its occupation of Cuba and the terms under which sovereignty was yielded by Spain, "a right to protect her which all foreign nations recognize." Moreover, he declared it to be of great importance to Cuba that that right, resting upon the Treaty of Paris and derived through that treaty from the sovereignty of Spain, should never be terminated but should be continued by a reservation, with the consent of the Cuban people, at the time when the authority then being exercised by the United States should be placed in their hands.<sup>1</sup> He felt that to allow the Cubans to establish a government under any

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Britain in respect of Canada to Regulate the Level of the Lake of the Woods, of Feb. 24, 1925, U. S. Treaty Vol. IV, 3988.

§ 19.<sup>1</sup> Secretary Root added: "If we should simply turn the government over to the Cuban administration, retire from the island, and then turn round to make a treaty with the new government, just as we would make treaties with Venezuela, and Brazil, and England, and France, no foreign State would recognize any longer a right on our part to interfere in any quarrel which she might have with Cuba, unless that interference were based upon an assertion of the Monroe Doctrine. But the Monroe Doctrine is not a part of international law and has never been recognized by European nations. How soon some one of these nations may feel inclined to test the willingness of the United States to make war in support of her assertion of that doctrine, no one can tell. It would be quite unfortunate for Cuba if it should be tested there." (Communication to General Wood, Military Governor of Cuba, Jan. 9, 1901, War Dept. mimeograph.) The author acknowledges his indebtedness to his colleague, Professor Philip C. Jessup, who placed at his disposal War Department mimeographs to which reference is made in this section.

See also same to Mr. Hay, Secy. of State, Jan. 11, 1901, War Dept. mimeograph; same to General Wood, Military Governor of Cuba, Feb. 9, 1901, War Dept. mimeograph, in the course of which it was said: "The United States has, therefore, not merely a moral obligation arising from her destruction of Spanish sovereignty in Cuba, and the obligations of the Treaty of Paris, for the establishment of a stable and adequate government in Cuba, but it has a substantial interest in the maintenance of such a government. We are placed in a position where for our own protection we have, by reason of expelling Spain from Cuba, become the guarantors of Cuban independence and the guarantors of a stable and orderly government protecting life and property in that Island. Fortunately, the condition which we deem essential for our own interests is the condition for which Cuba has been struggling, and which the duty we have assumed towards Cuba on Cuban grounds and for Cuban interests requires. It would be a most lame and impotent conclusion if, after all the expenditure of blood and treasure by the people of the United States for the freedom of

reasonable Constitution which they might adopt, turn over the control to that government, withdraw American troops, and then in the ordinary course of events take up the subject of political relations between Cuba and the United States by negotiation of a treaty with the new government, just as the United States normally negotiated treaties with independent States, "would leave the United States in a worse position as to her own interests than she was when Spain held the sovereignty of Cuba, and would be an abandonment both of our interests and the safety of Cuba herself."<sup>2</sup>

Acting on such a theory, the Secretary of War submitted his views to the Secretary of State;<sup>3</sup> and these duly found expression in an Act of Congress, approved March 2, 1901, containing a provision, commonly known as the Platt Amendment,<sup>4</sup> to the effect that the President was authorized to leave the government and control of the Island of Cuba to its people as soon as a government should be established therein under a constitution, which, either as a part thereof or in an ordinance appended thereto, should define the future relations of the United States with Cuba substantially as follows:

I. That the government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes or otherwise, lodgement in or control over any portion of said island.

II. That said government shall not assume or contract any public debt, to pay the interest upon which, and to make reasonable sinking fund provision for the ultimate discharge of which, the ordinary revenues of the island, after defraying the current expenses of government shall be inadequate.

III. That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba.

IV. That all Acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

V. That the government of Cuba will execute, and as far as necessary extend, the plans already devised or other plans to be mutually agreed upon, for the sanitation of the cities of the island, to the end that a recur-

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Cuba, and by the people of Cuba for the same object, we should, through the constitution of the new government, by inadvertence or otherwise, be placed in a worse condition in regard to our own vital interests than we were while Spain was in possession, and the people of Cuba should be deprived of that protection and aid from the United States which is necessary to the maintenance of their independence."

<sup>2</sup> Mr. Root, Secy. of War, to Dr. Albert Shaw, Feb. 23, 1901, War Dept. mimeograph.

<sup>3</sup> See, Mr. Root, Secy. of War, to Mr. Hay, Secy. of State, Jan. 11, 1901.

<sup>4</sup> An Act to make appropriation for the Army for the fiscal year ending June 30, 1902, 31 Stat. 897.

rence of epidemic and infectious diseases may be prevented thereby assuring protection to the people and commerce of Cuba, as well as to the commerce of the southern ports of the United States and the people residing therein.

VI. That the Isle of Pines shall be omitted from the proposed constitutional boundaries of Cuba, the title thereto being left to future adjustment by treaty.

VII. That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba will sell or lease to the United States lands necessary for coaling or naval stations at certain specified points to be agreed upon with the President of the United States.

VIII. That by way of further assurance the government of Cuba will embody the foregoing provisions in a permanent treaty with the United States.<sup>5</sup>

The Cuban Constitutional Convention, intensely interested in the terms of the Platt Amendment, appointed a committee to confer with the Government of the United States with respect to it. In the meantime the Secretary of War, in a personal note to General Wood, of March 29, 1901, had expressed the view that the intervention described in the third clause of the Platt Amendment meant only the formal action of the Government of the United States based upon just grounds of actual failure or imminent danger, and was in fact but a declaration or acknowledgment of the right to do what the United States did in April, 1898, as the result of the failure of Spain to govern Cuba. He declared that it gave to the United States no right which it did not already possess and which it would not exercise; but that it did give to the United States, for the benefit of Cuba, a standing as between itself and foreign nations in the exercise of that right which might be of immense value in enabling the United States to protect the independence of Cuba.<sup>6</sup>

On April 2, 1901, the Secretary of War authorized General Wood to state officially that in the view of the President, the intervention described in the third clause of the Platt Amendment

“is not synonymous with the intermeddling or interference with the affairs of the Cuban Government, but the formal action of the Government of the United States, based upon just and substantial grounds, for the preservation of Cuba independence and the maintenance of a government adequate for the protection of life, property and individual liberty and for

<sup>5</sup> The provisions of the Platt Amendment are embraced in the preamble of the Treaty between the United States and Cuba of May 22, 1903, Treaty Series, No. 437, Malloy's Treaties, I, 364.

Declared Secy. Root, in a communication to General Wood, Military Governor of Cuba, March 2, 1901: “Under the act of Congress they never can have any further government in Cuba, except the intervening Government of the United States, until they have acted. Many things are true which it would not be polite or kindly to say, and we do not want to say such things to the Convention; but no constitution can be put into effect in Cuba and no government can be elected under it, no electoral law by the Convention can be put into effect, and no election held under it until they have acted upon this question of relations in conformity with this act of Congress.” (War Dept. mimeograph.)

<sup>6</sup> War Dept. mimeograph.

discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States.”<sup>7</sup>

The members of the Cuban Committee duly conferred with the Secretary of War, as well as with the President, at Washington, in April, 1901, seeking formal or authoritative assurances as to the effect of the clause in respect to intervention, requesting a written memorandum, and volunteering the statement that, if given, it would be treated as personal to themselves and confidential. This was not given.<sup>8</sup> The Cuban Committee, returning to Habana, made a report on its conferences at Washington.<sup>9</sup> It proposed as an appendix to the Cuban constitution a statement embodying the terms of the Platt Amendment accompanied, however, by recitals interpretative of it, purporting to reflect what the Committee understood to be the scope of privileges reserved to the United States. Among them was a statement that the Government of the United States, through the Secretary of War, declared that the third clause of the Amendment

amplifies the Monroe Doctrine, so that European nations could not dispute the intervention of the United States in defence of Cuban independence without giving to the United States further rights than had by them when they recently intervened, a right they have already exercised and retain and which in no manner signifies intermeddling or interference in Cuban affairs, as they will intervene only to prevent foreign attacks against the independence of the Cuban republic or when a real state of anarchy should exist in Cuba; that the intervention will only last so long as necessary to establish a normal state of affairs and will always be a formal act of the American Government, exhausting beforehand all diplomatic resources;

<sup>7</sup> War Dept. mimeograph. On Oct. 2, 1930, Secy. Stimson in a Press conference quoted Secy. Root's instruction of April 2, 1901, as interpretative of the Platt Amendment. See *New York Times*, Oct. 3, 1930, p. 1.

<sup>8</sup> Declared Secy. Root, in a communication to General Wood of May 28, 1901: "Even this I did not give, but, after saying to them that I could not change or modify the law by anything which I said as to its effect, I procured for them a letter from Senator Platt, stating his views as to the effect of the third clause, which I handed to them marked 'confidential.'" In the same note the Secretary said: "You will remember, that what I said was accompanied by the explicit and distinct statement that I had no power or authority to change or modify the law enacted by Congress, and that, whatever I might say, the provisions of that law as they appeared in the statute must be the guide of the President's action." (War Dept. mimeograph.) The letter from Senator Platt to the Secy. of War was in the following terms:

"I am in receipt of your letter of this date (April 26), in which you say that the members of the Commission of the Cuban Constitutional Convention fear that the provisions relative to intervention, made in the third clause of the Amendment which has come to bear my name, may have the effect of preventing the independence of Cuba, and in reality establish a protectorate or suzerainty by the United States; and you request that I express my views on the questions raised. In reply I beg to state that the Amendment was carefully prepared with the object of avoiding any possible idea that by the acceptance thereof the Constitutional Convention will thereby establish a protectorate or suzerainty, or in any manner whatsoever compromise the independence or sovereignty of Cuba; and speaking for myself it seems impossible that such an interpretation can be given to the clause. I believe that the Amendment should be considered as a whole; and it ought to be clear on reading it that its well-defined purpose is to secure and safeguard Cuban independence and set forth at once a clear idea of the friendly disposition of the United States toward the Cuban people, and the express intention on their part to aid them if necessary in the maintenance of said independence. These are my ideas; and although, as you say, I cannot speak for the entire Congress, my belief is that such a purpose was well understood by that body."

<sup>9</sup> Appendix A, Senado, Republica de Cuba, Memoria, 1902-1904, No. 72, Document M.

that the acceptance of the 3rd clause by the Convention would not establish a protectorate or suzerainty of the United States over Cuba; that Cuba would appoint her foreign representatives and diplomatic agents, would freely direct her international relations, would make her political and commercial treaties with foreign countries without the intervention of the United States and would have her naval and land forces and her navy under her own flag within and beyond Cuban waters;<sup>10</sup>

Secretary Root immediately declared that he did not think that the passage of the proposed Appendix to the Constitution would be such an acceptance of the Platt Amendment as to authorize the President to withdraw the army from Cuba under the provisions of the Amendment.<sup>11</sup> He questioned, moreover, the accuracy of some of the recitals, and declared that he did not think that any part of the recitals or conversation ought to form any part of the resolution to be adopted by the Convention.<sup>12</sup> The Convention finally, on June 12, 1901, adopted a resolution adding to the Constitution as an Appendix the several provisions of the Platt Amendment without any of the recitals which had been proposed.<sup>13</sup>

The political relations between the United States and Cuba, having thus found expression in identic terms in the Platt Amendment and in those annexed to the Cuban Constitution, a treaty between the two countries, signed at Habana, May 22, 1903, made further repetition of them and caused them to become the basis of a formal agreement.<sup>14</sup>

By the foregoing processes Cuba is believed to have accepted the protection of the United States. Without essaying to interpret the scope of the Platt Amendment, it may be reasonably affirmed that it manifested the assertion by the United States of no privileges that it did not previously enjoy; that it was not designed to impose upon Cuba restrictions to which it was not at the time already subjected; and that it was not devised as an instrument of oppression.

The United States found occasion subsequently to intervene in Cuba for the purposes set forth in the third clause of the Platt Amendment and the third article of the treaty.<sup>15</sup>

<sup>10</sup> The text of the proposal was embraced in a telegram from General Wood, Military Governor of Cuba, to the Secretary of War, of May 26, 1901. War Dept. mimeograph.

<sup>11</sup> Telegram, Mr. Root, Secy. of War, to General Wood, Military Governor of Cuba, May 28, 1901. War Dept. mimeograph.

<sup>12</sup> Letter, same to same, May 28, 1901.

<sup>13</sup> See in this connection telegram, same to same, June 7, 1901, War Dept. mimeograph. On June 8, 1901, The Secy. of War telegraphed to General Wood: "The true course for the Convention to follow is to enact the provisions of the Platt amendment just as they are." (War Dept. mimeograph.)

Also Report of Mr. Root, Secy. of War, Nov. 27, 1901, House Doc. No. 2, 57 Cong., 1 Sess., 43-53; Report of same, Dec. 1, 1902, House Doc. No. 2, 57 Cong., 2 Sess., 6-11.

Also Elihu Root, *The Military and Colonial Policy of the United States*, Addresses and Reports, collected and edited by Robert Bacon and James Brown Scott, Cambridge (Mass.), 1916, 185-224; Charles E. Chapman, *History of the Cuban Republic*, New York, 1927, containing (643-645) letter from Hon. John Bassett Moore to that author, of March 15, 1925, in respect to the Platt Amendment; Cosme de la Torriente, "The Platt Amendment," *Foreign Affairs*, VIII, 364 (April, 1930).

See especially Philip C. Jessup, *Elihu Root*, New York, 1938, I, 310-326.

<sup>14</sup> Treaty Series, No. 437; Malloy's Treaties, I, 364.

See Harry F. Guggenheim, *The United States and Cuba*, New York, 1934.

<sup>15</sup> See For. Rel. 1906, I, 454-494, especially President Roosevelt to Señor Quesada, Cuban

## (b)

§ 19A. **Events in 1933.** The overthrow of President Machado that led to his precipitate flight to the Bahamas in August 1933, and the succession of Dr. Carlos Manuel de Cespedes as provisional President, were productive of serious disorders that prompted the United States to send vessels of war to Cuban waters.<sup>1</sup> Early in September 1933, through a *coup d'état* of representatives of the soldiers and sailors, Dr. de Cespedes was overthrown. President Roosevelt, on September 6, informed the diplomatic representatives of Argentina, Brazil, Chile and Mexico, whom he invited to the White House for conference, first, that he wanted them to have complete and constant information about the Cuban situation, to the fullest extent that the United States had such information; secondly, that the United States had absolutely no desire to intervene in Cuba, and was seeking every means to avoid intervention; and thirdly, that he was expressing a very definite hope on the part of the United States — “what might be called the key to this country’s policy” — that the Cuban People would obtain as rapidly as possible a government of their own choosing and, what was equally important, a government that would be able to maintain order. He added that of course, if a government were constituted as quickly as possible that would maintain order, it would have the happy effect of obviating the thought or the necessity of intervention by the United States.<sup>2</sup>

Shortly thereafter certain Republics of Latin America did not hesitate to manifest officially their interest in events in Cuba and in the course to be followed by the United States. Dr. Puig Casuaranc, Mexican Minister of Foreign Affairs, addressed notes to the Governments of Argentina, Brazil and Chile, suggesting their coöperation in bringing influence to bear upon the existing authorities in Cuba to maintain order and protect life and property within the Island.<sup>3</sup> The Argentine Government in guarded language announced

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Minister, Sept. 14, 1906, *id.*, 480; also Report by Mr. Taft, Secy. of War, and Mr. Bacon, Assist. Secy. of State, of Dec. 11, 1906, House Doc. No. 456, 59 Cong., 2 Sess., 444; James Brown Scott, Robert Bacon, *Life and Letters*, New York, 1923, 113–119; Charles E. Chapman, *History of the Cuban Republic*, New York, 1927, chapters IX and X; also, *Survey of American Foreign Relations under direction of Charles P. Howland*, New Haven, 1929, 38–42.

Concerning the attitude of the United States towards the insurrection in Cuba of 1917, see For. Rel. 1917, 350–414. Declared Mr. Lansing, Secy. of State, in the course of a telegram to Minister Gonzales at Habana, May 11, 1917: “The United States will be forced to consider as its own enemies those persons in revolt against constitutional government, unless they immediately return to their allegiance.” (*id.* 404.)

§ 19A.<sup>1</sup> See telegrams exchanged between President Roosevelt and President Cespedes, of Aug. 14, 1933, Dept. of State Press Releases, Aug. 19, 1933, 112–113.

<sup>2</sup> *New York Times*, Sept. 7, 1933, p. 1. Simultaneously, numerous naval vessels, embracing the U.S.S. *Mississippi*, *Indianapolis*, and *Richmond*, were despatched to Cuban waters.

It is understood that on the afternoon of Sept. 5, 1933, and on the morning of the following day, an Assistant Secretary of State and the Chief of the Latin American Division of the Department of State saw all the Latin American diplomatic representatives except those of El Salvador and Cuba, and that they were informed in about the same sense that the President on the afternoon of Sept. 6, informed the representatives of the countries mentioned in the text.

<sup>3</sup> *New York Times*, Sept. 9, 1933. He also telegraphed to Secy. Hull: “We very much appreciate the cordial attitude of the Department of State in transmitting to the Government of Mexico explanations of the situation in Cuba, and your Government’s proposals to continue its observations, assuring us the sending of ships does not mean intervention in Cuba.” (*Id.*)

to that of the United States the view that the Cuban people would be able to overcome their difficulties and find themselves a way to realize their proper destiny. It was declared that "the capacity to maintain order and to assure the reign of law emerges by itself as a fruit of this experience within the exercise of sovereignty, which must be characterized by absolute internal autonomy and complete external independence."<sup>4</sup>

Dr. Grau San Martín was designated as Provisional President of the Republic of Cuba on September 10, 1933. On October 2, 1933, a large number of persons were killed, embracing an American citizen, and a larger number wounded, in fighting in Habana, through which the existing government brought about the surrender of some five hundred army officers who had been besieged in the National Hotel of that city, operated by the United States Realty Corporation.<sup>5</sup> The United States refrained, however, from intervening. Moreover, it was not disposed to yield recognition to any provisional government in Cuba until the Cuban people themselves might reach a peaceful agreement resulting in general support of a Cuban government "and thus avoid continued civil disturbance with its attendant tragic loss of life and grave prejudice to the social and economic interests of the Republic."<sup>6</sup>

(c)

**§ 19B. Acquisition of Independent Statehood.** On January 23, 1934, the United States recognized the Government of Cuba under the presidency of Señor Mendieta.<sup>1</sup> Dr. Manuel Marquez Sterling presented his letters of credence as Cuban Ambassador to the President of the United States on January 31, 1934. On May 29, 1934, there was concluded at Washington a Treaty of Relations between the United States and Cuba through which the Treaty of May 22, 1903,

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In an Associated Press despatch from Mexico City of Sept. 12, 1933, it was announced that in view of the increasing stability of the political situation in Cuba, the Mexican Government was discontinuing its efforts to obtain the support of Argentina, Brazil and Chile in formulating a joint appeal for the establishment of a strong Cuban Government, *New York Herald-Tribune*, Sept. 13, 1933.

<sup>4</sup> Dept. of State Press Releases, No. 500, Sept. 9, 1933, p. 148.

On Sept. 11, 1933, Secretary Hull made the following announcement: "The chief concern of the Government of the United States is as it has been that Cuba solve her own political problems in accordance with the desires of the Cuban people themselves. It would seem unnecessary to repeat that the government of the United States has no interest in behalf of or prejudice against any political group or independent organization which is today active in the political life of Cuba. In view of its deep and abiding interest in the welfare of the Cuban people and the security of the Republic of Cuba, our Government is prepared to welcome any government representing the will of the people of the Republic and capable of maintaining law and order throughout the Island. Such a government would be competent to carry out the functions and obligations incumbent upon any stable government. This has been the exact attitude of the United States Government from the beginning.

"This statement has been communicated to Ambassador Welles and meets his full approval." Dept. of State Press Releases, No. 504, Sept. 16, 1933, p. 152.

<sup>5</sup> *New York Times*, Oct. 3, 1933.

<sup>6</sup> Statement by President Roosevelt, approved by him Nov. 23, 1933, released by the White House, Nov. 24, 1933, Dept. of State Press Releases, Nov. 25, 1933, 294. See, also, Hon. Sumner Welles, Assistant Secy. of State, "Two Years of the Good Neighbor Policy," April 13, 1935, Department of State Latin American Series, No. 11.

<sup>1</sup> § 19B.<sup>1</sup> Dept. of State Press Releases, Jan. 27, 1934, 49. See also Hackworth, Dig., I, § 47, and documents there cited.

embodying the Platt Amendment, was in terms "abrogated."<sup>2</sup> Through the later treaty Cuba secured freedom from restraints which, by the earlier arrangement, had served to subject that Republic to the wardship of the United States.<sup>3</sup>

If "territorial propinquity creates special relations between countries" which profess to be independent of each other,<sup>4</sup> it may be suggested that the geographical relationship between the United States and Cuba has served to establish an interest of the former in the affairs of the latter that must persist despite the abrogation of the treaty that embodied the provisions of the Platt Amendment.<sup>5</sup>

(d)

§ 20. **Panama.** Through the convention of November 18, 1903, between the United States and Panama, the former undertook to guarantee and maintain the "independence of the Republic of Panama."<sup>1</sup> The latter granted to the United States in perpetuity, for the construction, maintenance, operation, sanitation and protection of an interoceanic ship canal, the use, occupation and control of a trans-isthmian zone ten miles in width consisting of land and land under water, embracing islands within the zone, and of certain auxiliary lands and waters outside of the zone.<sup>2</sup>

<sup>2</sup> U. S. Treaty Vol. IV, 4054. See Lester H. Woolsey, "The New Cuban Treaty," *Am. J.*, XXVIII, 530.

<sup>3</sup> Declared President Roosevelt, in his message to the Senate, of May 29, 1934, accompanying the new treaty: "I have publicly declared 'that the definite policy of the United States from now on is one opposed to armed intervention.' In this new treaty with Cuba, the contractual right to intervene in Cuba which had been granted to the United States in the earlier treaty of 1903 is abolished, and those further rights, likewise granted to the United States in the same instrument, involving participation in the determination of such domestic policies of the Republic of Cuba as those relating to finance and to sanitation, are omitted therefrom. By the consummation of this treaty, this Government will make it clear that it not only opposes the policy of armed intervention, but that it renounces those rights of intervention and interference in Cuba which have been bestowed upon it by treaty." (Dept. of State Press Releases, June 2, 1934, 339.)

<sup>4</sup> See Lansing-Ishii Agreement in relation to the Republic of China, of Nov. 2, 1917, U. S. Treaty Vol. III, 2720-2722.

<sup>5</sup> Art. III of the Treaty of May 29, 1934, embraced the following provisions that are worthy of observation: "Until the two contracting parties agree to the modification or abrogation of the stipulations of the agreement in regard to the lease to the United States of America of lands in Cuba for coaling and naval stations signed by the President of the Republic of Cuba on February 16, 1903, and by the President of the United States of America on the 23d day of the same month and year, the stipulations of that agreement with regard to the naval station of Guantánamo shall continue in effect. The supplementary agreement in regard to naval or coaling stations signed between the two Governments on July 2, 1903, also shall continue in effect in the same form and on the same conditions with respect to the naval station at Guantánamo. So long as the United States of America shall not abandon the said naval station of Guantánamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty."

See Reciprocal Trade Agreement between the United States and Cuba of August 24, 1934, U. S. Executive Agreement Series, No. 67, and in this connection, Hon. Sumner Welles, Assistant Secy. of State, "Good Neighbor Policy in the Caribbean," July 2, 1935, Department of State Latin American Series, No. 12. See also Reciprocal Trade Agreement and accompanying protocol, of Dec. 18, 1939, U. S. Executive Agreement Series, No. 165.

§ 20. <sup>1</sup> Art. I, Malloy's Treaties, II, 1349.

<sup>2</sup> Art. II, according to which the zone was described as "beginning in the Caribbean Sea three marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to



The Republic of Panama also granted to the United States all the rights, power and authority within the zone and within the limits of all the lands and waters referred to as auxiliary thereto "which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."<sup>3</sup>

There was granted to the United States both within the limits of the cities of Panama and Colon and within the harbors and territory adjacent thereto, the broad right to acquire by purchase or by the exercise of eminent domain, properties of various kinds necessary and convenient for the construction, maintenance, operation and protection of the Canal, embracing works of sanitation. It was agreed that those cities should comply in perpetuity with the sanitary ordinances prescribed by the United States, and it was declared that

in case the Government of Panama is unable or fails in its duty to enforce this compliance by the cities of Panama and Colon with the sanitary ordinances of the United States the Republic of Panama grants to the United States the right and authority to enforce the same.

The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon and the territories and harbors adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.<sup>4</sup>

The United States has on occasion availed itself of the privilege thus acquired to maintain order in the Cities of Panama and Colon.<sup>5</sup> Moreover, in its opinion,

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said cities, which are included within the boundaries of the zone above described, shall not be included within this grant." There were also embraced within the grant "the group of small islands in the Bay of Panama, named Perico, Naos, Culebra and Flamenco."

Concerning the divergent views of the United States and Panama concerning the scope of the right conferred by Article II of the treaty upon the former to expropriate lands outside of the Canal Zone, see R. L. Buell, "Panama and the United States," *Foreign Policy Association Reports*, Jan. 20, 1932, VII, No. 23, pp. 423-424.

<sup>3</sup> Art. III. In 1927 the Department of State declared that "there is no question as to the right of the United States to permit the operation of any commercial establishments in the Canal Zone. Article III of the Treaty of 1903 grants the United States all sovereign rights, power, and authority in the Canal Zone to the exclusion of the exercise of any such sovereign rights, power and authority by Panama." (Department of State Press Releases, May 14, 1927.) In order to meet the desires of the Panamanian Government a treaty was negotiated and signed on July 28, 1926, by which the United States agreed in perpetuity to limit sales in the commissaries to those having a direct relation to the operation and protection of the Canal, and also limited residence in the Canal Zone in a similar manner. (See Art. IV, Senate Executive Doc. B. 69 Cong., 2 Sess., p. 13.)

By Art. V Panama granted to the United States in perpetuity a monopoly for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean. The treaty was not consummated.

<sup>4</sup> Art. VII. By Art. XXV the Government of Panama agreed to sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific coast and on the western Caribbean coast of the Republic at certain points to be agreed upon with the President of the United States.

For the rights, powers and privileges granted to it, the United States agreed to pay to the Republic of Panama the sum of \$10,000,000, and an annual payment during the life of the convention of \$250,000 in gold coin. Art. XIV.

<sup>5</sup> The privilege was exercised in 1918, 1921 and 1922.

the inability of Panama to maintain the requisite order, justifying exercise of the treaty right, has been deemed to be apparent where a situation arose that served to jeopardize the safety of the Zone and the operation of the Canal, despite the absence of, or prior to, disorderly occurrences.<sup>6</sup>

According to Article XXIII it was agreed that

If it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.<sup>7</sup>

By the terms of Article XXIV

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

If the Republic of Panama shall hereafter enter as a constituent into any other Government or into any union or confederation of states, so as to merge her sovereignty or independence in such Government, union or confederation, the rights of the United States under this convention shall not be in any respect lessened or impaired.<sup>8</sup>

Although the provisions of the convention of 1903 may not have been designed primarily with a view to imposing a status of dependency upon the Republic of Panama, the nature and scope of the rights conferred upon the United States, as incidental to the maintenance and protection of the Canal, and outside as well as within the zone, served to subject the grantor to a marked degree of external control. By yielding to a foreign State the right to conduct for all time an enterprise of the kind and magnitude of the Canal and bearing the geographical relationship which it did to the territory of the grantor, Panama undertook, and doubtless wisely, to subordinate its interests, whether domestic or foreign, to those of the grantee in respect to whatsoever pertained to the main-

<sup>6</sup> Mr. Hughes, Secy. of State, to the Panaman Minister at Washington, March 9, 1922.

Also in this connection, R. L. Buell, "Panama and the United States," *Foreign Policy Association Reports*, Jan. 20, 1932, Vol. VII, No. 23, pp. 412-414.

<sup>7</sup> Malloy's *Treaties*, II, 1356.

<sup>8</sup> The question presents itself whether Panama, in consequence of Art. XXIV in conjunction with other provisions of the convention, was thereafter in a position to undertake by a treaty with other States to restrict its own freedom to agree with the United States that the Republic would consider herself in a state of war in case of any war in which the United States might become a belligerent.

In the proclamation of President Valdes of Panama, of April 7, 1917, concerning the coöperation of that Republic with the United States in war against Germany, it was said: "Our clear and indisputable duty in this dreadful hour of human history is that of a natural ally whose interests, and whose very existence, are linked in a perpetual and indissoluble manner with the United States of America, and this is the meritorious attitude which it is incumbent upon us to adopt." *Declarations of War*, Dept. of State, confidential document, 1919, 53, 54. The full text of President Valdes' proclamation is contained in *For. Rel.* 1917, *Supp.*, 1, 245 and 248.

tenance and protection of the Canal.<sup>9</sup> The terms of the convention thus laid the foundation for what Secretary Hughes enunciated in 1923 as the Panama Canal Doctrine.<sup>10</sup> Moreover, certain burdens which the convention imposed upon the United States as the protector of Panama served to fortify the privileges of the former in that regard. Thus, on April 27, 1921, in connection with the award of Chief Justice White, determining, as arbitrator, the boundary controversy between Costa Rica and Panama, Secretary Hughes declared that the Government of the United States "must again state, in the most positive manner, that its duty to guarantee and maintain the independence of Panama requires it to inquire into the merits of any controversies relating to the boundaries of the Republic of Panama in order that it may satisfy itself as to the true extent of the territory of Panama and obliges it to assure itself that the Government of Panama faithfully performs its international obligations."<sup>11</sup> Such performance demanded, in the opinion of the Department of State, compliance with the terms of the White award, upon which the United States was insistent.<sup>12</sup>

<sup>9</sup> See Mr. Root, Secy. of State, to Mr. Taft, Secy. of War, Feb. 21, 1906, concerning the right of the United States under the treaty with Panama to maintain public peace and order in the territory of that State, For. Rel. 1906, II, 1203; also Mr. Knox, Secy. of State, to Mr. Squiers, Minister to Panama, April 19, 1909, For. Rel. 1909, 469.

<sup>10</sup> See The Panama Canal Doctrine, *infra*, § 97B; The Panama Canal, *infra*, § 198.

<sup>11</sup> For. Rel. 1921, I, 207, 208. Secretary Hughes added:

"It is precisely because of its friendship for the Republic of Panama, as well as because of its desire to assure itself that the peace of Central America is maintained on a stable basis guaranteed by the scrupulous observance of international obligations, that the Government of the United States feels compelled to state that it expects the Government of Panama to take steps promptly to transfer the exercise of jurisdiction from the territory awarded to Costa Rica by the Loubet award, at present occupied by the civil authorities of the Government of Panama, in an orderly manner, to the Government of Costa Rica. Unless such steps are taken within a reasonable time, the Government of the United States will find itself compelled to proceed in the manner which may be requisite in order that it may assure itself that the exercise of jurisdiction is appropriately transferred and that the boundary line on the Pacific side, as defined in the Loubet award, and on the Atlantic side, as determined by the award of the Chief Justice of the United States, is physically laid down in the manner provided in Articles II and VII of the Porras-Anderson Treaty.

"It is with the utmost regret that the Government of the United States feels itself obliged to communicate to the Government of Panama this determination which it has reached after the most careful and friendly deliberation. Its decision has been arrived at because of the special interest of this Government in the Republic of Panama and because of its belief that only by compliance with the reasonable expectations of the Government of the United States in this matter can the welfare of Panama be promoted and its friendly relations with the neighboring Republics of America be assumed." (*Id.*, 212.)

See Award Outside of Limits of Submission, *infra*, § 582.

<sup>12</sup> Mr. Hughes, Secy. of State, to M. Garay, July 29, 1921, For. Rel. 1921, I, 216.

In Hackworth, Dig., I, 731, the following statement is made: "In a telegram of February 6, 1925, the Department reiterated the views set forth in the instructions referred to above with respect to the validity of the White award and the grounds for the interest of the United States in a settlement of the matter, and stated that, in the event of a failure of Panama and Costa Rica to reach an agreement within a reasonable time satisfactory to both, the United States would 'have no other alternative than to afford facilities for the engineers appointed by the Chief Justice of the Supreme Court of the United States and by the Government of Costa Rica in demarcating the boundary line, should Panama refuse to cooperate therein.'

"Panama declined, however, to appoint a commissioner, and the negotiations for a settlement were continued at intervals during the ensuing years. Regular diplomatic relations were restored between Costa Rica and Panama on October 1, 1928, through the good offices of the Chilean Government, such relations having been broken off at the time of the conflict of 1921. The dispute as to the Atlantic slope boundary has appeared to be on the verge of a settlement a number of times but up to this time a mutually satisfactory agreement has not been reached."

On December 23, 1927, Secretary Kellogg announced that in harmony with the views expressed by Secretary Root in 1905 and 1906, the primary duty to maintain order and to enforce the election laws of Panama devolved upon that Republic; that as between the two political parties in that country, the United States would maintain absolute impartiality, and would not, directly or indirectly, lend support to any candidate for president or other office. "The United States will, of course," he added, "carry out its treaty obligation guaranteeing to maintain the independence of Panama, and will exercise the treaty right to maintain order in Panama, Colon, and the territories and harbors adjacent thereto, but it does not intend to supervise the election in Panama."<sup>13</sup>

The United States appeared to interpret broadly its rights as a protector derived from the treaty of 1903, and from the first Article thereof (apart from the provisions of Article VII), to conclude that it could lawfully exercise power to suppress revolutionary activities in any part of the Republic.<sup>14</sup> As the lessee in perpetuity of the Canal Zone, the United States was, moreover, inclined to subordinate to the maintenance and protection thereof, every opposing claim, testing the propriety of its assertions under the treaty of 1903, both by reference to the obligation to protect the Republic, and equally by the exigencies of the Panama Canal.

With respect to the area within the Canal Zone, the United States maintained that, by virtue of Article 1 of the treaty of 1903, it might, among other things, establish post offices and custom houses, set up commissaries, selling to whom it would, maintain bonded warehouses, grant exequaturs to consuls, and arrange for the extradition of fugitives from the justice of foreign States,<sup>15</sup> asserting that any relaxation of the exercise of such powers was a matter of policy rather than a response to a legal obligation. Nor was the American Government willing to refer to arbitration any question attacking "the exercise of its sovereign rights" declared to be "explicitly conceded by Article III of the treaty."<sup>16</sup> Panama, on the other hand, invoking Article XIII of the treaty, took a divergent and narrower view of what the convention yielded to the United States.<sup>17</sup> An arrangement, known as the Taft Agreement, concluded on December 3, 1904, served

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See, Memorandum of Hon. J. Reuben Clark, Jr., Solicitor for the Dept. of State, Dec. 29, 1911, concerning the right of the United States to erect radio stations in Panama, For. Rel. 1912, 1221; also decree of Panama, No. 130, of Aug. 29, 1914, For. Rel. 1914, 1051.

<sup>13</sup> Dept. of State Press Releases, Jan. 4, 1928.

<sup>14</sup> Mr. Taft, Secy. of War, to Mr. Magoon, American Minister, April 26, 1906, For. Rel. 1906, Vol. II, 1206; statement of Mr. Kellogg, Secy. of State, July 27, 1928, Dept. of State Press Releases, July 27, 1928.

<sup>15</sup> See Mr. Hay, Secy. of State, to the Panaman Minister, Oct. 24, 1904, For. Rel. 1904, 613; Mr. Hughes, Secy. of State, to the Panaman Minister, July 20, 1921; same to same, Feb. 3, 1922; same to Mr. Alfaro, Panaman Minister, July 7, 1923, For. Rel. 1923, Vol. II, 705; same to same, Oct. 13, 1923, *id.*, 707.

<sup>16</sup> See Mr. Hughes, Secy. of State, to Mr. Alfaro, Panaman Minister, Oct. 13, 1923, For. Rel. 1923, Vol. II, 707.

<sup>17</sup> According to Art. XIII, "the United States may import at any time into the said Zone and auxiliary lands, free of customs duties" materials "necessary and convenient in the construction, maintenance, operation, sanitation and protection of the Canal." See in this connection Mr. de Olbaldia, Panaman Minister, to Mr. Hay, Secy. of State, Aug. 11, 1904, For. Rel. 1904, 598.

while in force to bridge the gap without impairing the extent of the American claim.<sup>18</sup> The arrangement was, moreover, exemplified in certain executive orders issued by the Secretary of War by direction of the President, on December 3, December 6, and December 28, 1904, January 7, 1905, and January 5, 1911.<sup>19</sup> The effect of the agreement upon the rights of the United States became the subject of sharp controversy between the two Republics, in the course of which the Government of the United States made it clear that, as was indicated in the Executive Order of December 3, 1904, the carrying out of the arrangement was not to be taken as a delimitation, definition, restriction, or restrictive construction of the rights of either party under the treaty of 1903.<sup>20</sup> On October 18, 1923, the Panaman Foreign Office was informed that the Government of the United States, in virtue of congressional authorization would, on May 1, 1924, abrogate the Taft Agreement.<sup>21</sup>

For many years the United States paid to the Republic of Panama annually the sum of \$250,000, in accordance with the provisions of Article XIV of the Convention of November 18, 1903, between the two countries for the construction of a ship canal. A Treasury warrant in this sum was sent, on February 26 of every year, to the Fiscal Agent of Panama. In each instance subsequent to February, 1934, the warrant was returned to the Department of State, the Republic of Panama maintaining the position that the payment of the annuity should be made in gold coin of the weight and fineness existing in 1904, or the equivalent in actual value thereof. The matter became the subject of friendly discussion with the Panaman Government, and a conclusion satisfactory to

<sup>18</sup> U. S. Treaty Vol. III, 2757, 2758. Concerning the announcement by the United States of Intention to Abrogate the Taft Agreement, see documents in For. Rel. 1923, Vol. II, 638-687.

Concerning the provisions of the Panaman-American treaty signed in 1926, but which failed of consummation, see R. L. Buell, "Panama and the United States," Foreign Policy Association Reports, Jan. 20, 1932, Vol. VII, No. 23, pp. 424-426.

<sup>19</sup> See U. S. Treaty Vol. III, 2757-2767.

See Mr. Phillips, Acting Secy. of State, to President Harding, Sept. 1, 1922, For. Rel. 1922, Vol. II, 761-762.

<sup>20</sup> See Mr. Hughes, Secy. of State, to Mr. Alfaro, Panaman Minister, Oct. 15, 1923, For. Rel. 1923, Vol. II, 648, 653.

Cf. Mr. Alfaro, Panaman Minister, to Mr. Hughes, Secy. of State, Jan. 3, 1923, *id.*, 638, in which it was said that the Taft Agreement "determines the juridical status of the Canal Zone." (*Id.*, 642.)

<sup>21</sup> *Id.*, 676.

"On December 3, December 6, December 28, 1904, January 7, 1905 and January 5, 1911, Executive Orders were issued by the President of the United States embodying agreements with the Panaman Government regarding matters affecting the relations between the Panama Canal Zone and the Republic of Panama. This series of Executive Orders was known as the Taft Agreement. It was a temporary *modus vivendi* to cover the period of the construction of the Canal. By this agreement the United States temporarily waived the exercise of certain of the rights acquired by the Treaty of 1903. The Taft Agreement was in no wise a delimitation, definition, restriction or restrictive construction of the rights of either party under the treaty between the United States and the Republic of Panama.

"By Joint Resolution of Congress approved February 12, 1923, the President was authorized to abrogate this Agreement, which had been given legislative sanction by the Panama Canal Act approved August 24, 1912. On November 5, 1923, the American Legation in Panama informed the Panaman Government that the United States would abrogate the so-called Taft Agreement on May 1, 1924." The abrogation of the Taft Agreement was in fact postponed from May 1, to June 1, 1924. (Dept. of State Press Releases, May 28, 1924.)

See also documents in For. Rel. 1924, II, 521-537.

both countries was reached in new agreements with Panama signed on March 2, 1936.<sup>22</sup>

On July 27, 1939, there was an exchange of ratifications of a new "General Treaty" between the United States and Panama, signed at Washington, March 2, 1936.<sup>23</sup> The following paraphrase of the instrument was prepared by the Department of State:<sup>24</sup>

Article I establishes a basis of friendship and coöperation between Panama and the United States.

Article II. The compliance of Panama with the provisions of article II of the convention of November 18, 1903, in turning over to the United States additional lands and waters beyond those specifically mentioned therein is recognized. The requirement of further lands and waters is considered improbable by both Governments, but they nevertheless recognize their joint obligation to insure the continuous operation of the Canal and agree to reach the necessary understanding should additional lands and waters be in fact necessary for this purpose.

Article III contains various provisions restricting the commercial activities of the United States in the Canal Zone in order that Panama may take advantage of the commercial opportunities inherent in its geographical situation. In this article are listed the classes of persons who may reside in the Canal Zone and the persons who are entitled to make purchases in the Canal Zone commissaries.

Article IV provides for the free entry of merchandise entering Panama destined for agencies of the United States Government and provides that no taxes shall be imposed upon persons in the service of the United States entering Panama or upon residents of Panama entering the Canal Zone.

Article V provides that port facilities other than those owned by the Panama Railroad Co. in the ports of Panamá and Colón may be operated only by Panama; exempts from Panamanian taxation vessels using the Canal which do not touch at ports under Panamanian jurisdiction; and provides for the establishment of Panamanian customhouses within the Canal Zone. The United States undertakes to adopt such administrative regulations as may be necessary to assist Panama in controlling immigration into that country.

<sup>22</sup> On that date there were concluded the following agreements:

"(1) A general treaty revising in some aspects the convention of November 18, 1903, between the United States and Panama. This treaty is accompanied by 16 exchanges of notes embodying interpretations of the new treaty or agreements pursuant thereto.

"(2) A convention for the regulation of radio communications in the Republic of Panama and the Canal Zone, accompanied by three supplementary exchanges of notes.

"(3) A convention providing for the transfer to Panama of two naval radio stations.

"(4) A convention with regard to the construction of a trans-Isthmian highway between the cities of Panamá and Colón." (Dept. of State Press Releases, March 7, 1936, 200.)

See William D. McCain, *The United States and the Republic of Panama*, Duke University Press, 1937, 248-253.

See joint statement by President Roosevelt and President Arias, released Oct. 17, 1933, Dept. of State Press Releases, Oct. 17, 1933, 218, Hackworth, Dig., II, 806.

<sup>23</sup> U. S. Treaty Series No. 945.

See also Convention between the United States and Panama, of March 2, 1936, concerning a Trans-Isthmian Highway, U. S. Treaty Series No. 946.

<sup>24</sup> Dept. of State Bulletin, July 29, 1939, 83.

Article VI revises article VII of the convention of November 18, 1903, in that the United States renounces the right to acquire, by the exercise of the right of eminent domain, lands or properties in or near the cities of Panamá and Colón, although retaining the right to purchase necessary lands or properties. The third paragraph of the said article VII, granting the United States the right to intervene in the cities of Panamá and Colón and the territory adjacent thereto for the purpose of maintaining order, is abrogated.

Article VII provides that beginning with the 1934 annuity payment the annual amounts of these payments shall be four hundred thirty thousand balboas (B/430,000.00) or the equivalent thereof. In a supplementary exchange of notes the balboa is defined as having a gold content equal to that of the present United States dollar.

Article VIII provides for a corridor under Panamanian jurisdiction to connect the city of Colón with other territory of Panama.

Article IX establishes a similar corridor under American jurisdiction to connect the Madden Dam area with the Canal Zone proper.

Article X provides that in case of emergency both Governments will take such measures of prevention and defense as they may consider necessary for the protection of their common interests.

Article XI reserves to each country all rights enjoyed by virtue of treaties now in force between the two countries, and preserves all obligations therein established, with the exception of those rights and obligations specifically revised by the present treaty. The juridical status of the Canal Zone, as defined in article III of the 1903 convention, thereby remains unaltered.

Article XII provides that the treaty shall take effect immediately on the exchange of ratifications in Washington.<sup>25</sup>

The relinquishment by the United States of specific privileges of intervention laid down in Article VII of the convention of 1903 speaks for itself. The General Treaty of 1939, although amendatory in this regard of the earlier agreement, does not, however, serve completely to remove the Republic of Panama from the wardship of the United States.

(e)

§ 21. **The Dominican Republic.** By a convention of February 8, 1907, for the assistance of the United States in the collection and application of the cus-

<sup>25</sup> "There were 16 exchanges of notes signed on March 2, 1936, and 1 signed on February 1, 1939, interpreting and defining certain provisions of the General Treaty." (*Id.*, 84.)

Declared Secy. Hull, on the occasion of the exchange of ratifications: "Dissatisfaction on the part of the Republic of Panama with certain of the provisions of the convention of 1903 arose early, and various attempts were made, many of them successful, to solve certain specific problems either informally or by agreement. The present General Treaty is the result of many painstaking hours of negotiation and preparation. It is a document which we hope responds to the genuine and legitimate aspirations of the Government and people of Panama yet which not only continues existing safeguards and provisions for the operation, maintenance, sanitation, and protection of the Canal from our point of view, but by associating the Republic of Panama in this work, accords even greater security and efficiency to the Canal, either in its present form or should it become necessary, in an expanded form." (*Id.*, 84.)

See The Panama Canal, *infra*, § 198.

toms revenues of the Dominican Republic,<sup>1</sup> it was agreed that the President of the United States should appoint a General Receiver of Dominican Customs, who (with such assistant receivers and other employees of the receivership similarly appointed) should collect all customs duties,<sup>2</sup> applying the sums collected according to a specified plan.<sup>3</sup> The Dominican Republic agreed not only to make provision for the payment of all customs duties to the General Receiver and his assistants and to give them all needful aid and assistance as well as protection "to the extent of its powers," but also that the Government of the United States should give to the General Receiver and his assistants "such protection as it may find to be requisite for the performance of their duties."<sup>4</sup> It was also agreed that until the Dominican Republic had paid the whole amount of the bonds of the debt mentioned in the convention, its public debt should not be increased except by a previous agreement between the Dominican Government and the United States.<sup>5</sup>

In November, 1916, the United States undertook the military occupation of Dominican territory by a naval force on account of the failure of the Republic to observe the terms of the convention with respect to the increase of its public debt and by reason of the resulting disturbance of domestic tranquillity.<sup>6</sup> On

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Concerning the political and financial affairs of the Dominican Republic during the years 1914 and 1915, involving revolutionary movements and financial difficulties, and the attitude of the United States in relation thereto, see documents in *For. Rel.* 1914, 193-264; also, *id.*, 1915, 279-339.

§ 21. <sup>1</sup> The preamble of the convention referred at length to the financial difficulties of the Dominican Republic, the magnitude of its indebtedness, created in part by revolutionary governments, the prevention of the peaceable and continuous collection of revenues for the payment of interest or principal of its debts, the arrangement of a conditional plan of settlement with foreign creditors, the issuance and sale of bonds for their benefit, and the conditioning of the plan upon the assistance of the United States in the collection and application of customs revenues to meet the interest and effect the amortization and redemption of the bonds. See Malloy's *Treaties*, I, 418.

<sup>2</sup> Art. I. The period of such collection was to continue "until the payment or retirement of any and all bonds issued by the Dominican Government in accordance with the plan and under the limitations as to terms and amounts hereinbefore recited."

<sup>3</sup> The funds received were to be applied "first, to paying the expenses of the receivership; second, to the payment of interest upon said bonds; third, to the payment of the annual sums provided for amortization of said bonds including interest upon all bonds held in sinking fund; fourth, to the purchase and cancellation or the retirement and cancellation pursuant to the terms thereof of any of said bonds as may be directed by the Dominican Government; fifth, the remainder to be paid to the Dominican Government." (Art. I.)

<sup>4</sup> Art. II. See Jacob H. Hollander, "The Convention of 1907 between the United States and the Dominican Republic," *Am. J.*, I, 287.

<sup>5</sup> Art. III. It was here added: "A like agreement shall be necessary to modify the import duties, it being an indispensable condition for the modification of such duties that the Dominican Executive demonstrate and that the President of the United States recognize that, on the basis of exportations and importations to the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would at such altered rates of duties have been for each of such two years in excess of the sum of \$2,000,000 United States gold."

<sup>6</sup> See proclamation of Capt. H. S. Knapp, U.S.N., Nov. 29, 1916, *For. Rel.* 1916, 246, *Am. J.*, XI, *Supplement*, 96; also *For. Rel.* 1916, 220-249; also, *id.*, 249-256, concerning the assumption by the United States of control of Dominican finances. See editorial comment by Philip Marshall Brown, on "The Armed Occupation of Santo Domingo," in *Am. J.*, XI, 394.

See Mr. Knox, Secy. of State, to the American Minister to the Dominican Republic, Jan. 23, 1912, *For. Rel.* 1912, 341.

See other documents concerning the administration of the affairs of the Republic during the period of the American occupation in Hackworth, *Dig.*, I, § 29; also *id.*, § 47.



December 24, 1920, the Department of State gave to the press a proclamation which the President had directed Rear-Admiral Snowden, the Military Governor of Santo Domingo, to issue (and which was issued on December 23, 1920), in which was announced the achievement of the purposes of the United States in the employment, pursuant to the treaty of 1907, of military forces within Dominican territory, the contemplated withdrawal of responsibilities assumed in connection with Dominican affairs, and the plan of appointing a Commission of Dominican citizens to formulate amendments to the Constitution and a general revision of the laws of the Republic (including the drafting of a new election law), for submission, upon approval by the Military Government in occupation, to a Constitutional Convention and to the National Congress of the Dominican Republic. The American occupation continued, however, until 1924, when the amended Constitution and revision of laws became effective.<sup>7</sup> On January 20, 1925, Secretary Hughes was able to say: "Of course we could have remained in control had we desired, but instead of doing so we have been solicitous to aid in the establishment of an independent government so that we could withdraw and, such a government having been established through our efforts, we have withdrawn."<sup>8</sup>

## (f)

§ 21A. **The Same.** During the long period of occupation the Military Government established by the United States issued governmental regulations under the name of Executive Orders and Resolutions and Administrative Regulations, and also celebrated several contracts by virtue of such Executive Orders or of some existing laws of the Republic. A Convention of Ratification, as contained in an agreement of evacuation of June 30, 1922, signed at Santo Domingo, June 12, 1924, and duly proclaimed by President Coolidge, December 8, 1925,<sup>1</sup> after adverting to the foregoing facts, announced in the course of the preamble that

the Dominican Republic has always maintained its right to self-government, the disoccupation of its territory and the integrity of its sovereignty and independence; and the Government of the United States has declared that, on occupying the territory of the Dominican Republic, it never had, nor has at present, the purpose of attacking the sovereignty and independence of the Dominican Nation.

Through the terms of the convention the Dominican Government recognized the validity of all the Executive Orders and Resolutions promulgated by the

<sup>7</sup> Charles E. Hughes, *The Pathway of Peace*, New York, 1925, 164, 167.

Declared Mr. Hughes in 1928: "The significant thing, with respect to the general policy of the United States, is that the United States did not try to stay in Santo Domingo, but sought to get out and did get out. The leaders of the political parties were brought together. A plan for provisional government was developed and for ultimate evacuation on the establishment of a permanent government. This plan was carried out and the American occupation was terminated." (*Our Relations to the Nations of the Western Hemisphere*, Princeton, 1928, 77-78.)

<sup>8</sup> See For. Rel. 1924, Vol. I, 618-643, concerning "The Election of Horacio Vasquez to the Presidency and the Evacuation of the Forces of the United States."

§ 21A. <sup>1</sup> U. S. Treaty Vol. IV, 4077.

Military Government and published in the Official Gazette, which might have levied taxes, authorized expenditures, or established rights on behalf of third persons, and the administrative regulations issued, and the contracts which might have been entered into, in accordance with such Orders or with any law of the Republic.<sup>2</sup> The Dominican Government undertook also to recognize certain bond issues of 1918 and of 1922, as "legal, binding and irrevocable obligations of the Republic," and to pledge its full faith and credit to the maintenance of service thereon.<sup>3</sup> Finally, it was agreed that the Convention of February 8, 1907, should remain in force so long as the issues of 1918 and 1922 should remain unpaid, and that the duties of the General Receiver of Dominican Customs appointed in accordance with that convention should be extended to include the application of the revenues pledged for the service of those bond issues in accordance with the terms of the Executive Orders and of the contracts under which the bonds were issued.<sup>4</sup>

A convention signed at Washington December 27, 1924, and proclaimed by President Coolidge October 26, 1925, served to replace the Convention of February 8, 1907, between the two States providing for the assistance of the United States in the collection and application of the customs revenues of the Dominican Republic.<sup>5</sup> The Convention of December 27, 1924 marked a renewal of the plan of the receivership under that of 1907. The conditions for modifying import duties were slightly altered;<sup>6</sup> and there was a stipulation providing for the adjustment by arbitration of controversies in respect to the "carrying out of the provisions" of the conventions which the parties might be unable to adjust through the diplomatic channel.<sup>7</sup>

Through the conventions of 1907 and 1924 the Dominican Republic accepted the protection of the United States for the period of the receivership, and for the sake of the success of the arrangement, yielded to the protector the necessary fiscal, and contingently, the necessary military control which was duly exercised. In these ways there was seemingly contemplated throughout the life of the receivership a suspension or impairment of that freedom from external control which characterizes the life of an independent State, and which events between 1916 and 1924 served to illustrate. Nevertheless, the conventions revealed no

<sup>2</sup> These were set out with great particularity, in Art. I, and embraced "International Conventions entered into during the period of military government."

Art. I also made careful provision for the continuance in force, method and effect of abrogation of, and determination of controversies over, rights acquired under, the Executive Orders, resolutions, administrative regulations and contracts to which reference was made.

<sup>3</sup> Art. II.

<sup>4</sup> Art. III.

<sup>5</sup> U. S. Treaty Vol. IV, 4091; *Am. J.*, XX, *Official Documents*, 1.

The preamble made reference to the issuance of bonds in 1908, 1918 and 1922, and to the desire of the Dominican Government to refund them through the issuance of new bonds to a total of \$25,000,000.

<sup>6</sup> According to Art. IV: "The Dominican Government agrees that the import duties will at no time be modified to such an extent that, on the basis of exportations and importations to the like amount and the like character during the two years preceding that in which it is desired to make such modification, the total net customs receipts would not at such altered rates have amounted for each of such two years to at least 1½ times the amount necessary to provide for the interest and sinking fund charges upon its public debt."

<sup>7</sup> See Art. VI.

design to establish a permanent status of dependency. Except in so far as they imposed restraints required by the receivership they did not purport, even while it existed, to fetter or hamper the Republic in the management of its foreign affairs.

In consequence of a disastrous hurricane in September, 1930, the economic condition of the Dominican Republic became so serious, and its revenues declined so abruptly, that it announced to the Department of State the necessity to adopt emergency legislation giving priority to the interest charges on the foreign loans, but temporarily diverting certain customs revenues from the payment of amortization on these loans, applying the amounts so diverted to the maintenance of vital governmental functions and the preservation of law and order upon which the ultimate payment of the external debts necessarily depended. The Dominican Government frankly recognized that the step proposed by it was not only a violation of the obligations as to the holders of its securities, but also a violation of the convention between the United States and the Dominican Republic.<sup>8</sup> In August, 1934, it was announced that the Foreign Bondholders Protective Council had completed an investigation of the financial condition of the Government of the Dominican Republic, with reference to what it could be reasonably expected to do in taking care of its indebtedness represented by bonds issued several years before in pursuance of a treaty between that Republic and the United States; and that as a result of that investigation and of the Council's negotiations with the Dominican Government, the latter had presented to the former a proposal with respect to the future service of the bonds which had received the Council's unqualified approval.<sup>9</sup> The Department of State declared that inasmuch as the arrangement proposed by the Dominican Government in no sense impaired the treaty, but, on the contrary, placed it "again in full force and effect," and that inasmuch also as the proposal provided for the payment in full of interest to the bondholders, as well as for annual sinking fund payments to make possible the ultimate repayment in full of the principal of the obligations of the Dominican Government, the General Receiver of Dominican Customs would be at once instructed by the Secretary of State, with the approval of the President, to conduct his official activities and transactions in conformity with the terms of the proposal mentioned and the arrangement thereby evidenced.<sup>10</sup>

<sup>8</sup> Statement by the Dept. of State, Nov. 10, 1931, Dept. of State Press Releases, Nov. 14, 1931, 454, in which it appears that the Department of State, after an independent investigation of the Dominican situation, and noting the steps which the Dominican Government felt required to take and the reasons therefor, was inclined to believe that the policy announced by the Dominican Government was the best for all concerned.

<sup>9</sup> Statement by the Dept. of State, Aug. 16, 1934, Dept. of State Press Releases, Aug. 18, 1934, 105.

<sup>10</sup> *Id.*

See Correspondence and Press Releases in re Dominican Bond Case 1934, issued by Foreign Bondholders Protective Council Incorporated, containing among other documents a letter from President Trujillo of the Dominican Republic to the Council, Aug. 10, 1934, in which he said: "My Government recognizes that this settlement contemplates a necessary extension of the receivership of the Dominican customs pending a complete liquidation of the loan." It may be added that the new arrangement contained provisions for an extension on certain financial arrangements envisaged by the Convention of 1924, until the years 1962 and 1970.

By a Treaty of Special Assistance concluded by the United States with the Dominican Republic, September 24, 1940, of which ratifications were exchanged March 10, 1941,<sup>11</sup> the Convention of December 27, 1924 was modified.<sup>12</sup> The Government of the Dominican Republic was to resume the collection of the nation's revenues; the General Receivership of the Dominican Customs was to cease to operate, and all property and funds of that Receivership were to be turned over to the Dominican Government; no claim was to be advanced by either Government against the other on account of any act of the Receivership. There was provision for the selection by mutual agreement between the two Governments of a depository bank which should be the sole depository of all revenues of the Dominican Government. No disbursements of Government funds were, however, to be made by the bank until certain payments should be made, including interest and amortization charges on outstanding dollar bonds. The transmission of such funds to the Fiscal Agent or Agents of the loans was to be effected through an official chosen by the two Governments who should act as the representative of the 1922 and 1926 bonds.<sup>13</sup>

(g)

§ 22. Haiti. In order to remedy the existing condition of its finances, and to assist in the economic development and tranquillity of the Republic, Haiti concluded a treaty with the United States September 16, 1915,<sup>1</sup> whereby the latter

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See in this connection, Report of the Thirty-First Fiscal Period, Dominican Customs Receivership under the American-Dominican Convention of 1924, Washington, Government Printing Office, 1938, 4-5.

<sup>11</sup> U. S. Treaty Series, No. 965.

<sup>12</sup> "Under the provisions of Article IX of the Convention it entered into force upon the exchange of ratifications, and the Convention signed on December 27, 1924 ceased to have effect on that day with the exception that certain provisions of the Convention of 1924 will remain in force until the necessary measures have been taken by both Governments to put the provisions of the new convention into operation." (Dept. of State Bulletin, March 22, 1941, 344, 345.)

<sup>13</sup> The Department of State has made the following further comment on the arrangement: "It is stipulated in the new convention that the payments on the bonds and the compensation of the bondholders' representative and of the depository bank shall be an irrevocable first lien upon all the revenues of the Dominican Government. Under the convention of 1924 the holders of the bonds had a claim against only the customs revenues. The restriction of the 1924 convention which specified that there should be no increase in the Dominican public debt without the consent of the United States is omitted from the new convention."

"The agreement between the Dominican Republic and the Foreign Bondholders Protective Council concluded in 1934 regarding the rate of amortization of the outstanding bonds remains in effect."

"At the time the new convention was signed notes were exchanged by the Governments of the United States and the Dominican Republic providing for the liquidation at the rate of \$125,000 annually of the claims of United States nationals against the Dominican Republic; and for the payment of benefits to two retired officials who served in the General Receivership of Dominican Customs for many years."

"Simultaneously with the exchange of ratifications of the new convention, notes were exchanged designating the depository bank, the official who shall transmit payments to the fiscal agents of the loans, and the salary of that official."

"The conclusion of the new convention is another step in the development and coordination of the good-neighbor policy based on mutual respect and confidence among the countries of this hemisphere." (*Id.*)

§ 22. <sup>1</sup> U. S. Treaty Vol. III, 2673; also, in this connection, editorial comment by George A. Finch, *Am. J.*, X, 859.

undertook "by its good offices," to give its aid.<sup>2</sup> The President of Haiti was to appoint, upon nomination by the President of the United States,<sup>3</sup> a General Receiver and necessary aids, who were to collect, receive and apply all customs duties on imports and exports; and he was to appoint, upon like nomination, a Financial Adviser, to be an officer attached to the Ministry of Finance, clothed with broad advisory and constructive powers.<sup>4</sup> Haiti undertook to give all needful aid to these officers and to the receivership, and the United States on its part agreed to "extend like aid and protection."<sup>5</sup> All sums collected and received by the General Receiver were to be applied according to a specified arrangement.<sup>6</sup> The Government of Haiti undertook not to increase its public debt except by previous arrangement with the President of the United States, and not to contract any debt or assume any financial obligation unless the ordinary revenues of the Republic available for that purpose, after defraying the expenses of the Government, should be adequate to pay the interest and provide a sinking fund for the final discharge of such debt.<sup>7</sup> Modification of customs duties was also rendered subject to agreement with the President of the United States; and there was assurance by Haiti to coöperate with the Financial Adviser in his recommendations.<sup>8</sup>

There was arrangement for the establishment of an efficient constabulary to be composed of native Haitians, "organized and officered by Americans to be appointed by the President of Haiti upon nomination by the President of the United States."<sup>9</sup>

The Government of Haiti agreed not to surrender any of the territory of the Republic by sale, lease, or otherwise, or jurisdiction over such territory, to any foreign government or power, or to enter into any treaty or contract with any foreign power or powers that would impair or tend to impair the independence of Haiti.<sup>10</sup> It was agreed also that

The high contracting parties shall have authority to take such steps as may be necessary to insure the complete attainment of any of the objects comprehended in this treaty; and, should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian Independence and the maintenance of a government adequate for the protection of life, property and individual liberty.<sup>11</sup>

<sup>2</sup> Art. I.

<sup>3</sup> Art. II. *Compare* this provision with Art. I of the Convention with the Dominican Republic of Feb. 8, 1907, Malloy's Treaties, I, 419.

<sup>4</sup> *Id.*

<sup>5</sup> Art. III.

<sup>6</sup> Art. V. See, also, Art. IV with respect to the classification of Haitian debts.

<sup>7</sup> Art. VIII.

<sup>8</sup> Art. IX.

<sup>9</sup> Art. X. The authority and ultimate organization of the constabulary were here described.

<sup>10</sup> Art. XI. Art. XII made provision for the adjustment of pecuniary claims. Art. XIII provided for sanitary and public improvements to be made under the supervision and direction of engineers to be appointed by the President of Haiti on nomination by the President of the United States.

<sup>11</sup> Art. XIV. *Compare* Art. III of the convention with Cuba of May 22, 1903, Malloy's Treaties, I, 364.

The treaty was to remain in force for the term of ten years from the date of the exchange of ratifications, and for a subsequent term of ten years if, "for specific reasons presented by either of the high contracting parties," the purpose of the agreement had not been fully accomplished.<sup>12</sup> By an Additional Act, concluded March 28, 1917, the parties agreed "to fix at twenty years the life of the said convention."<sup>13</sup>

By clothing the United States with the right to preserve domestic tranquillity and to rehabilitate financial conditions, and by relinquishing certain rights pertaining to the exercise of its normal power to contract or cede territory, the Republic of Haiti appeared to accept the protection of the United States, and to that extent to consent, during the life of the treaty, to an abridgment of its independence.

The treaty of September 16, 1915, expressed the wishes, and was imposed by the will of, the United States exerted through its armed forces occupying Haitian territory.<sup>14</sup> It was the fruition of an armed intervention the character of which is examined in another place, where inquiry is made concerning not merely the invocation of the doctrine that would ignore compulsion as an element impairing the validity of a treaty, but also the circumstances, if any, under which a State may, in American opinion, justly demand that another accept its wardship and relinquish for a protracted period the privileges of independent statehood.<sup>15</sup> It suffices here to observe that by virtue of the treaty the United States exercised a large measure of control over the Republic.<sup>16</sup>

A Commission appointed by President Hoover for the Study and Review of Conditions in the Republic of Haiti was able to make the following statement in the course of its report of March 26, 1930:

<sup>12</sup> Art. XVI. Ratifications were exchanged at Washington May 3, 1916, on which day the treaty was proclaimed by the President of the United States.

<sup>13</sup> U. S. Treaty Vol. III, 2677.

<sup>14</sup> Inquiry into Occupation and Administration of Haiti and the Dominican Republic, Report of Senate Investigating Committee, Senate Doc. No. 794, 67 Cong., 2 Sess., 335, 355, 393-394.

<sup>15</sup> See Intervention, Haiti, *infra*, § 82A.

<sup>16</sup> Declared President Hoover, Feb. 4, 1930: "We entered Haiti in 1915 for reasons arising from chaotic and distressing conditions, the consequence of a long period of civil war and disorganization.

"We assumed by treaty the obligation to assist the Republic of Haiti in the restoration of order; the organization of an efficient police force; the rehabilitation of its finances; and the development of its natural resources. We have the implied obligation of assisting in building up of a stable self-government. Peace and order have been restored, finances have been largely rehabilitated, a police force is functioning under the leadership of Marine officers. The economic development of Haiti has shown extraordinary improvement under this régime. It is marked by highway systems, vocational schools, and public health measures. General Russell deserves great credit for these accomplishments.

"We need now a new and definite policy looking forward to the expiration of our treaties." (Report of The President's Commission for the Study and Review of Conditions in the Republic of Haiti, March 26, 1930, p. 1.)

See in this connection, Raymond L. Buell, *The American Occupation of Haiti*, Foreign Policy Association, Information Service, V, Nos. 19-20, 1929, 327-392.

Also Paul H. Douglas, "The American Occupation of Haiti," *Pol. Sc. Quar.*, XLII, Nos. 2 and 3, 1927; Ernest Gruening, "The Issue in Haiti," *Foreign Affairs*, Jan. 1933, XI, 279.

See Dept. of State Press Releases, Oct. 15, 1932, Publication No. 384, for correspondence concerning a treaty signed at Port-au-Prince in behalf of the United States and Haiti, on Sept. 3, 1932, and which was not consummated.

Under the American Occupation — and with its consent — the legislative chambers were dissolved in 1918, and by an interpretation of a new constitution, adopted under itsegis, they have not since been reassembled. The country has been ruled by a President and a Council of State exercising, under the direction of American officials, the legislative authority. Local self-government has also largely disappeared. The important municipalities and communes are ruled by commissioners appointed by the President. The members of the Council of State itself have been appointed and removed by him. The Council of State under the legislative authority vested in it by the 1918 constitution has exercised the powers of a National Assembly in electing the President.<sup>17</sup>

It should be observed that the American High Commissioner to Haiti, first appointed in 1922,<sup>18</sup> was superseded in 1930, by an American Minister accredited to the Republic.<sup>19</sup> By this means and through such a representative, the United States sought to lessen Haitian opposition to the American régime, and also to encourage the Republic to prepare itself for the situation to be anticipated when the treaty expired.

(h)

§ 22A. The Same. Through an agreement for the Haitianization of the Garde, withdrawal of military forces from Haiti, and financial arrangement, concluded on August 7, 1933,<sup>1</sup> the United States made relinquishment of certain means of control over affairs of the Republic. The arrangement contemplated the replacing of American officers serving with the Garde d'Haiti so that it should be completely commanded by Haitian officers, under a Haitian commandant designated by the President of the Republic,<sup>2</sup> as well as the withdrawal of the Marine Brigade of the United States and the American Scientific Mission (established by an accord of August 5, 1931).<sup>3</sup> That withdrawal took place on August 15, 1934.<sup>4</sup>

The financial arrangement provided that beginning January 1, 1934, the services of the Financial Adviser-General Receiver and of the Deputy General Receiver (as provided by the treaty of 1915) should be carried on, in fulfillment of obligations and guarantees undertaken in order to obtain a loan issued in

<sup>17</sup> Publications of Dept. of State, Latin American Series, No. 2, Publication No. 56, p. 8. See also documents in Hackworth, Dig., I, 249.

<sup>18</sup> Brig. General John H. Russell was the appointee. See Mr. Hughes, Secy. of State, to Gen. Russell, Feb. 11, 1922, For. Rel. 1922, Vol. II, 461.

<sup>19</sup> Dr. Dana G. Munro, appointed Envoy Extraordinary and Minister Plenipotentiary to Haiti, assumed his duties as such in November, 1930.

§ 22A. <sup>1</sup> U. S. Executive Agreement Series, No. 46.

<sup>2</sup> Arts. I-IV.

<sup>3</sup> Art. V.

<sup>4</sup> The withdrawal was effected in pursuance of an arrangement of July 24, 1934, U. S. Executive Agreement Series, No. 68, advancing the date for turning over the command of the Garde, and the withdrawal of the American forces.

See statement by Secretary Hull, Aug. 15, 1934, Dept. of State Press Releases, Aug. 18, 1934, in the course of which he said: "Arrangements have also been made whereby President Roosevelt, acting under authority expressly conferred upon him by Congress, is making a gift to the Haitian Government of a considerable amount of material and property belonging to our marine and naval units in Haiti and which the Haitian Government felt would be valuable and useful to it."

accord with a protocol of October 3, 1919, by a so-called Fiscal Representative and a Deputy Fiscal Representative, appointed by the President of the Republic upon the nomination of the President of the United States.<sup>5</sup> The financial arrangement provided merely for measures of administration envisaged in existing agreements between the two governments until the amortization or prior refunding of outstanding Haitian bonds.<sup>6</sup> Those measures were, nevertheless, in the judgment of the President of Haiti, "of a nature, as indeed were these previous engagements themselves, to infringe the essential attributes of the sovereignty of a friendly nation."<sup>7</sup>

Until the complete amortization of the bonds which, according to the terms of the agreement of August 7, 1933, would under normal conditions be effected by 1944,<sup>8</sup> or until the Haitian Government might, in advance of that date retire those obligations, an American oversight of the financial affairs of Haiti was to be existent. Nevertheless, the conclusion of the agreement of August 7, 1933, marked the progress of that Republic towards the resumption of a freedom from external control of which the treaty of 1915 and the so-called Additional Act of March 28, 1917, served long to deprive it.<sup>9</sup> It may be observed that on March 28, 1935, the United States and Haiti concluded a reciprocal trade agreement.<sup>10</sup>

On January 13, 1938, and also on July 1, 1938, agreements were concluded between the United States and Haiti modifying the agreement of Aug. 7, 1933, by permitting a temporary reduction in amortization payments.<sup>11</sup> A supple-

<sup>5</sup> Art. VII. Also, Arts. VIII-XXVI.

<sup>6</sup> See Mr. Phillips, Acting Secy. of State, to Mr. Ward, Nov. 27, 1933, Dept. of State Press Releases, Dec. 2, 1933, 303, containing an extended comment on the agreement of Aug. 7, 1933, the protocol of Oct. 3, 1919, and the Haitian law of June 26, 1922.

See Protocol for the Establishment of a Claims Commission, between the United States and Haiti, Oct. 3, 1919, U. S. Treaty Vol. III, 2678; Law of Haiti of June 26, 1922, authorizing the issuance of a loan in pursuance of the protocol of Oct. 3, 1919, *id.*, 2683; also, in this connection, Mr. Dana G. Munro, American Minister to Haiti, to the Haitian Minister of Foreign Affairs, April 6, 1932, Dept. of State Press Releases, April 23, 1932, 365.

<sup>7</sup> Communication of President Vincent to President Roosevelt, Nov. 16, 1933, Dept. of State Press Releases, Dec. 2, 1933, 300. The former expressed the hope that the Government of the United States would "be able to renounce a useless financial control in Haiti by spontaneous acts which would be the most eloquent affirmation of a common will towards friendship, towards better understanding, towards inter-American economic cooperation and collaboration for the well-being respectively of the nations of the three Americas."

<sup>8</sup> See Arts. XXIII and XXVI.

<sup>9</sup> The Additional Act of March 28, 1917, purporting to extend the life of the convention of 1915, for a period of twenty years, was in the nature of an executive agreement and was not submitted to the approval of the Senate of the United States. Consequently, in so far as the agreement of August 7, 1933, served to modify the provisions set forth in the convention of 1915 as extended by the Act of 1917 prior to the termination thereof (May 3, 1936), the modification was in reality the modification of an executive agreement rather than of an existing treaty. In his comment on the agreement of August 7, 1933, Mr. Phillips, Acting Secy. of State, did not hesitate to declare that "upon the examination and comparison of the new financial arrangement with the powers granted in the 1915 Treaty, it will be evident that the powers of the Fiscal Representative under the new arrangement are defined and limited, and that there is no such broad general grant of power as in the 1915 Treaty." (Dept. of State Press Releases, Dec. 2, 1933, 303, 310.)

<sup>10</sup> U. S. Executive Agreement Series, No. 78.

<sup>11</sup> U. S. Executive Agreement Series, No. 117, and No. 128.

Concerning the emergency which formed the reason for the new accords, see Haiti, Annual Report of the Fiscal Representative (for the Fiscal Year October, 1937-September, 1938), 88-89. In that Report it is significantly declared: "The per capita public debt in Haiti cannot be stated with exactitude in the absence of an accurate census. On the basis of the best estimates of population available it is apparently between Gdes. 15.00 and Gdes. 20.00 and therefore close to the lowest to be found anywhere in the world." (*Id.*, 84.)



mentary executive agreement providing for a temporary modification of the agreement of August 7, 1933, was signed on July 8, 1939,<sup>12</sup> and this was followed by a supplementary executive agreement of September 27, 1940, prolonging until and including September 30, 1941, the agreement of July 8, 1939, thus further modifying the agreement of August 7, 1933.<sup>13</sup>

The agreement of August 7, 1933, was replaced by an agreement on Haitian Finances signed, with an exchange of notes, on September 13, 1941.<sup>14</sup> The purpose of the arrangement was to modernize the fiscal machinery set up in 1915, while adequately safeguarding the interests of the holders of the 1922 and 1923 Haitian bonds.<sup>15</sup> Under the new agreement the National Bank of the Republic of Haiti is charged with the supervision of the accounting and disbursing systems and the collection of customs and internal revenues in the Republic. The Bank becomes the sole depository of Government funds and the Haitian Minister of Finance undertakes to transfer to a representative of the holders the sums necessary for the service of the outstanding Haitian dollar bonds.

The interest and amortization service of the 1922 and 1923 bonds are said to constitute an irrevocable first lien upon the revenues of the Government of Haiti. It is specified that until the amortization of the bonds has been completed, the public debt of the Republic shall not be increased except by agreement between the two Governments. It is provided that in the event that the total revenues of the Government should exceed \$7,000,000, additional sums shall be applied to the subsidiary fund for the redemption of the bonds.<sup>16</sup>

(i)

§ 23. *Nicaragua.* A convention between the United States and Nicaragua, of August 5, 1914, contained a grant in perpetuity to the United States of the exclusive proprietary right necessary and convenient for the construction, operation and maintenance of an interoceanic canal by way of the San Juan River and the great Lake of Nicaragua, or by way of any route over Nicaraguan territory.<sup>1</sup> In order to enable the United States to protect the Panama Canal and "the proprietary rights granted to the Government of the United States by the foregoing Article," and also to enable it to "take any measures necessary to the ends contemplated herein," there were leased to it, for a term of ninety-nine years, the islands in the Caribbean Sea known as Great Corn Island and Little

<sup>12</sup> U. S. Executive Agreement Series, No. 150.

<sup>13</sup> U. S. Executive Agreement Series, No. 183. See also supplementary agreement of Feb. 13, 1941, U. S. Executive Agreement Series, No. 201, and supplementary agreement of Sept. 30, 1941, U. S. Executive Agreement Series, No. 224.

<sup>14</sup> U. S. Executive Agreement Series, No. 220, where there is also set forth a further exchange of notes of Sept. 30-Oct. 1, 1941.

<sup>15</sup> Dept. of State Bulletin, Sept. 13, 1941, 214.

<sup>16</sup> *Id.* Art. III of the agreement makes elaborate provision for the joint control of the Bank by citizens of the United States and of Haiti.

§ 23.<sup>1</sup> U. S. Treaty Vol. III, 2740. See, also, in this connection, editorial comment by George A. Finch, in *Am. J.*, X, 344, reviewing the history of this convention. The provisions mentioned in the text are contained in Art. I. It may be noted that the convention was ratified by the President of the United States June 19, 1916, and that ratifications were exchanged at Washington, June 22, 1916. See, also, the terms on which the Senate advised and consented to ratification, 39 Stat. 1664.

Corn Island, and there was granted to it for a like period the "right to establish, operate and maintain a naval base at such place on the territory of Nicaragua bordering upon the Gulf of Fonseca as the Government of the United States may select." It was declared that

the territory hereby leased and the naval base which may be maintained under the grant aforesaid shall be subject exclusively to the laws and sovereign authority of the United States during the terms of such lease and grant and of any renewal or renewals thereof.<sup>2</sup>

Apart from the right conferred upon the United States to take measures, should occasion arise, necessary to achieve the ends contemplated by the convention, there appears to have been no design to accord to it the rights or functions of a protector. Neither the grant nor the lease sufficed in themselves to reduce Nicaragua to a condition of subordination, although they doubtless yielded to the grantee and lessee privileges likely to be productive of such a result in case of need. Nicaragua did not consent to accept, save under such a contingency, a condition of dependency involving the protection of another State.

(j)

§ 23A. **The Same.** It may be doubted whether the convention of August 5, 1914, conferred special authority upon the United States to employ its armed forces as it did in 1926–1927, for the protection of American and other foreign life and property by the establishment of neutral zones, as well as by other processes, in the course of the grave insurrection then existing in Nicaragua.<sup>1</sup> Inasmuch as the Government of the United States had not notified that of Nicaragua of a desire or intention to construct an interoceanic canal through Nicaraguan territory, and thus had not exercised the option acquired by the convention, events in that territory hardly served to interfere with the enjoyment of the proprietary rights that had been yielded.<sup>2</sup> Moreover, the record of the negotiation of the treaty discloses the fact that the United States had designedly refrained from accepting the suggestion of Nicaragua that the convention embody the idea expressed in the Platt Amendment as incorporated in the treaty with Cuba of 1903.<sup>3</sup> The relatively narrow limits of the arrangement thus at-

<sup>2</sup> Art. II. For the rights acquired under the convention, the United States agreed to pay to Nicaragua the sum of \$3,000,000. Art. III.

§ 23A.<sup>1</sup> Cf. Message of President Coolidge, January 10, 1927, House Doc. No. 633, 69 Cong. 2 Sess. Concerning activities of American Naval forces in August, 1926, and in March 1927, see Brief History of the Relations between the United States and Nicaragua, 1909–1928, Dept. of State, Washington, 1928, 32, and 46.

<sup>2</sup> In reference to the acquisition by the United States of an option, see Minister Chamorro, to Mr. Lansing, Secy. of State, March 6, 1916, For. Rel. 1916, 822; Mr. Lansing, Secy. of State, to Minister Chamorro, March 11, 1916, *id.*, 824.

<sup>3</sup> See Memorandum from Nicaraguan Legation for the Secretary of State, Feb. 12, 1914, For. Rel. 1914, 953.

"These negotiations were undertaken in 1914 and for some considerable time met with opposition in the United States because of the so-called Platt Amendment features, which had been included therein at the specific request of the Nicaraguan Government." (Brief

tributable to American policy, fail to reveal a common design to clothe the United States with a privilege available throughout the life of the convention, to fix the conditions on which insurrectionary warfare might be conducted on Nicaraguan soil. Obviously, however, the convention did not exhaust the rights of the United States in that regard.<sup>4</sup> Later events were of larger significance in marking the development of the special relationship between the two countries.<sup>5</sup>

When in 1927, the insurrection under Dr. Sacasa against the government under President Diaz was in full progress, the opposing parties accepted a settlement suggested by the former, but brought about through the efforts of the Honorable Henry L. Stimson, personal representative of President Coolidge. This contemplated:

- (1) Immediate general peace and delivery of arms simultaneously by both parties into American custody;
- (2) General amnesty and return of exiles and return of confiscated property;
- (3) Participation in the Diaz cabinet by representative Liberals;
- (4) The organization of a Nicaraguan Constabulary on a non-partisan basis, to be commanded by American officers;
- (5) Supervision of 1928 and subsequent elections by Americans who would have ample police power to make effective such supervision;
- (6) A temporary continuance of a sufficient force of American Marines to secure the enforcement of peace terms.<sup>6</sup>

The arrangement was carried out. The disarmament on both sides was effected.<sup>7</sup> There followed, however, numerous minor conflicts between the American forces and those of certain disaffected leaders who until their final suppression persisted in a course of banditry.<sup>8</sup> In 1928, an election was held with entire

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History of the Relations between the United States and Nicaragua, 1909-1928, Dept. of State, Washington, 1928, 17.)

<sup>4</sup> See Nicaragua, 1926-1927, *infra*, § 82B.

<sup>5</sup> See Charles E. Hughes, *Our Relations to the Nations of the Western Hemisphere*, New York, 1928, 84-85.

See also, I. J. Cox, *Nicaragua and the United States 1909-1927*, World Peace Foundation Pamphlets No. 10, 1927, 695-887; D. G. Munro, "The Basis of American Intervention in Nicaragua," *Current History*, XXVII, 857.

<sup>6</sup> Henry L. Stimson, *American Policy in Nicaragua*, New York, 1927, Chap. 2; Brief History of the Relations between the United States and Nicaragua, 1909-1928, Dept. of State, Washington, 1928, 47.

<sup>7</sup> "He (General Moncada, who was Dr. Sacasa's representative in the conference at Tipitapa) warmly approved of the plan of the supervision of the 1928 elections as the best method to save the country, but like Doctor Sacasa he urged the immediate substitution for Diaz of some other man, chiefly as a point of honor to pacify his army. He also told General Stimson frankly that he would not oppose the United States troops if the United States had determined to insist on the Diaz issue. General Stimson then told General Moncada that the United States Government intended to accept the request of the Nicaraguan Government to supervise the elections of 1928; that the retention of President Diaz during the remainder of his term was regarded as essential to that plan and would be insisted upon; that a general disarmament was also necessary for the proper conduct of such an election, and that American forces would be authorized to accept the custody of the arms of the Government and those others willing to lay them down, and to disarm the rest. General Stimson then confirmed this convention in a written communication to General Moncada." *Id.*, 49.

<sup>8</sup> *Id.*, 54-55, 58, also Appendix B, 71-74.

See, also, *The United States and Nicaragua, A Survey of the Relations from 1909 to 1932*, Dept. of State Latin American Series, No. 6.

success under the management of Brigadier-General Frank R. McCoy, U. S. A., as Chairman of the National Board of Elections.<sup>9</sup>

In these ways Nicaragua appeared to accept a wardship not required by the convention of 1914, and which served to place the Republic for the time being under the protection of the United States.<sup>10</sup> The method by which the latter caused the revolutionary party to concur, and the character of the achievement are considered elsewhere.<sup>11</sup>

Elections under the supervision of the United States were held in 1930, and also in 1932 when Dr. Sacasa was elected to the Presidency. On his assumption of office on January 1, 1933, the United States simultaneously announced the withdrawal on the following day of all American armed forces from Nicaragua. It was said that the direction of the Guardia had passed from American to Nicaraguan officers, that both political parties had agreed on their own initiative to a plan for insuring the non-political character of that organization, and that the act of turning over the direction of the Guardia to such officers marked "the realization of the other major commitment which the United States assumed at Tipitapa." It was declared that "the withdrawal of the American forces, therefore, follows upon the fulfillment of the above-mentioned obligations and marks the termination of the special relationship which has existed between the United States and Nicaragua."<sup>12</sup>

(k)

§ 24. **Certain Conclusions.** Earlier relationships wrought or acknowledged by treaty with Cuba, Panama, the Dominican Republic and Haiti marked the acceptance by those Republics of the protection of the United States. Upon the latter the Conventions imposed burdensome obligations; upon the former they imposed various restraints, the removal of which depended upon the consent of the protector. Broad, and in some cases, well-defined privileges were yielded to it in respect, under varying conditions, to the maintenance of public order. The United States found occasion to exercise them. It occupied for varying periods of time the territories of Cuba, the Dominican Republic and Haiti; and it pursued a somewhat similar course with respect to Nicaragua without the aid of a supporting treaty.

The United States was not, however, disposed to accentuate in the course of diplomatic discussions or elsewhere some consequences resulting from these relationships. It was, moreover, reluctant to proclaim that the Republics seemingly dependent upon it lacked independence. Deference for their sensibilities and aspirations at times inspired the disclaimer of a design to impair independ-

<sup>9</sup> See documents on Supervision of Election in Nicaragua, *Am. J.*, XXII, *Official Documents*, 118-124; W. H. Dodds, "American Supervision of the Nicaraguan Election," *Foreign Affairs*, VII, 488.

<sup>10</sup> Cf. Henry L. Stimson, *American Policy in Nicaragua*, 116-117.

<sup>11</sup> See *Intervention, Nicaragua, 1926-1927*, *infra*, § 82D.

<sup>12</sup> Dept. of State Press Releases, Jan. 7, 1933, 3.

See also *The United States and Nicaragua: A Survey of the Relations from 1909 to 1932*, Dept. of State, Latin American Series, No. 6, 1932; Foreign Policy Association Information Service, "American Supervision of Elections in Nicaragua," Dec. 24, 1930, Vol. VI, No. 21.

ence when the protector asserted even through military force, the restraining powers yielded to it by treaty.

The relatively recent agreements of the United States with Cuba, Panama, and Haiti, have rendered it unnecessary to probe at this time the extent of the diminution of freedom from external control which their previous relationships with the United States necessarily entailed. The situation has completely changed. The character of the new contractual arrangements render it, moreover, equally unnecessary to examine possible situations in the presence of which the United States might deem it legally possible to exercise any measure of restraint. The remnant of any privileges which it still retains need not be discussed. Again, the participation of the United States in the non-interventional policies enunciated in recent multipartite inter-American conventions<sup>1</sup> has for the time being allayed fears of an overlordship at Washington and demolished reason for them. As a cordial supporter of inter-American solidarity, the United States has not, in recent years, been disposed to oppose the lessening of its special rights as protector over States whose territories are near its own. Save where some still existing treaty provisions preserve a special privilege, the United States does not appear to evince interest in checking the freedom of its neighbors except under circumstances when in virtue of applicable principles of international law it may assert its normal rights as occasion may require, and may endeavor also to maintain them when the conduct of a non-American power challenges the American claim under the Monroe Doctrine.

### (5)

**§ 25. The Protection of Backward Communities or of Countries of Unique Civilization.** Not infrequently a so-called protectorate has been established by a State over a community or entity unfamiliar with the full requirements of civilization as tested by the standards prevailing in the international society. In some cases the community has at the time appeared to be remote from the stage where it might be deemed to be capable of responding to them. In others it has revealed the development of standards of its own and a faithfulness in observing them that have given promise of early capacity to respect those prescribed by the family of nations.

An uncivilized community, so long as it remains such, is obviously ineligible for statehood.<sup>1</sup> The outside world regards it as subject to the control of the State which in fact endeavors to protect it.<sup>2</sup> Thus, for many purposes the re-

<sup>1</sup> § 24.<sup>1</sup> See Intervention, The Conduct of the United States, Non-Intervention in the Western Hemisphere, *infra*, § 83B; The Monroe Doctrine, The Alignment of the United States with America and Non-America, *infra*, § 97A.

<sup>2</sup> § 25.<sup>1</sup> "Where there is no State, that is to say, in an uncivilized region, there can be no protected State, and therefore, no such protectorate as has been described in the last paragraph." Westlake, Collected Papers, 182. See Countries Not Familiar with Accepted Standards of Civilization, *infra*, § 33.

<sup>2</sup> Declared Huber, Arbitrator, in the course of his award of April 4, 1928, in The Island of Palmas Arbitration: "As regards contracts between a State or a company such as the Dutch East India Company and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of

lationship between the protector and the protected community may not be a matter of international concern. An anomalous situation exists, however, if the protecting State endeavors to exclude other States from commercial or other intercourse with the community, or to fix the conditions of such intercourse, without acquiring itself the territory thereof, or without otherwise assuming responsibility for the maintenance of justice therein.<sup>3</sup>

Where a protectorate is established over a country which, despite its unfamiliarity with, or inability to make full response to, the standards of civilization fixed by the international society, has long respected those of a different civilization not unworthy of the name, and which occupies and controls territory within fairly well-defined limits, the situation resembles that where the protected entity is itself a State. The country concerned may have, moreover, previously enjoyed extensive diplomatic intercourse with independent States and may have concluded treaties with them. Thus Tunis was a party to numerous treaties when, in 1881, it became a French protectorate.<sup>4</sup> Likewise, Zanzibar<sup>5</sup> and Korea had contracted conventions with the outside world when Great Britain and Japan, respectively, established protectorates over them.<sup>6</sup>

The readiness of members of the international society to enter into contractual relations with entities or countries not belonging to it has been habitual. By virtue of treaties with them States have oftentimes acquired commercial and

indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account. . . . The form of legal relations created by such contracts is most generally that of suzerain and vassal, or of the so-called colonial protectorate.

"In substance, it is not an agreement between equals; it is rather a form of internal organization of a colonial territory, on the basis of autonomy for the natives. In order to regularize the situation as regards other States, this organization requires to be completed by the establishment of powers to ensure the fulfillment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of territorial sovereignty as towards other members of the community of nations." (*Am. J.*, XXII, 867, 897-898.)

<sup>3</sup> See General Act of the Berlin Conference of Feb. 26, 1885, concerning the assumption of protectorates on the African coast by any of the contracting parties, and the requirements incidental thereto in the matter of notification, and in the establishment of governmental authority in regions occupied, *Nouv. Rec. Gén.*, 2 Sér., X, 414, 426; Moore, Dig. I, 267-268. See in this connection Westlake, 2 ed., I, 121-129.

Concerning the protected princes of India, cf. William Lee-Warner, *The Protected Princes of India*, London, 1894; Westlake, *Collected Papers*, 220-224.

<sup>4</sup> See treaty between France and Tunis of May 12, 1881, *Nouv. Rec. Gén.*, 2 Sér., VI, 307; also treaty of June 8, 1883, *id.*, IX, 698. See, also, in this connection Fauchille 8 ed., § 184, and literature there cited.

As early as Aug., 1797, the United States concluded a treaty with Tunis, and did so again Feb. 24, 1824. Malloy's *Treaties*, II, 1794 and 1800.

<sup>5</sup> See Treaty of Amity and Commerce with Muscat, of Sept. 21, 1833, Malloy's *Treaties*, I, 1228, accepted by Zanzibar after the separation of Zanzibar from Muscat, Oct. 20, 1879; Treaty with Zanzibar as to Duties on Liquors, and Consular Powers, of July 3, 1886, Malloy's *Treaties*, II, 1899.

See Brit. and For. State Pap., LXXXII, 654, embracing text of notification of the British Protectorate under date of Nov. 4, 1890; also declarations of Great Britain and France, of Aug. 5, 1890, *id.*, 89.

See treaties between the United States and His Britannic Majesty, "acting in the name of His Highness the Sultan of Zanzibar," of May 31, 1902, Malloy's *Treaties*, I, 784, of June 5, 1903, *id.*, 785, and of February 25, 1905, *id.*, 795.

<sup>6</sup> See treaty with Corea (Korea) of Peace, Amity, Commerce and Navigation of May 22, 1882, Malloy's *Treaties*, I, 334.

See arrangements between Japan and Korea of Aug. 24, 1904, For. Rel. 1904, 439, and of Nov. 17, 1905, *id.*, 1905, 612. Also in this connection, documents in For. Rel. 1905, 612-616.

other privileges for which the grantees have demanded respect.<sup>7</sup> They have been unwilling to admit that the validity or permanence of what was yielded depended upon the character of the civilization possessed by the grantor, or upon its eligibility for the full privileges of statehood. In a word, capacity to contract with States, and by such process to grant to them important privileges such as those of extraterritorial jurisdiction, has not been deemed to depend upon capacity also for statehood. Hence, in American opinion, a protecting State is not able, by extending its strong arm as such over the country subjected to wardship, to ignore or set aside what the latter has already by treaty formally conceded.<sup>8</sup> Again, where the privilege has been regarded as capable of outliving the treaty through which it was yielded, and as constituting an irrevocable grant, a subsequent event serving neither to effect a change of sovereignty nor to terminate the treaty has been looked upon as inconsequential.

It should be observed in this connection that the establishment of a protectorate over a country enjoying diplomatic intercourse with the outside world, contemplates the retention by it of an international personality recognizable as such by the family of nations. This is true regardless of the character of the civilization prevailing within the territory concerned. Such retention is manifested by some participation, however slight, by the protected country in the conduct of its foreign affairs, or by its continued existence as a political entity maintaining, possibly through the medium of its protector, diplomatic relations with the outside world. As the establishment of a protectorate does not imply that a change of sovereignty has taken place, the treaties previously concluded by the protected State are not affected by any rule that is applicable upon such

<sup>7</sup> See treaty between the United States and France of March 15, 1904, in which the former renounced its rights under existing treaties with Tunis, and the latter undertook on its part "to assure these rights and privileges in Tunis to the consuls and citizens of the United States and to extend to them the advantage of all treaties and conventions existing between the United States and France." Malloy's Treaties, I, 544, 545.

Declared the Permanent Court of International Justice on Feb. 7, 1923, in the course of its Fourth Advisory Opinion in the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French Zone): "The international character of the legal situation follows not only from the fact that the two Governments concerned place a different construction upon the obligations undertaken, but also from the fact that Great Britain exercises capitulatory rights in the territory of the French Protectorate in Morocco." (Publications, Permanent Court of International Justice, Series B, No. 4, 30.)

<sup>8</sup> On Oct. 2, 1886, the United States concluded a treaty of Amity, Commerce and Navigation with the King of Tonga. (Malloy's Treaties, II, 1781.) In 1915, negotiations were initiated by the United States with Great Britain which had proclaimed a protectorate over the Tonga Islands, looking to the abrogation of Art. X of the treaty as in conflict with the provisions of the Act of Congress of March 4, 1915, known as the La Follette Seamen's Act. (See Mr. Bryan, Secy. of State, to Ambassador Page, May 29, 1915, For. Rel. 1915, 11.) There finally resulted a British notice of denunciation of the entire treaty other than Art. VI, issued on July 28, 1919, in accordance with the terms of Art. XIV. It is to be observed that the notice of denunciation was on behalf of the King of Tonga. Moreover, it marked the recognition by the protector of the continuance of the contractual obligation created by the treaty in excepting from the operation of the notice Art. VI which by its terms was terminable only by mutual consent. By virtue of that article the United States had acquired the privilege of securing at a nominal rental the lease of ground for a permanent coaling and repair station in any harbor of the Tonga Islands. Under instructions from the Dept. of State, Ambassador Davis on March 3, 1921, informed the British Foreign Office that it was the understanding of the United States that the provisions of Art. VI of the treaty continued in force under the exception which was made concerning them in Art. XIV. See also documents in Hackworth, Dig., I, § 17.

an event, or that is brought into operation by reason of it. If a protecting State seeks to destroy the international personality of its ward and so put an end to its eligibility for statehood, it should by some appropriate process make known its design and in pursuance thereof assert its supremacy as the territorial sovereign.

The United States invoked the foregoing principles in respect to Morocco over which France established a protectorate by virtue of the Treaty of Fez, of March 30, 1912.<sup>9</sup> Declaring that the attitude of his country had been previously explained to M. Jusserand, the French Ambassador, Secretary Lansing took pains to inform him on January 18, 1916, that the United States had "consistently maintained the position that the rights granted to it by capitulations in any of the extraterritorial countries have been irrevocably granted" and could not be taken away without American consent.<sup>10</sup> In the course of assuring the Ambassador, in January 1917, of the disposition of the United States to recognize the protectorate, and in his communication of October 20, 1917, announcing recognition, Secretary Lansing was far from acknowledging that any pre-existing conventional arrangements between the United States and Morocco had been terminated.<sup>11</sup> Again, on November 28, 1923, Secretary Hughes announced that the Department of State was desirous that the French Government be made aware informally of the fact that the American Government did not consider the cancellation of the American capitulatory rights in the French Zone of Morocco "to be a natural sequence to our recognition of French Protectorate in part of Morocco, or to our suggested adherence to a convention purporting to deal solely with internationalization of City of Tangier."<sup>12</sup> Nor was the United States disposed to take a different stand in consequence of the Convention regarding the Organization of the Statute of the Tangier Zone signed by Great Britain, Spain and France on December 18, 1923, and amended by a protocol on July 25, 1928.<sup>13</sup>

In October, 1937, the Department of State announced a readiness to enter into negotiations with France for a convention of commerce and navigation defining the commercial relations between the United States and Morocco and embracing provisions for the surrender of American capitulatory rights in Morocco along the lines of the Anglo-French Convention of July 29, 1937.<sup>14</sup>

<sup>9</sup> *Am. J.*, VI, *Supplement*, 207; *Nouv. Rec. Gén.*, 3, Sér. VI, 332. *Cf.*, also convention between France and Spain concerning Morocco, Nov. 27, 1912, *id.*, VII, 323; *Am. J.*, VII, *Supplement*, 81. Also Articles 141-146 of the Treaty of Versailles, of June 28, 1919, U. S. Treaty Vol. III, 3395.

See N. Dwight Harris, "The New Moroccan Protectorate," *Am. J.*, VII, 245; E. Rouard de Card, *Le Traité de Versailles et le Protectorat de la France au Maroc*, Paris, 1923; same author, *Les États-Unis d'Amérique et le protectorat de la France au Maroc*, Paris, 1930.

<sup>10</sup> For. Rel. 1916, 800. Also Mr. Lansing, Secy. of State, to Ambassador Riano, of Spain, Aug. 20, 1917, For. Rel. 1917, 1096. See also, For. Rel. 1911, 621-624.

<sup>11</sup> Mr. Lansing, Secy. of State, to Ambassador Jusserand, Jan. 2, 1917, and Jan. 15, 1917, For. Rel. 1917, 1093 and 1094, also same to same, Oct. 20, 1917, *id.*, 1096. See documents in Hackworth, Dig., I, 89.

<sup>12</sup> For. Rel. 1923, Vol. II, 584.

<sup>13</sup> *Am. J.*, XXIII, *Official Documents*, 235.

It is understood that the Spanish Zone in Morocco, based upon a treaty concluded by France and Spain, Nov. 27, 1912, *Am. J.*, VII, *Supplement*, 81, has not been recognized by the United States. See documents in Hackworth, Dig., I, 90; also documents, *id.*, II, 507.

<sup>14</sup> The statement in the text was taken from a statement in Hackworth, Dig., II, 506.



§ 25A. **The Tangier Zone.** By the Convention regarding the Organization of the Statute of the Tangier Zone, concluded in behalf of Great Britain, Spain and France, December 18, 1923,<sup>1</sup> and amended by a protocol of July 25, 1928,<sup>2</sup> to which Italy was a party, the contracting parties were, under Shereefian authority,<sup>3</sup> enabled to transform the town and district of Tangier into an entity styled the Tangier Zone. Through a consular "Committee of Control,"<sup>4</sup> an "International Legislative Assembly," under the presidency of a Mendoub nominated by His Shereefian Majesty and composed of the representatives of the foreign and native communities,<sup>5</sup> a Mixed Court responsible for the administration of justice over the nationals of foreign Powers,<sup>6</sup> and an Administrator directing the International Administration of the Zone,<sup>7</sup> executive, judicial and legislative powers were to be exercised.<sup>8</sup> Not merely the administration of the Zone by international agencies, but also the relation in which it was to stand in respect to the outside world were significant. There was generally no derogation from the plan registered in the Protectorate Treaty of March 30, 1912, confiding the control of diplomatic matters to the French Republic;<sup>9</sup> and there was express arrangement that the protection in foreign countries "of Moroccan subjects of the Tangier Zone and of their interests" should be entrusted to the diplomatic and consular agents of that Republic.<sup>10</sup> It was declared that the Zone should "respect all treaties in force."<sup>11</sup> It was also provided, however, that "international agreements concluded in the future by His Shereefian Majesty" should "only extend to the Tangier Zone with the consent of the International Legislative Assembly of the Zone."<sup>12</sup> There was thus yielded to the Zone as

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where it is declared that "The French Government acquiesced in this proposal in a note of August 5, 1938, from its Chargé d'Affaires in Washington to the Department of State."

§ 25A. <sup>1</sup> *Am. J., XXIII, Official Documents, 235.* See in this connection documents in Hackworth, Dig., I, § 17.

<sup>2</sup> *Am. J., XXIII, Official Documents, 281.*

<sup>3</sup> Shereefian Dahir Organizing the Administration of the Tangier Zone, annexed to convention of Dec. 18, 1923. *Am. J., XXIII, Official Documents, 259.*

<sup>4</sup> Arts. 29-31 of convention of Dec. 18, 1923.

<sup>5</sup> Art. 32.

<sup>6</sup> Art. 48; also Dahir Concerning the Organization of an International Tribunal at Tangier, annexed to the convention, *Am. J., XXIII, Official Documents, 273.* By Art. 13 of the convention it was provided that "as a result of the establishment" of the Mixed Court, "the capitulations shall be abrogated in the Zone," entailing also the suppression of the system of protection. See Manley O. Hudson, "The International Mixed Court at Tangier," *Am. J., XXI, 231.*

<sup>7</sup> Art. 35.

<sup>8</sup> According to Art. 25: "The administration of the native population and of Mussulman interests in the Zone as well as the administration of justice shall continue to be exercised, with respect to traditional forms, by a Moroccan staff directly appointed by the Sultan and under the control of his agents." It was declared in Article 29 that the Mendoub will "directly administer the native population."

<sup>9</sup> Art. 5, where it was also provided that "The duly constituted authorities of the Zone may, however, negotiate with the consuls on questions of interest to the Zone within the limits of its autonomy."

<sup>10</sup> Art. 6.

<sup>11</sup> Art. 7.

<sup>12</sup> Art. 8. It was here also declared that "by exception, international agreements to which all the Powers signatories of the Act of Algieras are contracting parties or shall have acceded apply automatically to the Zone."

such a voice in the control of subsequent contractual undertakings applicable to it. Arrangements to place it "under a régime of permanent neutrality,"<sup>13</sup> and others designed to apportion to it its share in the service of certain loans,<sup>14</sup> and otherwise to accentuate its existence as a fiscal unit,<sup>15</sup> were supplementary to, and in harmony with, the apparent design of the contracting parties to confer upon the Zone an international personality.<sup>16</sup>

<sup>13</sup> Art. 3.

<sup>14</sup> Art. 21.

<sup>15</sup> Arts. 20 and 24.

<sup>16</sup> In March, 1923, before the meeting at Paris of representatives of the French, Spanish, British and Italian Governments to discuss Moroccan affairs with a view to reaching an agreement as to the future administration of Tangier, the Government of the United States took occasion to remind the foreign offices of those Powers that prior to a similar conference by the French, Spanish and British Governments in the autumn of 1923, it had made known to them its position as a party to the Act of Algeciras, and had stated that while the United States had no political interest in Morocco it had a fundamental interest in the maintenance of the Open Door and in the protection of the life, liberty and property of American citizens in Morocco, and that it presumed that nothing would be done by the conferring Powers to interfere with the principle of the Open Door or with the interests of the United States. It was added that the views of the United States regarding Tangier which were further set forth in its correspondence with the French, Spanish and British Governments regarding the possibility of its adherence to the Statute of Tangier remained unaltered, and that it would, accordingly, advise the Powers about to confer that it made full reservation of its position on any decisions taken by the Conference which in any way might affect or touch upon its rights and interests in Morocco and Tangier. (Dept. of State Press Releases, March 16, 1928.)

On Nov. 23, 1928, the French Resident-General in Morocco, acting in his capacity as Minister of Foreign Affairs of the Sultan, through a note to the American Diplomatic Agent and Consul General at Tangier, requested the consent of the Government of the United States to the application to American nationals and ressortissants in the Tangier Zone of Morocco of a general law proposed by the International Legislative Assembly and sometimes referred to as the "padlock law," whereby any increase of consumption taxes would be provisionally effective the day after the measure proposed to create them had been deposited in the office of the Assembly, thus giving the consent of the United States to subsequent specific laws — assuming it were granted — a retroactive effect. In submitting the request in this way the Shereefian Government was following the procedure required under treaty rights acquired by the United States by the Act of Algeciras and previous treaties, which necessitated a specific consent on the part of the Government of the United States before any new laws in Morocco could be made applicable to American nationals and protégés in that country. The request was, moreover, supported by notes submitted by the French, British, Italian and Spanish Embassies.

On Feb. 14, 1929, the Government of the United States made response, and withheld its consent. It declared that while desirous of facilitating the task of the Administration of Tangier in such manner as might be possible and appropriate, the contemplated law would "involve a radical departure from its well-established practise in Morocco in conformity with its treaty rights, and a substantial alteration of those rights." It declared, however, that it would continue to give the same careful consideration which it had previously accorded to requests made in accordance with existing treaty provisions for its consent to the application to its nationals and ressortissants of new taxation measures which might be definitely adopted by the competent legislative body in Tangier. Furthermore, it declared that if given through the customary channel an opportunity to examine proposed taxation measures, it would issue appropriate instructions in advance to the American Diplomatic Agent and Consul General at Tangier, so that, where possible, American consent to the application of those measures might be given immediately after they had been duly adopted by the competent legislative body in the form submitted to the United States. (Dept. of State Press Releases, Feb. 27, 1929.)

In a communication from Mr. Hull, Secy. of State, to Mr. Blake, Diplomatic Agent and Consul General at Tangier, July 22, 1936, it was said: "Article 3 of the Statute of Tangier would seem to prohibit the use of the Zone as a base of military operations. The Department is not in possession of sufficient facts to enable it to determine whether the refueling of the vessels in question would be in contravention of this article. It is, however, of the opinion that any repeated refueling of the Spanish war vessels in Tangier during the present uprising would be in violation of the provisions of the article."

It may be observed that in November, 1940, Spanish authorities undertook to make the Tangier Zone a part of the Spanish protectorate in Morocco.<sup>17</sup> Shortly thereafter the Department of State announced that certain representations had been made to the Spanish Government through the American Ambassador to Spain, "concerning the recent action of the Spanish military authorities at Tangier, Morocco." It was added that although the United States had not adhered to the convention of December 18, 1923, revised on July 25, 1928, regarding the organization of the Statute of the Tangier Zone, it possessed certain treaty rights in Morocco, including the International Zone of Tangier, on which the representations of the American Government had been based.<sup>18</sup>

## (6)

MANDATES UNDER THE LEAGUE OF NATIONS<sup>1</sup>

## (a)

§ 26. **The Terms of the Covenant. Their Implications.** Article 22 of the Covenant of the League of Nations declared that

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

"While this Government has not accepted the Statute of Tangier and its provisions are not, therefore, applicable to American nationals, nevertheless the Department, in the interest of international coöperation for the avoidance of complications, would not be disposed to support American nationals in Tangier in any efforts to furnish supplies to either side to the present conflict, contrary to the policy adopted by the constituted authorities of the Tangier Zone." (Hackworth, *Dig.*, I, 95.)

<sup>17</sup> See Gabriel Delore, "The Violation by Spain of the Statute of Tangier and its Consequences as they Affect the United States," *Am. J.*, XXXV, 140. Also, *New York Times*, Nov. 5, 1940, p. 7.

<sup>18</sup> Dept. of State Bulletin, Nov. 16, 1940, 430.

§ 26.<sup>1</sup> For a bibliography of the documents and extensive literature concerning mandates, see Quincy Wright, *Mandates Under The League of Nations*, Chicago, 1930, 639-668; also Aaron M. Margalith, *The International Mandates*, Baltimore, 1930, 229-233; Norman Bentwich, *The Mandates System*, London, 1930; Elizabeth Van Maanen-Helmer, *The Mandates System in Relation to Africa and the Pacific Islands*, London, 1929. For documents published by the League of Nations concerning the mandates system, see, *Publications issued by the League of Nations*, 1929, catalogue, 124-146.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific islands, which, owing to the sparseness of their population or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.<sup>2</sup>

It was provided that in every case of mandate, the Mandatory should render to the Council an annual report in reference to the territory committed to its charge. The degree of authority, control or administration to be exercised by the Mandatory was, if not previously agreed upon by the Members of the League, to be explicitly defined by the Council. A permanent Commission was to be constituted to receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates.<sup>3</sup> By such process it was sought to safeguard respect for the underlying principle enunciated in the first paragraph of the article as against abuses of power by the Mandatory, and also to facilitate the performance by the Mandatory of the task to be undertaken by it.

The mandates system revealed the influence of fresh and changing standards upon the conscious life of that part of the international society which, in 1919, was prepared to accept the principle that the well-being and development of backward peoples constituted a trust sufficiently sacred to call for the acknowledgment, in their behalf, of duties, State to State, by the Powers in control of the situation.<sup>4</sup> A sense of moral responsibility was acute enough to breed international legal obligations. These found expression in the terms of the Covenant quoted above, and reflected the determination of those Powers to abstain from taking over, and treating as purely domestic establishments unfettered by ex-

<sup>2</sup> U. S. Treaty Vol. III, 3342-3343.

<sup>3</sup> *Id.* See Hackworth, Dig., I, § 21, and documents there cited.

<sup>4</sup> These standards had been long in the making. See Alpheus H. Snow, *The Question of Aborigines in the Law and Practice of Nations*, Washington, 1919.

ternal restraint, certain territories with the people in them, which successes in the World War had enabled the victors to sever from the control of two of their foes. The significant feature of the arrangement, both in its conception and execution, was the willingness of Powers that found themselves free to deal as they saw fit with what lay within their grasp, to subject the control of certain fruits of victory to any degree of supervision and restraint by an international agency acting under a considered and accepted design. In pursuance of the plan the Principal Allied Powers through their Supreme Council proceeded to allocate particular areas to prospective mandatories, and to draft mandates for the approval of the Council.<sup>5</sup> Upon that approval, mandatory States undertook, under the terms of the mandates, the tasks assigned to them.<sup>6</sup>

As Professor Wright has stated, "Three types of mandates were prepared designated as 'A,' 'B,' and 'C' corresponding to the three classes of territory described in article 22 of the Covenant. The first included former Turkish territory, the second Central African territory, and the third Southwest Africa and the Pacific islands."<sup>7</sup>

The lofty design reflected in the terms of the Covenant was to be given effect in areas which bore a resemblance to each other in that the States "which formerly governed them" had lost control of them. Those States were Germany and Turkey. By the terms of the Treaty of Versailles, Germany "renounced in favour of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions"; and when the treaty became effective, these ceased to be under the sovereignty of Germany.<sup>8</sup> At that time and for a substantial period thereafter, however, Turkey did not cease to be the sovereign of wide areas within Asia which were then under the control of her enemies and which they planned to subject to the operation of the mandates system. The loss or transfer of Turkish sovereignty was wrought through the Treaty of Lausanne signed on July 24, 1923, which became effective in August 1924, whereby peace

<sup>5</sup> See Quincy Wright, *Mandates Under the League of Nations*, 43-48, and documents there cited.

<sup>6</sup> For the texts of the several mandates, see *Am. J.*, XVII, *Supplement*, 138-194.

See also Decisions of the Council of the League of Nations of Sept. 27, 1924, and March 11, 1926, relating to the application of the principles of Art. 22 of the Covenant to Iraq, together with certain Treaties and Agreements between Great Britain and Iraq and other relevant documents, in League of Nations document C. 216, M. 77. 1926. VI.

<sup>7</sup> Quincy Wright, *Op. cit.*, 47. "A" mandates were assigned to, and accepted by, Great Britain for Palestine (and Transjordan); and were assigned to, and accepted by, France for Syria and the Lebanon.

"B" mandates were assigned to, and accepted by, Great Britain for the British Cameroons, British Togoland and Tanganyika, by France for the French Cameroons and French Togoland, and by Belgium for Ruanda Urundi.

"C" mandates were assigned to, and accepted by, Japan for the Pacific Islands north of the Equator, by the Union of South Africa for South-West Africa, by New Zealand for Samoa, by the British Empire (embracing Great Britain, Australia, and New Zealand jointly) for Nauru, and by Australia for certain other Pacific Islands south of the Equator.

Iraq, instead of being an entity or area under an "A" mandate, became a State under the protection of Great Britain through a treaty signed on Oct. 10, 1922, to which, however, the principles of Art. 22 of the Covenant were applied in consequence of decisions of the Council of Sept. 27, 1924, and March 11, 1926. See, League of Nations document, C. 216. M. 77. 1926. VI.

With reference to the allocation of mandates according to the three categories in which they were divided, see statement in Hackworth, *Dig.*, I, § 21.

<sup>8</sup> See Art. 119, U. S. Treaty Vol. III, 3391.

was restored between Turkey and the Principal Allied Powers.<sup>9</sup> On July 24, 1922, just one year before the signature of that treaty, the Council of the League approved of the mandates for Palestine and Syria, which were to become effective automatically upon the receipt by the President of the Council of notification of agreement by France and Italy on certain points relative to those mandates. They became effective in point of fact on September 29, 1923.<sup>10</sup> The Principal Allied Powers thus relied upon the fact of their own control over the territory of an enemy which had not agreed to terms of peace as the foundation for the régime which they proceeded to institute therein.<sup>11</sup> It should be observed, however, that the Treaty of Lausanne, manifesting as it did the relinquishment by Turkey of claims to areas that had been wrested from its control in the course of the war, gave expression to no objection on the part of that State to the previous application of the mandatory system to territory that had been its own at a time when it was its own.<sup>12</sup>

(b)

§ 26A. The Relation of the United States to the Mandatory System. On November 19, 1919, the Senate of the United States withheld its approval of the Treaty of Versailles, of June 28, 1919, with and without reservations.<sup>1</sup>

<sup>9</sup> Brit. Treaty Series, No. 16 (1923); *Am. J.*, XVIII, *Official Documents*, I.

<sup>10</sup> League of Nations, *Official Journal*, III, 825, and IV, 1355; Wright, *op. cit.*, 607, note 9.

"But the treaty [of Sèvres], though signed, was never ratified; and the Mandates were brought into effect before there had been an express renunciation of sovereignty by Turkey." (Norman Bentwich, *The Mandates System*, 12.)

<sup>11</sup> The reference in Art. 22 of the Covenant to colonies and territories that had "ceased to be under the sovereignty of the States which formerly governed them," and to "communities formerly belonging to the Turkish Empire" as within that group of entities to which the mandatory régime should be applied, was perhaps fairly responsive to the situation which, on June 28, 1919, when the treaty of Versailles was signed, was expected to exist in the very near future. It may then have been a reasonable expectation that an appropriate treaty of peace with Turkey would, by the time the treaty of Versailles became effective or shortly thereafter, pay the desired heed to the will of the victors. The terms of the Treaty of Sèvres which Turkey was called upon to accept and did in fact sign on Aug. 10, 1920, revealed the soundness of such expectations. But the political and military situation in Turkey underwent a radical change. A new Turkey came into being; a Republic supplanted the wreckage of an Empire from the domain of which the Sultan Abdul Hamid was obliged to flee. Much territory was regained which had seemingly been lost. The Greeks were driven from Anatolia and Smyrna, the French from Cilicia, and the Italians dislodged in Konia; and to Constantinople the Turk returned victorious, contemptuous of the unratified treaty of Sèvres, and of the theory on which it rested. These events did not, however, enable Turkey to regain control over certain broad areas to which its enemies sought to apply the mandates system; but they did serve to render uncertain the time when, and the exact method whereby, a treaty of peace might register Turkish acquiescence in a change of sovereignty. Nevertheless, that acquiescence was anticipated, and the recitals of the mandates (such, for example, as those for Palestine and for Syria and the Lebanon) employing the language of Article 22 of the Covenant, referred to the territories concerned as having "formerly belonged to the Turkish Empire." The enemies of Turkey did not, however, undertake to annex what lay within their grasp, or to effect a change of sovereignty through subjugation. They still looked forward to, and ultimately obtained, a treaty of relinquishment. In the interval before it was consummated, they must be deemed to have acknowledged that to the relinquisher belonged the territories concerned.

<sup>12</sup> According to Art. XVI: "Turkey hereby renounces all rights and titles whatsoever over or respecting the territories situated outside the frontiers laid down in the present treaty and the islands other than those over which her sovereignty is recognized by the said treaty, the future of these territories and islands being settled or to be settled by the parties concerned." (*Am. J.*, XVIII, *Official Documents*, 9.)

§ 26A. <sup>1</sup> *Cong. Rec.*, LVIII, 8786; 8802; 8803.

The Senate again rejected that treaty with amendments on March 19, 1920.<sup>2</sup> In January, 1920, the treaty became operative, and the League of Nations was launched on its way.

In the spring of 1919, President Wilson in the course of discussions at Paris, respecting the assignment of former German islands in the North Pacific Ocean to Japan under mandate, made reservations touching the Island of Yap, by reason of its importance as a base of cable communications.<sup>3</sup> In a note to the British Government of May 12, 1920, respecting the application of a mandatory régime over Turkish territory in Mesopotamia, Secretary Colby through Ambassador Davis, demanded respect for the open-door policy in the matter of the exploitation of petroleum.<sup>4</sup> In a note of November 20, 1920, to Earl Curzon, he declared that the United States as a participant in the World War and a contributor to its successful issue could not consider "any of the Associated Powers, the smallest not less than itself, debarred from the discussion of any of its consequences, or from participation in the rights and privileges secured under the mandates provided for in the treaties of peace."<sup>5</sup> Moreover, in behalf of the United States he requested that draft mandate forms be communicated to his government for its consideration before their submission to the Council.<sup>6</sup>

On December 17, 1920, the Council of the League confirmed the so-called "C" Mandates, embracing a mandate to Japan of the former German islands in the North Pacific Ocean, including Yap, pursuant to the previous action of the Supreme Allied Council, and purporting to be in the name of the Principal Allied and Associated Powers, and yet in fact without the assent of the United States.<sup>7</sup> In a note of February 21, 1921, addressed to the President and members of the Council, Secretary Colby declared that: "as one of the Principal Allied and Associated Powers, the United States has an equal concern and an inseparable interest with the other Principal Allied and Associated Powers in the overseas possessions of Germany and concededly an equal voice in their disposition, which it is respectfully submitted cannot be undertaken or effected without its assent."<sup>8</sup> It fell to Secretary Hughes, who assumed office on March 4, 1921,

<sup>2</sup> *Cong. Rec.*, LIX, 4599. See in this connection, H. B. Learned, in Temperley's *History of the Peace Conference*, VI, 391.

<sup>3</sup> See Mr. Colby, Secy. of State, to The President and Council of the League of Nations, Feb. 21, 1921, League of Nations, *Minutes of Council*, 12th Session, Feb. 21 to Mar. 4, 1921, Annex 154b.

<sup>4</sup> Misc. No. 10 (1921). Correspondence between His Majesty's Government and the United States Ambassador respecting Economic Rights in Mandated Territories. [Cmd. 1226] 1921, p. 2.

<sup>5</sup> *Id.*, p. 8.

<sup>6</sup> See documents in Hackworth, Dig., I, § 21.

Concerning the unwillingness of the Congress in 1920 to grant to the Executive authority to accept a mandate over Armenia, see documents cited in Hackworth, Dig., I, § 21.

<sup>7</sup> *Am. J.*, XVII, *Official Documents*, 160.

<sup>8</sup> League of Nations, *Minutes of Council*, 12th Session, February 21 to March 4, 1921, Annex 154b. In the course of this note Secretary Colby declared that the statements in the mandate to Japan making mention of an agreement on the part of "the Principal Allied and Associated Powers" were incorrect by reason of the absence of agreement on the part of the United States which was one of them.

He adverted to President Wilson's reservation in respect to the Island of Yap, and to the fact that his country had never assented to the inclusion of that Island in the proposed mandate to Japan. He concluded with the statement that the Government of the United

to develop and press upon the Principal Allied Powers the full measure of the objections of his country.

Secretary Hughes adhered to the position that the right to dispose of the overseas possessions of Germany having been acquired only through the victory of the Allied and Associated Powers, could not validly or effectively be disposed of without the assent of the United States as a participant in that victory; that such a position was confirmed rather than opposed by the terms of the Treaty of Versailles through which Germany had renounced in favor of the Principal Allied and Associated Powers, of which the United States was one, all rights to overseas possessions. Adverting to the fact that that treaty, according to Article 440, should become operative when ratified by Germany and three of the Principal Allied and Associated Powers, he maintained that it was clearly not the design that, upon ratification by three of those powers, Germany should retain any undivided share of right, title, or sovereignty in its oversea possessions, the clear intent being that the renunciation should not be divisible. Accordingly, he declared that had the treaty become operative through or on the ratification by merely three of those Powers, the cession by Germany would, nevertheless, have become wholly operative, divesting Germany of its entire rights, and that, as its provisions themselves stated, the renunciatory article would of necessity have become operative in favor of the five Principal Allied and Associated Powers. He contended that the three Powers which ratified the treaty could have asserted no greater right than the treaty yielded, and no exclusive privileges which it did not specifically yield. He declared that a like result was apparent on the actual ratification of the Treaty of Versailles, and that the failure of his country to ratify it did not serve to modify the renunciation which Germany had made; and that any different terms would necessarily require the consent of the interested parties including Germany; and no amendatory arrangement had been concluded. He called attention to the later treaty between Germany and the United States (of July 22, 1921), whereby the former confirmed to the latter, the rights accruing to it under Article 119, of the Treaty of Versailles. Thus, he declared that both by the American participation in the common victory and by the explicit terms of the German renunciation, his country must insist that no valid disposition of the former German overseas possessions could be made without the acquiescence of the United States, manifested by an appropriate treaty to which the Senate should give its approval. The Government of the United States, he said, could not deviate from this fundamental stand, and consequently, could not admit that less than five of the Principal Allied and Associated Powers could take for themselves or grant to others any privileges or advantages not equally accorded the United States in those possessions, of which title and right were, by reason of the common

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States could not regard itself as bound by the provisions of the mandate to Japan, and desired to record its protest against the reported decision of the Council of the League of December 17, 1920, in relation to the matter, and also "to request that the Council, having obviously acted under a misapprehension of the facts, should reopen the question for the further consideration which the proper settlement of it clearly requires."

See in this connection documents in Hackworth, Dig., I, § 24.



victory, renounced by the former sovereign in favour of the five Principal Allied and Associated Powers.<sup>9</sup>

The situation was one where, in the opinion of the Secretary of State, a sovereign had divested itself of title and had made and executed grant thereof for the benefit of designated grantees. Nothing remained to be done by the grantor, and no formal assent by convention on the part of the grantee was requisite when once the treaty went into effect. The case was well outside of the familiar principle that withholds from a State not a party to a treaty the legal right to share in the benefits derivable from promises remaining to be performed by a party to the agreement in fulfillment of its terms.<sup>10</sup> That Germany acquired by the Treaty of Versailles the right to demand that the mandatory system as set forth in Article 22 thereof be applied to former possessions did not change the character of its grant as an executed one. No further act on the part of Germany was needed in order to perfect the transfer of sovereignty after the treaty became effective.<sup>11</sup>

The Secretary of State, in the course of the Conference on the Limitation of Armament that convened at Washington in November, 1921, won the acquiescence of the delegates of Japan as well as of the heads of other Allied missions, including Mr. Balfour. A treaty safeguarding American privileges in the islands under Japanese mandate was concluded on February 11, 1922.<sup>12</sup> Treaties of like import and respectful of the same principle were concluded with France, on February 13, 1923, relating to rights in the Cameroons,<sup>13</sup> and to rights in Togoland,<sup>14</sup> with Belgium, on April 18, 1923, and (a protocol) January 21, 1924, relating to Rights in East Africa,<sup>15</sup> and with Great Britain, on February 10, 1925, relating to the Cameroons,<sup>16</sup> to Rights in East Africa,<sup>17</sup> and to British Togoland.<sup>18</sup> Negotiations respecting American rights in the islands subjected under "C" Mandates to Australia, New Zealand and South Africa, although initiated by Secretary Hughes in 1924, long proved to be abortive. It is not understood that agreements have yet been concluded by the United States with reference to those rights.<sup>19</sup>

<sup>9</sup> The views of Secretary Hughes were set forth in a note addressed to the American Chargé in Japan, April 2, 1921 (For. Rel. 1921, Vol. II, 279), and were communicated to the American diplomatic representatives in France, Great Britain and Italy (*id.*, 282, footnote 27). They were also enunciated in personal conferences with representatives of those Powers, in numerous instructions to American diplomatic missions, and notably in a communication addressed to the British Government Feb. 16, 1924. (For. Rel. 1924, Vol. II, 193.)

See also extended statement by Mr. Hughes, Secy. of State, to the American Ambassador at London, Aug. 4, 1921, For. Rel. 1921, Vol. II, 106; also documents *id.*, 119-123.

<sup>10</sup> The statement in the text reproduces that of the author in his biographical sketch of Secretary Hughes in *American Secretaries of State and Their Diplomacy*, New York, 1929, X, 249, and which was prepared after conference with him.

See also documents in Hackworth, Dig., §§ 21 and 181.

<sup>11</sup> See Mr. Hughes, Secy. of State, to the American Chargé in Japan, April 2, 1921, For. Rel. 1921, Vol. II, 279.

<sup>12</sup> U. S. Treaty Vol. III, 2723.

<sup>13</sup> U. S. Treaty Vol. IV, 4153.

<sup>14</sup> U. S. Treaty Vol. IV, 4160.

<sup>15</sup> U. S. Treaty Vol. IV, 4244. See also Hackworth, Dig., I, § 23, and documents there

<sup>16</sup> U. S. Treaty Vol. IV, 3954.

<sup>17</sup> U. S. Treaty Vol. IV, 4235.

<sup>18</sup> U. S. Treaty Vol. IV, 4239.

cited.

<sup>19</sup> On March 14, 1925, the British Foreign Office informed the Government of the United States that the Governments of the Dominions were willing to give assurance to the United

The attitude of the United States in relation to the application of the mandates system to areas over which Turkey had lost control, and which were being placed under the operation of the so-called "A Mandates," must be considered in the light of the complicated factual situation that presented itself. The territory continued to be technically under the sovereignty of Turkey, until, as has been observed, that State made relinquishment of it through the Treaty of Lausanne which became effective in August 1924. By the terms of that treaty the United States, which had not been at war with Turkey, acquired nothing by way of grant.<sup>20</sup> Within that territory, however, the United States claimed important privileges embracing that of extraterritorial jurisdiction, attributable to, or recognized by, its treaty with the Ottoman Empire of May 7, 1830.<sup>21</sup> No act or event served, in American opinion, to put an end to those treaty privileges while Turkey remained the sovereign; nor was it admitted that its ultimate loss of sovereignty would necessarily cut off the privilege of extraterritorial jurisdiction.<sup>22</sup> Upon the actual loss by Turkey of control over the areas concerned, and upon the subsequent acknowledgment by it through the Treaty of Lausanne of that fact, the United States focused its attention upon the conduct of the Principal Allied Powers which were responsible for both results, and which were asserting the right to determine the status of the areas which their success as belligerents had enabled them to sever from the domain of a common enemy.<sup>23</sup> As that success had been due in part to the participation of the United States in other, but none the less decisive fields in the major conflict against Germany, the ally of Turkey, it was asserted, as has been noted, that the Principal Allied Powers therein could not equitably deprive the United

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States—embodied, if desired, in the form of a binding agreement that "so long as the terms of the mandates remain unaltered, United States nationals and goods will be treated in all respects on a footing equal to that enjoyed by the nationals and goods of any State member of the League of Nations, with the exception of those within the British Empire, subject only to the proviso that this shall not involve the violation of any existing treaty engagements towards third parties." (Hackworth, Dig., I, 126.)

<sup>20</sup> The terms of the treaty (Art. XVI) marked the relinquishment rather than the cession of Turkish "rights and titles." Even the Principal Allied Powers were not designated as grantees. Compare Art. 132 of the unratified Treaty of Sèvres in which Turkey purported to renounce rights and titles to certain territories "in favour of the Principal Allied Powers."

<sup>21</sup> See *infra*, Difficulties with Turkey, § 263.

It will be recalled that on May 24, 1920, President Wilson requested the Congress to grant to the Executive power to accept for the United States a mandate for Armenia, in pursuance of a formal request of the statesmen in conference at San Remo. *Cong. Rec.*, May 24, 1920, Vol. LIX, p. 8137. On June 1, 1920, the Senate passed a resolution to the contrary. *Id.*, 8093. For a Report by General Harbord concerning Armenia, see Senate Doc. No. 266, 66 Cong., 2 Sess.

Concerning the Report of a Commission under Messrs. Henry Churchill King and Charles R. Crane sent by President Wilson to Asia Minor, see Quincy Wright, *Mandates under the League of Nations*, 45-46.

<sup>22</sup> See Steps towards the Relinquishment of Extraterritorial Jurisdiction, *infra*, § 265.

<sup>23</sup> "It is important to note that this claim was preferred by the United States not against Turkey, but against its enemies with which the United States was aligned in the general conflict. To the United States the method by which the sovereignty was transferred from the Ottoman possessor was of slight concern. The significant fact, from an American point of view, was not only that some time before the conclusion of any treaty of peace Turkey had been ousted from actual control, but also that its victorious enemies had decided that there must be a new sovereign." (Biographical sketch of Charles Evans Hughes by the author, in *American Secretaries of State and Their Diplomacy*, X, *Appendices*, Note 13, p. 434.

States of commercial or other privileges in the Turkish areas concerned which they themselves might claim for their own benefit. The strength of the American contention sufficed to beget treaties with France and Great Britain which were in the main respectful of the contentions of the United States, and which at the same time marked the recognition by it of the mandatory régime to the areas specified.<sup>24</sup> As has been recently observed by Mr. Hackworth in his Digest, the convention signed by the United States and Great Britain on December 3, 1924, regarding Palestine, is similar to the convention concluded in 1924 with France regarding Syria and the Lebanon, with the exception that it contains specific provision that the agreements relating to extradition and consular rights between the United States and Great Britain shall apply to the mandated territory. He adds: "In view of the assurances by the British Foreign Office that the Palestine administration had every intention of treating United States consular officers in as favorable manner as the consular representatives of other States, the United States did not insist on the insertion of a stipulation to that effect in the convention with Great Britain. On July 17 and November 10, 1924, the British Foreign Office assured the American Embassy in London that American nationals in Palestine would receive most-favored-nation treatment and that any special privileges granted to subjects of any other power would automatically be accorded to American citizens in Palestine."<sup>25</sup>

## (c)

§ 26B. **The United States and Iraq.** The territory of Iraq which had constituted a part of the Turkish Empire passed into the occupation of British military forces in the course of the World War. In April, 1920, the Supreme Council decided that a mandate for Iraq be conferred upon Great Britain, which agreed to accept one.<sup>1</sup> This plan was not, however, carried out, although Great Britain, through a High Commissioner, technically remained in control until long after

<sup>24</sup> See treaty with France Relating to Rights in Syria and the Lebanon, of April 4, 1924, U. S. Treaty Vol. IV, 4169; also treaty with Great Britain Relating to Palestine, Dec. 3, 1924, *id.*, 4227, according to the provisions of Art. 2 of each of which "The United States and its nationals shall have and enjoy all the rights and benefits secured under the terms of the mandate to members of the League of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations."

See also in this connection documents in Hackworth, Dig., I, § 22.

"A treaty of friendship and alliance was signed by France and Syria on September 9, 1936, and by France and the Lebanon on November 13, 1936, looking to the admission of Syria and the Lebanon into the League of Nations and the termination of the mandate. On August 4, 1936, the United States informed the French Government that Article 6 of the convention of 1924 with France and the well-established position of the United States gave it the right to be consulted not only with respect to the termination of the French mandate over Syria and the Lebanon but also with respect to the conditions under which the territory should be administered upon the cessation of the mandatory relationship. In reply (August 25, 1936) the French Foreign Office, in addition to describing generally the nature of the agreements in negotiation, stated that their texts when ratified would be communicated to the United States." (Hackworth, Dig., I, 113.)

<sup>25</sup> Hackworth, Dig., I, 115.

Concerning the question of consultation with the United States in respect to any changes that might be proposed in Palestine as a result of the report of the Royal Commission under date of June 22, 1937 (Parliamentary Papers, 1937, Cmd. 5479), see Mr. Hull, Secy. of State, to Mr. Bingham, American Ambassador at London, no. 1869, July 27, 1937, Hackworth, Dig., I, 116-117.

§ 26B.<sup>1</sup> League of Nations, *Official Journal*, 1924, 1346-1347.

the enthronement of King Faisal, and the conclusion of the Anglo-Iraqi Treaty of Alliance,<sup>2</sup> of October 10, 1922, which became operative on December 19, 1924.<sup>3</sup> That treaty, together with a protocol of April 30, 1923, and certain subsidiary agreements, was designed, in the estimation of the Council of the League of Nations, "to ensure the complete observance and execution in Iraq of the principles which the acceptance of the mandate was intended to secure."<sup>4</sup> Moreover, in a decision of Sept. 27, 1924, the Council of the League accepted certain undertakings of the British Government and approved of the terms of a communication from it "as giving effect to the provisions of Article 22 of the Covenant."<sup>5</sup> By this indirect process Iraq was deemed to be subjected to the mandatory system. In January, 1926, Great Britain and Iraq agreed that the Treaty of Alliance, of October 10, 1922, should continue in force for a period of twenty-five years, from December 16, 1925, unless before the expiration of that period Iraq should have become a member of the League of Nations.<sup>6</sup> The Anglo-Iraqi treaty of January, 1926, was approved by the Council of the League of Nations on March 11, 1926.<sup>7</sup>

By a convention and protocol, of January 9, 1930, concluded by the United States with Great Britain and Iraq, it was declared that "the United States of America, by participating in the war against Germany, contributed to her defeat and the defeat of her Allies, and to the renunciation of the rights and titles of her Allies in the territory transferred by them, but has not ratified the Covenant of the League of Nations embodied in the Treaty of Versailles."<sup>8</sup> According to Article I, the United States, subject to the provisions of the convention, consented to the régime established in Iraq and recognized "the special relations existing between His Britannic Majesty and His Majesty the King of Iraq as defined in those instruments."<sup>9</sup> Through Article VII it was provided that, on the termination of those special relations, negotiations should be entered into between the United States and Iraq for the conclusion of a treaty in regard to their future

<sup>2</sup> Memorandum on The Termination of The Mandatory Régime in Iraq, Royal Institute of International Affairs, Information Department, London, 1932, 16 and 38.

<sup>3</sup> See League of Nations, Treaty Series, No. 891, footnote (1).

<sup>4</sup> League of Nations, *Official Journal*, 1924, 1347.

<sup>5</sup> *Id.*, 1347.

In its decision the Council declared "that the privileges and immunities, including the benefits of consular jurisdiction and protection formerly enjoyed by capitulation or usage in the Ottoman Empire, will not be required for the protection of foreigners in Iraq so long as the Treaty of Alliance is in force." (*Id.*)

<sup>6</sup> League of Nations, Treaty Series, No. 1147, XLVII, 419.

See, Elizabeth P. MacCallum, "Iraq and the British Treaties," Foreign Policy Association, Information Service, Aug. 20, 1930, Vol. VI, No. 12.

<sup>7</sup> League of Nations, *Official Journal*, 1926, 503.

See documents in U. S. Treaty Vol. IV, 4335-4376.

<sup>8</sup> U. S. Treaty Vol. IV, 4335.

Paragraph ix of the preamble contains the statement that "the United States of America recognises Iraq as an independent State." It is to be regretted that the exigencies of diplomacy appeared to call for a description of Iraq that did violence to the facts.

<sup>9</sup> In the protocol of Jan. 9, 1930, annexed to the convention, it was declared that upon the coming into force of the convention and during the period of the special relations existing between His Britannic Majesty and His Majesty the King of Iraq, defined in Art. I of the convention, there would be a suspension of the capitulatory régime in Iraq, so far as the rights of the United States and its nationals were concerned, and that such rights would be exercised in conformity with the decision of the Council of the League of Nations, of Sept. 27, 1924. U. S. Treaty Vol. IV, 4373.

relations and the rights of nationals of each country in the territories of the other.<sup>10</sup> The ratifications of the convention and protocol were exchanged at London, February 24, 1931.

On June 30, 1930, Great Britain and Iraq concluded a treaty of alliance which was to come into force as soon as Iraq might be admitted to membership in the League of Nations.<sup>11</sup> The preamble stated that the British Government had, in 1929, both informed the Government of Iraq and announced to the Council of the League an intention to support the candidature of Iraq for admission to the League of Nations in the year 1932. Appropriate and careful steps were taken by the Council with the assistance of the Permanent Mandates Commission, both to inquire into and establish conditions for the termination of the mandatory régime in Iraq and for the admission of that State to membership in the League of Nations.<sup>12</sup>

On October 3, 1932, Iraq was admitted to membership in the League,<sup>13</sup> and the British-Iraqi treaty of alliance became effective. That treaty, together with the annexure thereto, yielded distinct military and strategic advantages to Great Britain. The King of Iraq recognized that "the permanent maintenance and protection in all circumstances of the essential communications of His Britannic Majesty is in the common interest of the High Contracting Parties." To that end sites for British air bases in the vicinity of Basra and also west of the Euphrates were to be granted, as well as the privilege of maintaining British forces at such localities under specified conditions.<sup>14</sup> Thus the termination of the mandatory régime seemed to place Iraq, in some degree, under British military domination.<sup>15</sup>

<sup>10</sup> According to Art. VI "No modification of the special relations existing between His Britannic Majesty and His Majesty the King of Iraq, as defined in Article 1 (other than the termination of such special relations as contemplated in Article 7 of the present Convention), shall make any change in the rights of the United States as defined in this Convention, unless such change has been assented to by the Government of the United States."

<sup>11</sup> British Treaty Series, No. 15 (1931), Cmd. 3797.

<sup>12</sup> See, in this connection, Manley O. Hudson, "The Admission of Iraq to Membership in the League of Nations," *Am. J.*, XXVII, 133, in which the several steps are noted. These embraced a report by the Permanent Mandates Commission (See Minutes, Mandates Commission, 21st Session, Annex 22, 221-225.), the demanding of certain assurances from Iraq to meet the recommendations of the Permanent Mandates Commission (League of Nations, *Official Journal*, 1932, 474), a declaration by Iraq on May 30, 1932, previously approved by the Council of the League, embracing necessary guarantees (League of Nations, *Official Journal*, 1932, 1213, 1347.), and a formal request by Iraq for admission to membership to the League of Nations, under date of July 12, 1932 (League of Nations, Doc. A. 17. 1932. VII.) and action by the Assembly, on Oct. 3, 1932 (League of Nations, *Official Journal*, 1932, Special Supplement No. 104, p. 47.).

See, W. L. Williams, "The State of Iraq," Foreign Policy Reports, Oct. 12, 1932, Vol. VIII, No. 16.

<sup>13</sup> League of Nations, *Official Journal*, 1932, Special Supplement No. 104, p. 47.

In the Iraqi Declaration of May 30, 1932, the effective protection of racial, linguistic and religious minorities under the guarantee of the League of Nations was accorded. See, League of Nations, Document A. 17. 1932. VII, p. 3.

<sup>14</sup> See, Art. V, and annexure.

<sup>15</sup> "It will be seen that the Treaty takes full cognizance of Iraq's strategic importance to Great Britain. She is given a special position in a part of the world in which a special position is most valuable to her." (Information Department Memorandum on The Termination of the Mandatory Régime in Iraq, Royal Institute of International Affairs, London, 1932, p. 33.)

Declared the Permanent Mandates Commission, in its special report to the Council: "Finally the Commission, in conformity with the Council's resolution of September 4th, 1931,

In March, 1932, the British Foreign Office was informed that the United States, in the opinion of the Department of State, retained the right to demand consultation with respect to the conditions under which Iraq was to be administered upon the cessation of the mandatory relationship; that since the termination of a régime in a mandated territory necessarily involved the "disposition" of the territory and affected the interests of American nationals therein, the right of the United States to be consulted with respect to the conditions under which the territory was subsequently to be administered, was on precisely the same basis as its right to be consulted with regard to the establishment of a mandatory régime. Inquiry was made whether the United States Government was correct in assuming that it was to be consulted by the British Government with respect to the conditions under which Iraq was to be administered upon the termination of the "special relations" between that country and Great Britain.<sup>16</sup> In a response of April 1, 1932, the British Foreign Office declared that the provisions of Article VII of the convention of January 9, 1930, did not confer on the United States any rights to be consulted as to the obligations which the League of Nations might require Iraq to undertake as conditions of the termination of the mandatory régime and of her election as a member of the League of Nations. It was added that the British Government would furnish that of the United States with copies of the assurances which Iraq was to furnish the Council of the League as a preliminary of the termination of the mandatory régime and entrance into the League.<sup>17</sup> On July 8, 1932, the American Embassy at London informed the British Foreign Office that the United States Government was satisfied from information received from other sources that those assurances, to the benefits of which American nationals would be entitled under the provisions of Article VII of the Convention of January 9, 1930, would afford adequate protection to legitimate American interests in Iraq upon the termination of existing special relations. Accordingly, it was considered that no useful pur-

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examined the undertakings entered into by Iraq with Great Britain from the point of view of their compatibility with the status of an independent State.

"After having carefully considered the text of these undertakings and having heard the explanations and information on the subject from the accredited representative, the Commission came to the conclusion that, although certain of the provisions of the Treaty of Alliance of June 30th, 1930, were somewhat unusual in treaties of this kind, the obligations entered into by Iraq towards Great Britain did not explicitly infringe the independence of the new State." (Permanent Mandates Commission, Minutes, 21st Session, p. 225.)

On Oct. 30, 1931, Marquis Theodoli, chairman of the Mandates Commission, expressed opinion that in the clauses of Art. 5 "the extreme limit of what could be done without infringing the independence of a State, as conceived by the Covenant, had been reached and perhaps even passed." (*Id.*, 76.)

On May 19, 1932, the Council of the League recommended "that the Powers concerned, whose nationals enjoyed capitulation rights in the former Ottoman Empire, renounce, before the admission of Iraq to the League of Nations, the maintenance of these former jurisdictional privileges in favour of their nationals in future." (League of Nations, *Official Journal*, July, 1932, p. 1213.) For texts of communications from various governments concerned, see League of Nations, *Official Journal*, Minutes, 86th Session of Council, Annex, 1932.

<sup>16</sup> First Secretary of the American Embassy at London, to an Official of the Eastern Department of the British Foreign Office, March 1, 1932, Department of State Press Release, Nov. 5, 1932, p. 301.

<sup>17</sup> Head of the Eastern Department of the British Foreign Office, to First Secretary of the American Embassy at London, April 1, 1932, *id.*, 301.

pose would be served by continuing the discussions with the British Government concerning the right of the United States to be consulted with regard to the conditions under which Iraq was to be administered upon the termination of the mandatory relationship. At the same time the American Government expressed a desire to place on record the declaration that it could not fully accept the interpretation of the position of the United States *vis-à-vis* Iraq as set forth in the British note of April 1, 1932. Thus, it was declared that while the American Government conceded that by the terms of the Tripartite Convention it waived its right to consultation with respect to the actual termination of the mandate, it considered that the right was retained to be consulted with respect to the conditions under which Iraq was to be administered upon such termination. "This Government is therefore," it was declared, "of the opinion that, in addition to the most-favored-nation treatment which, by virtue of the provisions of the Tripartite Convention of January 9, 1930, it will enjoy in Iraq upon the termination of the special relations, it is also entitled to a voice in the determination of the conditions upon which that most-favored-nation treatment is to be based. Accordingly the American Government desires to make a full reservation of its position in this matter and, with a view to avoiding any possible misconception which may arise in the future, to make clear that its action in refraining from insisting upon a fulfillment of its rights in the case of Iraq is not to be construed as an abandonment of the principle established in 1921 that the approval of the United States is essential to the validity of any determination which may be reached regarding mandated territories."<sup>18</sup>

Taking cognizance of the provisions of Article VII of the Convention of January 9, 1930, the United States and Iraq concluded on December 3, 1938, a treaty of commerce and navigation, of which ratifications were exchanged on May 29, 1940.<sup>19</sup>

(d)

§ 26C. **Aspects of the Mandates System.** The territories or entities for which mandates have been conferred and accepted are not States, although they may be States in the making.<sup>1</sup> They are populated areas which the Principal Allied Powers have, in consequence of their control thereof, and with the approval of the Council of the League of Nations, placed under the administration of designated mandatories on conditions set forth in the terms of the particular mandates, and in pursuance of the requirements of the Covenant. Those terms and conditions indicate the measure of authority of the mandatories, and emphasize the obligation of each to accept the coöperation and oversight of the League, and to make annual reports to the Council. The mandatory is

<sup>18</sup> Aide-Mémoire of July 8, 1932, from the American Embassy at London to the British Foreign Office, Department of State Press Release, Nov. 5, 1932, p. 304. See also documents in Hackworth, Dig., I, §§ 22 and 43; II, 181.

See Baron E. Nolde, *L'Irak, Origines Historiques et Situation Internationale*, preface by F. Georges-Picot, Paris, 1934.

<sup>19</sup> U. S. Treaty Series, No. 960.

§ 26C.<sup>1</sup> The situation respecting the experience of Iraq is not here considered. See in this connection, Wright, *op. cit.*, 397-398.

not free to deal with the territory or people assigned to it as though either were its own; the relationship sharply differs from that existing, in an international sense, between the United States and its colonial possessions such as the Philippine Islands. A territory or entity under mandate is thus to be distinguished from the colonial possession which, in international contemplation, is a part of the State to which it belongs. The outstanding, and perhaps novel, feature of the mandatory system is the international obligation imposed upon and accepted by the mandatory to administer a territorial area not its own, and not constituting a State, under the supervision of an international agency.<sup>2</sup>

It is consistent with the theory of the system, and with the foundation on which it rests that the inhabitants of mandated areas should be deemed to have lost the nationality which they previously possessed without acquiring that of a mandatory; and it is not inconsistent with the non-recognition of a mandated area or entity as a State, that the inhabitants thereof, or any class of them, should be regarded as belonging to it rather than to any other entity.<sup>3</sup>

The supervision undertaken by the League of Nations is effected through the Council acting upon the advice of the Permanent Mandates Commission, supplemented by the views of the Assembly, and with the assistance of the Secretariat.<sup>4</sup> The Mandates Commission — the seeker of information from the mandatories and the examiner of their reports, as well as the adviser of, and reporter of conclusions to, the Council — possesses itself no control. Although alert to make inquiry it lacks the power to command responses;<sup>5</sup> nor is it able of itself to cause desired coöperation on the part of a mandatory. Nevertheless, the Commission is enabled, from light that it obtains through annual reports from the mandatories, and from other sources, to advise the Council on all matters relating to the observance of the mandates. In the course of so doing it does not refrain from criticizing the conduct of the mandatory if there is deemed to be ground for such action, as in a situation where it is regarded as having been tolerant of a condition productive of, or conducive to, grave dis-

<sup>2</sup> "If the Mandatory Power is given wide responsibility in the execution of its mandate, the League is given an equally wide right of supervision, and the principal means provided to enable it to exercise this right is in the annual report of the Mandatory Power. The report is 'the only official link between the Mandatories and the League, in whose name they exercise their powers.'" (Elizabeth Van Maanen-Helmer, *Mandates System in Relation to Africa and the Pacific Islands*, 74, citing M. Rappard, P. M. C. — I, p. 6.)

<sup>3</sup> See Report of the Permanent Mandates Commission on the National Status of the Inhabitants of the Territories under "B" and "C" Mandates, League of Nations document, C 546, 1922, V.; resolutions of the Council of April, 1923, League of Nations, *Official Journal*, 1923, 604; Lauterpacht's 5 ed. of Oppenheim, I, § 94e.

Also British Order in Council of July 24, 1925, productive of a so-called Palestinian citizenship.

<sup>4</sup> See Quincy Wright, *op. cit.* Chap. V., where that author adverts to the fact that "the Permanent Court of International Justice is recognized by the mandates themselves as the final interpreter of their terms." (155.) Illustrative of the exercise of that function by that Tribunal see, Judgment No. 2 (Mavrommatis Palestine Concessions), Publications, Permanent Court of International Justice, Series A, No. 2; Judgment No. 5 (The Mavrommatis Jerusalem Concessions), *id.*, No. 5; Judgment No. 10 (Case of the Re-adaptation of the Mavrommatis Jerusalem Concessions), *id.*, No. 11.

<sup>5</sup> See List of Questions which the Permanent Mandates Commission desired to have dealt with in the Annual Reports of the Mandatory Powers on "B" and "C" Mandates, League of Nations document, A. 14. 1926. VI. Also views of the Council touching the freedom of mandatory Powers respecting the use of such list of questions, League of Nations, *Official Journal*, Oct. 1927, 1119.



turbances.<sup>6</sup> It is however, the obvious desire of the League as a supervisor of the system to coöperate with and assist the mandatory in the achievement of its task; and the Permanent Commission, as the principal agency of supervision, does not fail to reflect that desire and by such process to encourage respect for the principles laid down in Article 22 of the Covenant.

(7)

§ 27. **Certain Minor Impairments of Independence through the Medium of the League of Nations. Protection of Minorities.** Events of the World War, 1914-1918, impelled the Principal Allied and Associated Powers to require that certain new States resulting from the conflict, as well as some others, should be subjected to a slight measure of external control not commonly suffered by independent States, and that such control should be exercised for the collective interests of all concerned through the medium of the League of Nations. The protection of racial, linguistic and religious minorities was a matter of special concern.<sup>1</sup> By four different sets of international instruments they were placed under the guarantee of the League. These were (a) so-called "Minorities Treaties" signed at Paris during the Peace Conference; (b) Special Chapters inserted in the General Treaties of Peace; (c) Special Chapters inserted in other treaties; and (d) Declarations by particular States made before the Council of the League of Nations.<sup>2</sup>

<sup>6</sup> See, for example, Report of the Commission to the Council on the disturbances in Palestine in August, 1929, Annex 10; Seventeenth (Extraordinary) Session of Commission, June 3-21, 1930, p. 137; Cf. Report of British Commission of Enquiry on the Palestine Disturbances of 1929, Cmd. 3530, 1930. See also statement by the accredited British representative to the Permanent Mandates Commission, May, 1930, Minutes, Seventeenth (Extraordinary) Session of Commission, June 3-21, 1930, Annex I, 121; Comments by the Mandatory Power, of Aug. 2, 1930, *id.*, 148; Resolution of the Council, Sept. 8, 1930, League of Nations, *Official Journal*, 1930, p. 1294; also *id.*, 1291-1294. Also, in this connection, Fannie Fern Andrews, *The Holy Land Under Mandate*, Boston, 1931, Chaps. XX-XXII.

§ 27.<sup>1</sup> See The League of Nations and the Protection of Minorities of Race, Language and Religion, Information Section, League of Nations, 1927; bibliography in Lauterpacht's 5 ed. of Oppenheim, I, Chap. XII, § 340b.

<sup>2</sup> These instruments were the following:

"1. 'Minorities' Treaties signed at Paris during the Peace Conference.

(1) Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles on June 28th, 1919.

(2) Treaty between the Principal Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes, signed at St. Germain on September 10th, 1919.

(3) Treaty between the Principal Allied and Associated Powers and Czechoslovakia, signed at St. Germain on September 10th, 1919.

(4) Treaty between the Principal Allied and Associated Powers and Roumania, signed at Paris on December 9th, 1919.

(5) Treaty between the Principal Allied and Associated Powers and Greece, signed at Sèvres on August 10th, 1920.

"2. Special Chapters inserted in the General Treaties of Peace.

(1) Treaty of Peace with Austria, signed at St. Germain-en-Laye on September 10th, 1919 (Part III, Section V, Articles 62 to 69).

(2) Treaty of Peace with Bulgaria, signed at Neuilly-sur-Seine on November 27th, 1919 (Part III, Section IV, Articles 49 to 57).

(3) Treaty of Peace with Hungary, signed at Trianon on June 4th, 1920 (Part III, Section VI, Articles 54 to 60).

(4) Treaty of Peace with Turkey, signed at Lausanne on July 24th, 1923 (Part I, Section III, Articles 37 to 45).

"3. Special Chapters inserted in other Treaties.

(1) German-Polish Convention on Upper Silesia, dated May 15th, 1922 (Part III).

The following analysis of the treaties may be accepted as authoritative: <sup>8</sup>

In the first place, the Minorities Treaties contain stipulations regarding the acquisition of nationality. These stipulations provide, in principle, that the nationality of the newly created or enlarged country shall be acquired: (a) by persons habitually resident in the transferred territory or possessing rights of citizenship there when the Treaty comes into force; (b) by persons born in the territory of parents domiciled there at the time of their birth, even if they are not themselves habitually resident there at the coming into force of the treaty.

The treaties also provide that nationality shall be *ipso facto* acquired by any person born in the territory of the State, if he cannot prove another nationality. The treaties further contain certain stipulations concerning the right of option.

The States which have signed the Minorities Treaties have undertaken to grant all their inhabitants full and complete protection of life and liberty, and recognise that they are entitled to the free exercise, whether in public or in private, of any creed, religion or belief whose practices are not inconsistent with public order or public morals.

As regards the right to equality of treatment, the Minorities Treaties lay down the following general principles: (a) equality of all nationals of the country before the law; (b) equality of civil and political rights; and (c) equality of treatment and security in law and in fact.

Moreover, the treaties expressly stipulate that differences of race, language or religion shall not prejudice any national of the country as regards admission to public employments, functions and honours, or to the exercise of professions and industries. It is also provided that nationals belonging to minorities shall have an equal right to establish, manage and control, at their own expense, charitable, religious or social institutions, schools and

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(2) Convention concerning the Memel Territory, dated May 8th, 1924 (Article II, and Articles 26 and 27 of the Statute annexed to the Convention).

"4. Declarations made before the Council of the League of Nations.

(1) Declaration by Albania, dated October 2nd, 1921.

(2) Declaration by Estonia, dated September 17th, 1923.

(3) Declaration by Finland (in respect of the Åland Islands), dated June 27th, 1921.

(4) Declaration by Latvia, dated July 7th, 1923.

(5) Declaration by Lithuania, dated May 12th, 1922." (See page 43 document cited in next foot-note.)

<sup>8</sup> Report of Committee of Three, under Resolution of the Council, of March 7, 1929, prepared by the Representative of Japan, M. Adatci, *Rapporteur*, with the collaboration of the Representatives of the British Empire and Spain, League of Nations, *Official Journal, Special Supplement* (Documents relating to the Protection of Minorities by the League of Nations), No. 73, pp. 47-48. This document is cited hereinafter as League Council, Protection of Minorities Report, 1929.

"It must at once be placed on record that it was no part of the purpose of the authors of the treaties to set out principles of government which should be of universal obligation. They never considered or professed to consider the general principle of religious toleration as applicable to all States of the world, nor did they lay down any general principles of universal application for the government of alien peoples who might be included within the territory or colonial dominions of all States. Anything of the kind would have been quite outside the scope and powers of the Peace Conference; if anything of this kind had been done, it could only have been in connection with the drafting of the Covenant of the League of Nations, and as we have seen, it was there deliberately rejected. What the Conference had to deal with was a number of problems which were purely local, which arose only in certain specified districts of Europe, but which at the same time, in view of the political conditions of the moment, were serious, urgent and could not be neglected." (*Id.*, 46.)

other educational establishments, with the right to use their own language and to exercise their religion freely therein.

As regards the use of the minority language, States which have signed the treaties have undertaken to place no restriction in the way of the free use by any national of the country of any language, in private intercourse, in commerce, in religion, in the Press or in publications of any kind, or at public meetings. Those States have also agreed to grant adequate facilities to enable their nationals whose mother-tongue is not the official language to use their own language, either orally or in writing, before the Courts. They have further agreed, in towns and districts where a considerable proportion of nationals of the country whose mother-tongue is not the official language of the country are resident, to make provision for adequate facilities for ensuring that, in the primary schools (the Czechoslovak Treaty refers to "instruction" in general), instruction shall be given to the children of such nationals through the medium of their own language, it being understood that this provision does not prevent the teaching of the official language being made obligatory in those schools.

The treaties finally provide that, in towns or districts where there is a considerable proportion of nationals of the country belonging to racial, religious or linguistic minorities, these minorities will be assured an equitable share in the enjoyment and application of sums which may be provided out of public funds under the State, municipal or other budgets for educational, religious or charitable purposes.

In addition to these general engagements, the Minorities Treaties establish a number of special rights in favour of certain minorities, viz., the Jewish minority (Greece, Poland, and Roumania), the Valachs of Pindus (Greece), the non-Greek monastic communities of Mount Athos (Greece), the Moslem minorities in Albania, Greece and the Kingdom of the Serbs, Croats and Slovenes, the Czechs and Saxons in Transylvania (Roumania), and the people of the Ruthene territory south of the Carpathians (Czechoslovakia).

In addition to the stipulations contained either in certain Treaties of Peace or in the Minorities Treaties, various countries have accepted, for the protection of minorities, provisions placed under the guarantee of the League of Nations.<sup>4</sup>

The Council accepted the burdens established by the treaties and acknowledged in the unilateral declarations. It proceeded also to take measures to facilitate the exercise of the guarantee by the institution and development of a procedure for the examination of petitions, and by the creation and development of a Minorities Section of the Secretariat of the League.<sup>5</sup>

<sup>4</sup> With special reference to Albania, Lithuania, Latvia, Esthonia, Finland and Upper Silesia, see *id.*, 48-49.

<sup>5</sup> League Council, Protection of Minorities Report, 1929, League of Nations, *Official Journal, Special Supplement*, No. 73, 40-64.

Also, Resolutions and Extracts from the Minutes of the Council, Resolutions and Reports adopted by the Assembly, relating to the Procedure to be followed in Questions concerning the Protection of Minorities, League of Nations Document C. 24. M. 18. 1929. I.

See J. S. Roucek, "Procedure in Minority Complaints," *Am. J.*, XXIII, 538.

According to Art. X of the Declaration of the Kingdom of Iraq of May 30, 1932, on the occasion of the termination of the mandatory régime in Iraq, and containing guarantees

The procedure of the Council is said to have had as its basis five main principles, of which three were present in the settlement reached at Paris, the other two being the product of experience. The first is that "the guarantee of the rights of minorities is a collective guarantee," being the business of the League as a whole, and in particular of the Council, to insure respect for those rights. Thus the remedy for infractions is action taken by the Council rather than by a neighboring or any other State. "The parties concerned in discussing treaty infraction are, therefore, the Council on the one hand and the State concerned on the other." The second principle is that, "the persons belonging to the minorities have no more a place in the procedure than have neighbouring States. No international personality has been conferred upon them. They have no juridical status whether before the Council or before the Permanent Court. Minorities and the State to which they belong may never be placed in the position of litigants in a suit. The only possible status of minority persons is that of informants, whose action produces no effect in law." The third principle, described as the introduction of the judicial element, involves the employment of the Permanent Court of International Justice, whereby through recourse to the judicial process, the possibility of the abuse of the right of intervention in the case of minorities is reduced to a minimum. The fourth principle involves the art of persuasion, as well as the cooperation of, the State concerned; and the fifth is the invocation of public opinion through which moral pressure may be centered at a given moment upon the alleged wrong-doing of a particular State.<sup>6</sup>

The conventional system whereby individual States agreed that obligations undertaken in relation to minorities constituted obligations of international concern to be placed under the guarantee of the League, yielding to the Council thereof broad supervisory powers in the event of infraction or contemplated infraction, had a two-fold significance. It revealed the determination of the Powers controlling the treaty policy of Europe to establish fresh and workable guarantees for the performance of certain newly accepted burdens,<sup>7</sup> and

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given to the Council by the Iraqi Government: "The stipulations of the foregoing articles of this Declaration, so far as they affect persons belonging to racial, religious or linguistic minorities, are declared to constitute obligations of international concern and will be placed under the guarantee of the League of Nations. No modification will be made in them without the assent of a majority of the Council of the League of Nations." (League of Nations Document A. 17. 1932. VII, p. 3.)

<sup>6</sup> The paragraph in the text is a paraphrase of "The General Principles at the Basis of the Present Procedure" as set forth by Dr. Julius Stone in his treatise entitled *International Guarantees of Minority Rights*, Oxford, 1932, 247-248.

Concerning the Minorities Petition, the use thereof in the Minorities Section of the Secretariat of the League, and also before the Minorities Committees, as well as procedure before the Council, see *id.*, Parts II and III, and documents there cited, and Appendices, pp. 269-280.

*Cf.*, however, the right of petition and methods of appeal conferred upon individuals belonging to minorities as provided in Division III of the Geneva Convention Relating To Upper Silesia concluded by Germany and Poland, May 15, 1922, Brit. and For. St. Pap., CXVIII, 365, 412. See, in this connection, Julius Stone, *Regional Guarantees of Minority Rights, A Study of Minorities Procedure in Upper Silesia*, New York, 1933.

<sup>7</sup> Declared M. Clemenceau, in his note to M. Paderewski, of June 24, 1919: "It is indeed true that the new treaty differs in form from earlier conventions dealing with similar matters. The change of form is a necessary consequence and an essential part of the new system of international relations which is now being built up by the establishment of the League of Na-

secondly, a method of so doing which served to subject a group of States, regardless of their affiliations in the World War, to an external restraint not suffered by those Powers themselves or by other States enjoying the broadest privileges of political independence. Accordingly, there seemingly sprang into being a new grade of States which by acknowledging a duty to forgo a freedom from external supervision or control enjoyed by the most favored members of the international society, found it necessary or expedient to accept a lesser place therein.

## (8)

§ 28. **Turkey.** By the terms of the treaty of peace signed at Sèvres, August 10, 1920, Turkey was called upon to subject itself to a condition of dependence upon the Principal Allied Powers acting in certain matters in conjunction with the League of Nations.<sup>1</sup> This subordination was manifested in a variety of ways. The treaty was not, however, accepted by the Turkish State. It is unnecessary to advert to the change of conditions, military and political, which took place prior to the negotiations of 1922 and 1923, resulting in an acceptable treaty of peace signed at Lausanne on July 24, 1923.<sup>2</sup> Through the terms thereof the new Turkish Republic was able to free itself from much that its enemies had demanded of its predecessor, the Ottoman Empire under Sultan Abdul Hamid.<sup>3</sup> Nevertheless, the later treaty was not without some provisions which reflected slight external restraints. As has been noted, the instrument contained articles for the protection of minorities under the guarantee of the League of Nations.<sup>4</sup>

Through the Convention Relating to the Régime of the Straits, annexed to the Treaty of Lausanne, Turkey agreed to confide the control of those water communications to an international "Straits Commission"<sup>5</sup> designed to carry out its functions under the auspices of the League of Nations, to the Council of which was committed the power under certain contingencies to decide as to the measures to be taken in order to safeguard the freedom of navigation of the Straits or the security of demilitarized zones.<sup>6</sup> It should be observed, however, that by the terms of Article 24 of the Convention Regarding the Régime of the Straits signed at Montreux, July 30, 1936, which was designed to replace

tions. Under the older system the guarantee for the execution of similar provisions was vested in the Great Powers. Experience has shown that this was in practice ineffective, and it was also open to the criticism that it might give to the Great Powers, either individually or in combination, a right to interfere in the internal constitution of the States affected which could be used for political purposes. Under the new system the guarantee is entrusted to the League of Nations. The clauses dealing with this guarantee have been carefully drafted so as to make it clear that Poland will not be in any way under the tutelage of those Powers who are signatories to the treaty." Brit. Treaty Series, No. 8 [Cmd. 223], p. 2.

See also Turkey, *infra*, § 28.

§ 28. <sup>1</sup> For the text of the Treaty of Sèvres, see Senate Doc. 7, 67 Cong., 1 Sess., 320.

<sup>2</sup> *Am. J.*, XVIII, *Official Documents*, 1; British Treaty Series, No. 16 (1923), Cmd. 1929; League of Nations, Treaty Series, Vol. XXVIII, p. 11.

<sup>3</sup> See Edgar Turlington, "The Settlement of Lausanne," *Am. J.*, XVIII, 696.

<sup>4</sup> Arts. 37-45.

<sup>5</sup> *Am. J.*, XVIII, *Official Documents*, 53.

<sup>6</sup> Art. 18, *id.*, 61.

See The Treaty of Lausanne of July 24, 1923, *infra*, § 158A.

the convention signed at Lausanne, July 24, 1923, the functions of the International Commission set up under that convention were transferred to the Turkish Government.<sup>7</sup> Turkey did, nevertheless, agree through the Montreux Convention, that if the Council of the League of Nations should decide by a majority of two-thirds that certain measures taken by Turkey restrictive of the passage of foreign warships, when it regarded itself threatened with imminent danger of war, were not justified and if such should also be the opinion of the majority of the parties signatories to the convention, it would discontinue such measures, as well as certain others that might have been taken under Article 6 thereof.<sup>8</sup>

By the Treaty of Lausanne, the ensurance of the carrying out of stipulations exempting from duties and tolls travellers and goods coming from, or destined for, Turkey or Greece, and making use in transit of the three sections of the Oriental railways included between the Græco-Bulgarian frontier and the Græco-Turkish frontier near Kuleli-Burgas, was confided to a commissioner to be appointed by the Council of the League. It was made the duty of that officer to submit for the decision of that body any question relating to the execution of the stipulations which he might not be able to settle; and both Turkey and Greece undertook to carry out any decision by the majority vote of the Council thereon.<sup>9</sup>

The foregoing arrangements reveal the extent to which the Turkish State, although proclaiming its equality and independence as a negotiator,<sup>10</sup> found it expedient to yield in 1923, to certain external restraints that were not imposed upon some of its former enemies, and which were not completely removed by the terms of the Montreux Convention of 1936.

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§ 29. **Neutralized States.** The common interest of a group of States may be deemed to demand that, in the event of war, one of their number be shielded from participation therein, and its territory permanently isolated from belligerent

<sup>7</sup> See *Am. J.*, XXXI, *Official Documents*, 1, 9.

See The Montreux Convention Regarding the Régime of the Straits, *infra*, § 198B. Also James T. Shotwell and Francis Deák, *Turkey at the Straits*, New York, 1940.

<sup>8</sup> Art. 21, *Am. J.*, XXXI, *Official Documents*, 8.

<sup>9</sup> Art. 107, *Am. J.*, XVIII, *Official Documents*, 42.

See also the provisions of Art. 116 specifying the contingencies when the Council of the League was empowered to decide certain minor questions pertaining to the former Superior Council of Health at Constantinople.

<sup>10</sup> "At the concluding session of the Conference at Lausanne Ismet Pasha expressed his gratification at the happy issue of the negotiations, which, he said, had been 'conducted on a footing of equality.' The Turkish plenipotentiaries, he continued, had not failed to point out on every occasion that their country was worthy of the full and complete independence enjoyed by all civilized countries. They were going to sign the Treaty of Peace in the belief that it was based upon the recognition of the equality and independence of Turkey and they were determined to apply its provisions loyally." (Edgar Turlington, "The Settlement of Lausanne," *Am. J.*, XVIII, 696, 706.)

According to Art. 25: "Nothing in the present convention shall prejudice the rights and obligations of Turkey, or of any of the other high contracting parties members of the League of Nations, arising out of the Covenant of the League of Nations." See also Art. 19.

See The Montreux Convention Regarding the Régime of the Straits, *infra*, § 198B.

operations.<sup>1</sup> The achievement of such an end is believed to depend upon the power and influence of the interested States, the extent of the burdens which they are prepared to agree to undertake, the character of strategic advantages which any one of them may, when at war, be obliged to forgo, as well as the conduct of the particular State which it is sought to place in such a unique and favored position. Obviously, the mere pacific avowals or declarations of that State are insufficient.<sup>2</sup> Bi-partite and even multi-partite conventions registering the bare obligation of the contracting parties to respect its neutrality may, when war ensues, also prove inadequate. An undertaking on the part of several powers to endeavor to prevent the commission of forbidden acts doubtless promises more.<sup>3</sup> Nevertheless, if respect for the injunctions of a treaty necessarily serves to impose a severe military detriment upon a signatory power when it becomes a

§ 29. <sup>1</sup> See statement in Hackworth, Dig., I, 66.

See also K. Strupp, *Handbuch des Völkerrechts*, II, *Neutralisation, Befriedung, Entmilitarisierung*, Stuttgart, 1933; Aldo Baldassarri, *La Neutralizzazione*, Rome, 1912; F. W. Baumgartner, *The Neutralization of States*, Kingston, Ontario, 1917; J. V. Bredt, *Die belgische Neutralität und der Schlieffensche Feldzugsplan*, Berlin, 1929; Emmanuel Descamps, *L'État Neutre à Titre Permanent*, Paris, 1912; C. Ekdahl, *La neutralité perpétuelle avant le pacte de la Société des Nations*, Paris, 1923; Fauchille, 8 ed., §§ 348-367, with bibliography; M. W. Graham, Jr., "Neutralization as a Movement in International Law," with bibliography, *Am. J.*, XXI, 79; O. Griessinger, *Die völkerrechtliche Stellung Luxemburgs nach dem Versailler Vertrag*, Würzburg, 1927; F. Hagerup, "La Neutralité Permanente," *Rev. Gén.*, XII, 577; C. F. Littell, *The Neutralization of States*, Meadville, Pennsylvania, 1920; Lauterpacht's 5 ed. of Oppenheim, I, §§ 95-101, with bibliography; E. Nys, "Notes sur la neutralité," *Rev. Droit Int.*, 2 Sér., II, 461 and 583; 3 Sér., III, 15; C. Piccioni, *Essai sur la neutralité perpétuelle*, Paris, 1902; L. Renault, *First Violations of International Law by Germany*, London, 1917; C. P. Sanger, *England's Guarantee to Belgium and Luxemburg*, London, 1915; Gordon E. Sherman, "The Permanent Neutrality Treaties," *Yale L. J.*, XXIV, 217; same writer, "The Neutrality of Switzerland," *Am. J.*, XII, 241, 462 and 780; A. Sottile, *Nature juridique de la neutralité à titre permanent*, Catania, 1920; J. Westlake, "Notes sur la neutralité perpétuelle," *Rev. Droit Int.*, 2 Sér., III, 389; Cyrus F. Wicker, *Neutralization*, Oxford, 1911; same writer, "Some Effects of Neutralization," *Am. J.*, V, 639; George Grafton Wilson, "Neutralization in Theory and Practice," *Yale Review*, IV, 474.

<sup>2</sup> See McNair's 4th ed. of Oppenheim, § 95, including note 2, Vol. I, p. 217, where Dr. McNair advertising to the instance of "self-neutralisation" afforded by Iceland, "which in 1918 declared herself 'permanently neutral' — British and Foreign State Papers, Vol. CXI., (1917-1918), p. 706," correctly concludes that "self-neutralisation (or autonomous neutralisation) may have political but cannot have legal consequences," and cites M. W. Graham, Jr., in *Am. J.*, XXI, 79, 87-88.

See, in this connection, the declaration of Honduras in Art. III of the Central American Peace Treaty of Dec. 20, 1907, Malloy's Treaties, II, 2393.

<sup>3</sup> Declares M. W. Graham, Jr., in the course of his illuminating paper on Neutralization as a movement in International Law: "Thus viewed, (1) the collective guarantee merely to respect the principle of neutrality is so weak as to be meaningless, as was proved by the instances of Luxemburg and the Congo during the World War. (2) A collective guarantee to cause neutrality to be respected is somewhat stronger, and would probably be workable if some Power other than a signatory should attempt the violation of the neutrality of the area in question, though in actual fact such a guarantee is not likely to be invoked against a signatory who violates it. (3) A joint-and-several guarantee to respect is of no more significance than the cumulative self-restraint of the guarantors, but (4) the joint-and-several guarantee to cause to be respected involves, in strict theory, effective sanctions. A guarantee of this character leaves the individual guarantor no option but to act, irrespective of the action taken by other cosignatories. In fact, however, this type of guarantee is almost invariably associated with a stringent territorial guarantee which would in itself involve armed assistance to the attacked state. The only effective test of such a guarantee of neutrality would appear to occur in the absence of the territorial guarantee." (*Am. J.*, XXI, 79, 91.)

The statement in the treaty concluded between the Holy See and Italy, Feb. 11, 1929, that "the Vatican City shall always and in all circumstances be regarded as neutral and inviolable territory," would not suffice to neutralize that territory. *Brit. and For. St. Pap.*, CXXX, Part 1, 799, Hackworth, Dig., I, 74.

belligerent, or if the conduct of the favored State which it is sought to safeguard from war is inconsistent with the general scheme, the success of the plan is gravely threatened. In theory the isolation of such a State depends upon the comprehensiveness and appropriateness of the terms of the treaty that reflects the common design. In point of fact, however, isolation may depend equally upon other considerations, such as the propinquity or special relationship of the territory of that State to actual areas of hostilities. If it affords a belligerent contracting party an easy avenue of approach to a vulnerable position of its enemy, the temptation to seize the strategic advantage regardless of the prohibitions of a restraining party may prove irresistible.<sup>4</sup> Arrangements which assume that a condition or status of permanent neutrality or neutralization may be impressed upon a particular State regardless of such considerations are heedless of actual conditions which in time of stress are likely to be decisive of State conduct. Yet on such an assumption and with such heedlessness treaties have been concluded with varying degrees of success.

The Nineteenth Century witnessed attempts through multi-partite treaties to isolate certain States from war. The agreements usually embraced the guarantees of interested powers looking to the preservation of the neutrality of the particular State concerned. These varied in form and purport.<sup>5</sup> Upon such a State there was commonly imposed the reciprocal obligation to do its part. By such process it was believed that a permanent condition of neutrality was or could be assured, and that States on which it was imposed or to which it was yielded, acquired, at least in legal contemplation, a special position that justified the assignment to them of a distinctive appellation. They were called neutralized States. Moreover, attention was drawn to the checks upon the freedom of a State within this accepted category, and particularly to the question whether, in consequence of the treaty applicable to it, it might still be fairly regarded as independent. By way of interpretation of the group of relevant multi-partite treaties, opinion became widespread that a neutralized State, so-called, could not properly take any step at variance with the plan for its isolation from war, or render abortive the scheme of neutralization. That it was precluded from entering into a treaty of alliance or of guaranty, or from otherwise assuming burdens contemplating offensive belligerent action, were logical deductions, and generally accepted doctrine.<sup>6</sup> The significant fact was, however, that of four

<sup>4</sup> The author is far from suggesting that the nature of the advantage would justify a yielding to the temptation in the face of an opposing treaty.

<sup>5</sup> See C. F. Littell, *The Neutralization of States*, 1920, Chap. X; Lauterpacht's 5 ed. of *Oppenheim*, I, § 96.

<sup>6</sup> There were, however, and still remain differences of opinion concerning the terms on which such a State might have recourse to certain forms of conduct such, for example, as the acquisition of territory.

In correspondence between the United States and Belgium concerning participation by the latter in the military operations of the Allied powers in China in 1900, Count Lichterfelde informed Mr. Hay, Secy. of State, Aug. 16, 1900: "Under the circumstances which will govern the mission of that body, we cannot, and the powers in interest undoubtedly will not, see anything therein that could possibly be contrary to the position occupied by Belgium in the law of nations." (For. Rel. 1900, 308, 309.) Belgium was a party to the protocol of Sept. 7, 1901, between the Allied Powers and China, For. Rel. 1901, Appendix, China, 312.



States supposedly neutralized, two, Belgium and Luxemburg, were, in the course of the World War, subjected to attacks by a guarantor, a third, the Independent State of the Congo, prior to the conflict, lost its international personality by merger with another through annexation, and to the fourth, Switzerland, alone belonged the distinction of enjoying and maintaining respect for its status during a period when its neighbors, guarantors of its neutrality, were locked in desperate conflict with each other.

The precise steps that were taken to shield permanently each of the four States mentioned from becoming belligerents in the event of war deserve attention. Neutralization was impressed upon Switzerland in consequence of the declaration of the Powers at the Congress of Vienna, of March 20, 1815,<sup>7</sup> by the Act of Accession of the Swiss Cantons, of May 27, 1815,<sup>8</sup> by Article 84 of the Act of the Congress of Vienna, of June 9, 1815,<sup>9</sup> and by an Act of the Powers signed at Paris, November 20, 1815,<sup>10</sup> where it was announced that

The Powers who signed the Declaration of Vienna of March 20, 1815, declare, by this present act, their formal and authentic acknowledgment of the perpetual neutrality of Switzerland; and they guarantee to that country the integrity and inviolability of its territory in its new limits, such as they are fixed, as well as by the Act of the Congress of Vienna, as by the Treaty of Paris of this day, and such as they will be hereafter.<sup>11</sup>

On November 30, 1917, the American Chargé d'Affaires in Switzerland was instructed by the Department of State to inform the Swiss Minister of Foreign Affairs that the United States, in harmony with the attitude of its co-belligerents in Europe, would not fail to observe the principle of neutrality applicable to Switzerland and the inviolability of its territory, so long as the neutrality of that country was maintained by the Confederation and respected by the enemy.<sup>12</sup>

<sup>7</sup> *Nouv. Rec.*, II, 149.

<sup>8</sup> *Id.*, 165.

<sup>9</sup> *Id.*, 361, 400.

<sup>10</sup> "Since that time," declares Oppenheim, "Switzerland has always succeeded in maintaining her neutrality. She has built fortresses and organized a strong army for that purpose, and in January, 1871, during the Franco-Prussian War, she disarmed a French army of more than eighty thousand men who had taken refuge on her territory, and guarded them till after the war." Lauterpacht's 5 ed., I, § 98, p. 204.

<sup>11</sup> *Nouv. Rec.*, II, 714, 715. The English translation is from C. F. Littell, *Neutralization of States*, 33-34, where that author discusses the interpretation of the section quoted. Cf. Paul Schweizer, *Geschichte der Schweizerischen Neutralität*, Fraunfeld, 1895; Rivier, I, 111-117.

The Town of Cracow was with its territory declared "to be forever a Free, Independent and strictly Neutral City, under the protection of Austria, Russia and Prussia," by Art. VI of the Final Act of the Congress of Vienna, of June 9, 1815. (Hertslet, *Map of Europe by Treaty*, I, 218.) It was, however, annexed to Austria through the treaty of Nov. 6, 1846. (*Id.*, II, 1061.) See in this connection, C. F. Littell, *Neutralization of States*, 68-71.

According to Art. I of the General Act of Berlin, of June 14, 1889, concluded by the United States, Great Britain, and Germany, the Samoan Islands were to be "neutral territory in which the citizens and countries of the Three Signatory Powers have equal rights of residence, trade, and personal protection." For. Rel. 1889, 353, 354. The arrangement did not, however, appear to contemplate the neutralization of the Islands. The convention concluded by the same Powers, Dec. 2, 1899, providing for the partition of the Islands, declared that all previous agreements relating to Samoa were annulled, For. Rel. 1899, 665, 667.

<sup>12</sup> Mr. Lansing, Secy. of State, to Mr. Wilson, Nov. 30, 1917, For. Rel. 1917, Supp., 2, 758, Hackworth, Dig., I, 66.

After the establishment of the League of Nations Switzerland was admitted to membership on terms that gave heed to the special situation which the neutralization of that State appeared to demand.<sup>13</sup>

Belgium became neutralized by virtue of Articles VII and XXV of the Treaty of London of November 15, 1831,<sup>14</sup> and by the provisions of the Treaties of London of April 19, 1839.<sup>15</sup> Through the latter there was a guarantee of the enforcement of the Articles of the treaty of November 15, 1831, according to Article VII of which Belgium was to form an independent and perpetually neutral State, and was to be required to observe such neutrality towards all other States. It may be observed that the arrangements of April 19, 1839, did not in fact contain a specific guarantee of the integrity and inviolability of Belgian territory, which was set forth in a protocol of January 20, 1831,<sup>16</sup> expressive of the resolve of the interested Powers to effect the neutralization of Belgium,<sup>17</sup> and which was embodied also in a proposed treaty of June 26, 1831.<sup>18</sup>

Through the treaties of Peace of Versailles of June 28, 1919, of St. Germain-en-Laye, of September 10, 1919, and of the Trianon, of June 4, 1920, Germany, Austria and Hungary, respectively, "recognizing that the treaties of April 19, 1839, which established the status of Belgium before the War" no longer conformed "to the requirements of the situation," consented to the abrogation of those treaties, and undertook immediately to recognize whatever conventions might be entered into by the Principal Allied and Associated Powers, or by any of them, in concert with the Governments of Belgium and the Netherlands to replace the treaties of 1839.<sup>19</sup> Cognizance was taken of the "abrogation of the

<sup>13</sup> See resolution, Council of the League of Nations, Feb. 12, 1920, where it was declared that "the Council recognizes that the perpetual neutrality of Switzerland and the guarantee of the inviolability of her territory as incorporated in the Law of Nations, particularly in the Treaties and in the Act of 1815, are justified by the interests of general peace and as such are compatible with the Covenant." (Minutes, Second Session, 7, and Appendix 18; also Hudson's Cases, 2 ed., 45, footnote 3.)

See also resolution of the Council of the League of Nations, Feb. 13, 1920, League of Nations, *Official Journal*, 1920, 57, Hackworth, Dig., I, 67.

Concerning the effort of Switzerland in 1938, to have its "absolute neutrality" explicitly recognized within the framework of the League, and the intention of that country not to participate in any manner in the putting into operation of the provisions of the Covenant relating to sanctions, and the response of the Council thereto, see League of Nations, *Official Journal*, 1938, 385, 369, and 375, Hackworth, Dig., I, 68.

<sup>14</sup> *Nouv. Rec.*, XI, 390, 394, 404. Belgium was not itself a party to this treaty. Concerning events leading up to its conclusion, see Frank Lord Warrin, Jr., "The Neutrality of Belgium," Dept. of State, 1918; Ed. Descamps, *La Neutralité de la Belgique*, Brussels, 1902; René Dollot, *Les Origines de la Neutralité de la Belgique*, Paris, 1902.

Also *La Neutralité de la Belgique*, with Preface, by Paul Hymans, Belgian Ministry of Foreign Affairs, 1915; The Neutrality of Belgium, British Foreign Office, Historical Section, 1920.

<sup>15</sup> See treaty concluded by Austria, France, Great Britain, Prussia and Russia with the Netherlands, *Nouv. Rec.*, XVI, 770; treaty between Belgium and the Netherlands, relative to the separation of their respective territories, *id.*, 773; treaty concluded by Austria, France, Great Britain, Prussia and Russia, with Belgium, *id.*, 788.

<sup>16</sup> *Id.*, X, 158, 160.

<sup>17</sup> *Id.*, 287, 288.

<sup>18</sup> See C. F. Littell, The Neutralization of States, 41-45. Also discussion concerning the nature or type of guarantee that was embodied in the treaties of April 19, 1839, by M. W. Graham, Jr., in *Am. J.*, XXI, 91, note 39. Cf. Albéric Rolin, *Le Droit Moderne de la Guerre*, Brussels, 1921, III, § 937.

<sup>19</sup> Art. 31 of the Treaty of Versailles, U. S. Treaty Vol. III, 3349; Art. 83 of the Treaty of St. Germain-en-Laye, *id.*, 3180; and Art. 67 of the Treaty of the Trianon, *id.*, 3566. It

treaties for the neutralization of Belgium," in the so-called Locarno Pact of December 1, 1925, concluded by Great Britain, France, Germany, Italy and Belgium.<sup>20</sup>

A treaty signed at Paris, May 22, 1926, in behalf of Belgium, France, Great Britain, and The Netherlands, purporting "to recognize upon the basis of the complete and inviolable independence of Belgium the abrogation" of the treaties of 1839, failed to become operative.<sup>21</sup> Nevertheless, the significant fact was that with the complete failure of the plan for the isolation of Belgian territory from scenes of conflict as manifested by events therein during the World War, the several parties to the treaties of 1839 ceased to regard Belgium as a neutralized State.<sup>22</sup>

In September, 1920, the Belgian and French Governments through an exchange of notes gave approval to a so-called Military Understanding signed by their respective military representatives on September 7 of that month, the object of that understanding being "to reinforce the guarantees of peace and security resulting from the Covenant of the League of Nations."<sup>23</sup>

On October 14, 1936, the King of the Belgians made announcement of the determination of his country to adopt a fresh military policy "designed not to prepare for a war, more or less victorious, as the result of a coalition, but to keep war from our territory." He added: "The re-occupation of the Rhineland, by ending the Locarno arrangement, has almost brought us back to our international position before the war. Our geographical situation enjoins it upon us to maintain a military establishment in order to dissuade any one of our neighbors from borrowing our territory to use in attacking another State."<sup>24</sup> The

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was added that if formal adhesion should be required to such conventions or to any of their stipulations, it would be immediately given.

Concerning Belgium's demand at the Peace Conference at Paris, 1919, for a revision of the treaties of 1839, see Miller's Diary, X, 261. For the Report of the Commission on Belgian Affairs to the Supreme Council, see *id.*, X, 176-182; also Annex to Procès-Verbal No. 4 of Commission's Meeting of March 4, 1919, *id.*, X, 66.

<sup>20</sup> *Am. J.*, XX, *Official Documents*, 22, 23.

See A. Rousel Le Roy, *L'abrogation de la Neutralité de la Belgique*, Paris, 1923.

<sup>21</sup> The author is indebted to Mr. Charles M. Barnes, Chief of the Treaty Division, Dept. of State, for a copy of the Treaty.

Nor were negotiations in 1928 between Belgium and the Netherlands, contemplating in part recognition by the latter of the freedom of Belgium from the status of neutralization, successful.

<sup>22</sup> When, in 1914, Belgian territory was invaded and subjected to belligerent occupation by one of the guarantors of the neutralization of Belgium under the treaties of 1839, that country is believed to have been justified in taking the stand that the breach of those treaties at least clothed it with the right to free itself from those peculiar restrictions which were incidental to its neutralized status, regardless of whether in other respects the treaties were to be deemed still existent. There can be no doubt that the other parties thereto, in so far as they were interested in the status of Belgium, acknowledged that the country was no longer a neutralized State, and that circumstance renders unnecessary inquiry concerning the causes productive of that conclusion. Yet it may be added that there may have been perhaps also room for the implication that it was not the design of the parties to the treaties of 1839 that should Belgium be subjected to the treatment which one of the parties applied to it as an enemy in the World War, the neutralized status of the country should continue, even though the action of that enemy did not weaken the obligation of other parties in the course of the conflict to repel the invader.

See Harold J. Tobin, "Is Belgium Still Neutralized?", *Am. J.*, XXVI, 514.

<sup>23</sup> League of Nations Treaty Series, Vols. 2-3, 128.

<sup>24</sup> *New York Herald Tribune*, Oct. 15, 1936, p. 2.

resolution of Belgium to assume a position of neutrality with respect to wars that might afflict its neighbors was obviously insufficient to neutralize Belgian territory or to transform Belgium into a neutralized State; and it rendered the success of the policy which was enunciated dependent at the outset upon the exercise by the territorial sovereign of its own power to preserve the inviolability of its domain. Consequently, the avowed preference by a small State, however unneutralized, for its own neutrality as a means of preserving that inviolability, over a scheme of collective security involving participation that might be more than technical in a prospective war was of significance.<sup>25</sup> It emphasized doubt as to the efficacy of plans to preserve from scenes of conflict the domain of a State that was allied to a participant therein and whose territory might be within the natural zone or path of hostilities; it revealed the fact that to the Belgian mind freedom from invasion was of greater consequence than participation in ultimate victory over an invader that had once occupied Belgian soil.<sup>26</sup> Deference for the stand taken by Belgium was reflected in a communication from the Ambassadors of France and Great Britain accredited to Belgium, on April 24, 1937,<sup>27</sup> and in another from the German Minister of Foreign Affairs addressed to the Belgian Minister accredited to Germany, October 13, 1937.<sup>28</sup>

The Belgian plan for safeguarding the State from invasion was unsuccessful. German forces invaded Belgium in May, 1940.<sup>29</sup>

Luxemburg was neutralized by virtue of Article II of the Treaty of London of May 11, 1867, according to the terms of which

The Grand Duchy of Luxemburg, within the limits determined by the Act annexed to the treaties of April 19, 1839, under the guarantee of the Courts of Great Britain, Austria, France, Prussia, and Russia, shall henceforth form a perpetually neutral State. It shall be bound to observe the same neutrality towards all other States. The High Contracting Parties engage to respect the Principle of permanent neutrality stipulated by the present article. That principle is and remains placed under the collective guarantee of the Powers signing the present treaty, with the exception of Belgium, which is itself a neutral State.<sup>30</sup>

<sup>25</sup> The Franco-Russian Alliance of 1935, with the resultant denunciation by Germany of the Locarno Pacts of 1925, and of the Militarization Clauses of the Treaty of Versailles of June 28, 1919, made Belgium increasingly aware of the difficulties to be anticipated in the maintenance of peace between France and Germany, and inspired fear lest, in the event of a Franco-German war, Belgian territory, being where it was, would encourage and excuse invasion by the enemy of France, if the sovereign of that territory were the ally of the French belligerent Republic.

<sup>26</sup> Declared King Leopold III, in the course of his announcement: "An alliance, even if it is purely defensive, does not achieve its purpose because, however prompt might be the aid from our ally, it would come only after an onslaught by an invading army which would be devastating. In any event, we should have to struggle single-handed against that onslaught."

<sup>27</sup> See Parliamentary Papers (1937), Cmd. 5437, Hackworth, Dig., I, 69.

<sup>28</sup> Mr. Gibson, American Ambassador to Belgium, to Mr. Hull, Secy. of State, Oct. 18, 1937, Hackworth, Dig., I, 70.

<sup>29</sup> The American Ambassador in Brussels reported on May 10, 1940, that without presenting any note and without giving any warning, a large fleet of German bombers had bombed Brussels early on that day. Dept. of State Bulletin, May 11, 1940, 485, 487.

<sup>30</sup> *Am. J.*, III, *Supplement*, 118.

Germany, by the Treaty of Versailles of June 28, 1919,<sup>81</sup> and Austria, by that of St. Germain-en-Laye, of September 10, 1919,<sup>82</sup> adhered to the "termination of the régime of neutrality of the Grand Duchy," and accepted in advance "all international arrangements" which might be concluded by the Allied and Associated Powers relating to it. In a communication to the League of Nations of April 28, 1923, the Government of the Grand Duchy declared that the treaty of May 11, 1867, "which is still in force, imposes perpetual neutrality upon the Grand Duchy of Luxemburg," and that that State formed "an independent, indivisible, inalienable and perpetually neutral State."<sup>83</sup> German forces invaded Luxemburg in May, 1940.<sup>84</sup>

The neutralization of the Independent State of the Congo was the result of the provisions of Articles X and XI of the General Act of the Conference of Berlin, of February 25, 1885,<sup>85</sup> and the acceptance by King Leopold II as head of that State of the terms of the Act.<sup>86</sup> It should be observed, however, that according to those terms the parties declared that

In order to give a new guarantee of security to commerce and to industry and to favor, by the maintenance of peace, the development of civilization in the countries mentioned in Article I and placed under the régime of commercial liberty, the high signatory parties of the present Act and those who shall subsequently adhere to it engage themselves to respect the neutrality of the territories or parts of territories depending on said countries, including therein the territorial waters, so long as the Powers who exercise or shall exercise rights of sovereignty or protectorate over these territories, making use of the option to proclaim themselves neutrals, shall fulfill the duties which belong to neutrality.<sup>87</sup>

The foregoing appears to have been an undertaking to "respect the neutrality" of territorial areas, rather than that of a State, and it embraced no guarantee relative to either.<sup>88</sup> The State concerned was, however, annexed by Belgium by virtue of a treaty of November 28, 1907.<sup>89</sup>

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See in this connection, Mr. Lansing, Secy. of State, to the American Minister to the Netherlands, No. 632, Aug. 22, 1918, For. Rel. 1918, Supp. 1, 299, Hackworth, Dig., I, 71.

Concerning the interpretation of the "collective guarantee" mentioned in the treaty, see C. F. Littell, *Neutralization of States*, 155-160.

<sup>81</sup> Art. 40, U. S. Treaty Vol. III, 3351.

<sup>82</sup> Art. 84, *id.*, 3180.

See Oskar Griessinger, *Die Völkerrechtliche Stellung Luxemburgs nach dem Versailler Vertrag*, Würzburg, 1927.

<sup>83</sup> League of Nations, *Official Journal*, 1923, 722.

On April 6, 1929, Luxemburg concluded a treaty of "Conciliation" with the United States, U. S. Treaty Vol. IV, 4438.

<sup>84</sup> Dept. of State Bulletin, May 11, 1940, 485-488.

<sup>85</sup> *Nouv. Rec. Gén.*, 2 Sér., X, 414, 419; *Am. J.*, III, *Supplement*, 7, 14.

<sup>86</sup> See communication of Administrator General of Dept. of For. Affairs, Aug. 1, 1885, U. S. For. Rel. 1885, 59. See, also, documents in *Am. J.*, III, *Supplement*, 5-96.

<sup>87</sup> *Id.*, 14.

See views of Mr. Kasson, American representative at the Berlin Conference, on Nov. 19, 1884, favoring neutralization of the Congo territory. Senate Exec. Doc. No. 196, 49 Cong., 1 Sess. 39, set forth in C. F. Littell, *Neutralization of States*, 61.

<sup>88</sup> See Lauterpacht's 5 ed., of Oppenheim, I, § 101, p. 208, note 4.

<sup>89</sup> *Nouv. Rec. Gén.*, 3 Sér., II, 101-109; *Am. J.*, III, *Supplement*, 73. P. Fauchille, "*L'Annexion du Congo à la Belgique et le droit international*," *Rev. Gén.*, II, 400.

It is no longer to be expected that interested States will attempt through the faultless terms of relevant treaties to carve out of a contemplated or natural area of hostilities the territory of a small State that is to find itself in the thick of the fight. The small buffer State has proved to be dough. If Switzerland is to remain in fact aloof from wars on which its neighbors may embark, it will be due primarily to its power and determination to control the buttresses that nature has confided to its keeping.

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§ 29A. *Liberia.* With Liberia, a Republic that grew out of American colonization on the west coast of Africa early in the Nineteenth Century, the United States has long acknowledged and claimed a unique relationship.<sup>1</sup> In relation to various aspects of its life, such as the matter of its boundaries, the solution of various financial problems, relations with the indigenous population, the maintenance of a frontier police force, and the matter of forced labor, the United States has manifested deep concern and special interest. By no formal act has the United States become, however, the protector of Liberia, or accepted

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"The Organic Statute of the State of Albania, drawn up at London by the Conference of Ambassadors on July 29, 1913, contained the provision in article 3 thereof that 'Albania is neutralized; its neutrality is guaranteed by the six Powers'—namely, Germany, Austria-Hungary, France, Great Britain, Italy, and Russia." (Hackworth, Dig., I, 73, and documents there cited.)

§ 29A.<sup>2</sup> See, African Colonization—Slave Trade—Commerce, House Report No. 283, Feb. 28, 1843, 27 Cong., 3 Sess.

Also statement in Moore, Dig., V, 762–764, quoting statements by Mr. Webster, Secy. of State, to Mr. Everett, Minister to England, Jan. 5, and March 24, 1843, and correspondence between Mr. Upshur, Secy. of State, and Mr. Fox, British Minister, in August and September, 1843. See also documents in Moore, Dig., V, 764–776, especially Mr. Evarts, Secy. of State, to Mr. Hoppin, chargé, No. 446, April 21, 1880, MS. Inst. Great Britain, XXV, 627, Moore, Dig., V, 767; Mr. Hay, Secy. of State, to Mr. Porter, Ambassador to France, No. 640, June 28, 1899, MS. Inst. France, XXIV, 199, Moore, Dig., V, 768.

Cf. Mr. Polk, Acting Secy. of State, to the Secy. of the Treasury, July 25, 1918, in which the statement was made that "In 1847 Liberia was declared an independent State by the Government of the United States." (For. Rel. 1918, 553.) The accuracy of this statement may be doubted.

Declared Secy. Root, in a communication to President Roosevelt, Jan. 18, 1909: "Liberia is an American colony. It was established through the combined efforts of our Government and philanthropic and missionary enterprises in the United States, organized in the American Colonization Society and in societies in Maryland, New York, Pennsylvania, Mississippi, Louisiana, and other States. The Government participation in the establishment was the result of a series of statutes extending from 1794 to 1819 for the abolition of slavery. The last of these statutes, the act of March 3, 1819, provided that negroes from captured slavers should be safely kept, supported, and removed 'from beyond the limits of the United States.' . . .

"The first members of the colony were transported from America and landed upon African soil in vessels chartered by the Government of the United States. . . .

"From time to time since 1843 there have been expressions of interest in Liberia on the part of the United States Government, including the recognition of the independence of the Republic and a treaty of commerce and navigation in 1862, and also including a correspondence with the British Government in an ineffective effort to be of assistance to the people of Liberia in 1897. The present situation is to some extent indicated by the recent correspondence through the American ambassador in London, a copy of which is annexed." (For. Rel. 1910, 699, 700–701.) Also, Mr. Knox, Secy. of State, to the Commissioners of Liberia, April 13, 1909, For. Rel. 1910, 705.

See, in this connection, R. P. Falkner, "The United States and Liberia," *Am. J.*, IV, 529; also collection of official documents relating to the United States and Liberia, *Am. J., Supplement*, IV, 188–229.

responsibility for its conduct.<sup>2</sup> The former has, nevertheless, not hesitated to declare on occasion that it would regard with disapproval efforts on the part of other States unjustly to deprive Liberia of its territory, or otherwise to impair its rights.<sup>3</sup> While at one time the American government appeared to regard with some misgivings the acquisition by other Powers of a preponderance of influence in the economic affairs of the Republic,<sup>4</sup> it has in more recent years, especially since the advent of the League of Nations, evinced less interest in such a contingency.

The United States has not been reluctant to exert an influence in the management of the financial affairs of the Republic.<sup>5</sup> It has sought to effect loan agreements.<sup>6</sup> It has itself extended credit to Liberia.<sup>7</sup> It has designated general receivers of customs,<sup>8</sup> and financial advisers.<sup>9</sup> The United States has taken the initiative for the investigation of conditions in Liberia in relation to the matter of forced labor. It has sought, moreover, to coöperate with the League of Nations in the endeavor to disclose, and in efforts to suppress such conditions in that country.<sup>10</sup> In so doing, it has expressed indignation in consequence of the revela-

<sup>2</sup> The treaty of commerce and navigation between the United States and Liberia of Oct. 21, 1862, Malloy's Treaties, I, 1050, is far from subjecting the latter to a status of dependency.

See also, Mr. Fish, Secy. of State, to Mr. Seys, Minister to Liberia, No. 34, June 16, 1869, MS. Inst. Liberia, I, 65, Moore, Dig., V, 766.

<sup>3</sup> Declared Mr. Evarts, Secy. of State, on April 21, 1880: "The United States are not averse to having the great powers know that they publicly recognize the peculiar relations between them and Liberia, and that they are prepared to take every proper step to maintain them." (Communication to Mr. Hoppin, Chargé, No. 446, MS. Inst. Great Britain, XXV, 627, Moore, Dig., V, 767.)

See also Mr. Upshur, Secy. of State, to Mr. Fox, British Minister, Sept. 25, 1843, MS. Notes to British Leg., VI, 302, Moore, Dig., V, 763; Mr. Hay, Secy. of State, to Mr. Porter, Ambassador to France, No. 640, June 28, 1899, MS. Inst. France, XXIV, 199, Moore, Dig., V, 768; Same, to Mr. Jackson, Chargé, No. 641, Nov. 18, 1898, MS. Inst. Germany, XX, 572, Moore, Dig., V, 768.

<sup>4</sup> "This Department not only because of this Government's historic interest in Liberia, but for political and commercial reasons as well, is of the opinion that a larger share of foreign control of the finances of Liberia would be undesirable, and that the Government of the United States should alone assume responsibility for the conduct of the affairs of the Republic." (Mr. Lansing, Secy. of State, to Mr. McAdoo, Secy. of the Treasury, June 1, 1918, For. Rel. 1918, 524, 526.)

<sup>5</sup> See, for example, documents in For. Rel. 1912, 667-701, concerning the conclusion of the refunding loan of 1912, to refund the registered external and internal debt of Liberia as of Dec. 31, 1910.

<sup>6</sup> See Mr. Lansing, Acting Secy. of State, to Messrs. Kuhn, Loeb and Co., Nov. 30, 1914, For. Rel. 1914, 442; also, documents in For. Rel. 1915, 635-642.

<sup>7</sup> See documents in For. Rel. 1918, 505-547, especially, 536-537.

<sup>8</sup> See Mr. Knox, Secy. of State, to the British Ambassador, Dec. 21, 1911, in reference to the appointment by the Liberian Government of Mr. R. C. Clark as general receiver, For. Rel. 1911, 347.

See, in this connection, R. L. Buell, "The Reconstruction of Liberia," Foreign Policy Reports, Aug. 3, 1932, p. 121.

<sup>9</sup> See Art. VIII of agreement between the Government of the Republic of Liberia and Finance Corporation of America: Loan Agreement of 1926, League of Nations, *Official Journal*, 1932, 1386, 1389.

<sup>10</sup> See Report of the International Commission of Inquiry into the Existence of Slavery and Forced Labor in the Republic of Liberia, Monrovia, Liberia, Sept. 8, 1930 (Members: Dr. Cuthbert Christy, League of Nations, *Chairman*, Dr. Charles Spurgeon Johnson, United States, Honorable Arthur Barclay, Liberia), Publications, Dept. of State, No. 147, Washington, 1931.

Also, Communication by the Government of Liberia, Dec. 15, 1930, transmitting the Commission's Report, League of Nations, document C. 658. M. 272. 1930. VI.

tion of conditions that were shown to exist, and has been critical of delay on the part of Liberia in the amelioration of them.<sup>11</sup>

Responding to a request for assistance from the Liberian Government, the Council of the League of Nations, in January, 1931, appointed a committee to study the problem and make recommendations and suggestions. In this connection on January 20th, 1931, the Department of State declared:

While it would not accord with the established policy of the United States to assume any exclusive responsibilities on the African Continent, the American Government, in view of the social and humanitarian principles involved and the traditional friendly interest of the American people in the welfare of Liberia, would be prepared to give sympathetic consideration to a proposal for affirmative international coöperation destined to assist the Liberian people in a solution of their present problems concerning both slavery and sanitation.<sup>12</sup>

Shortly thereafter, the American Government announced its acceptance of an invitation to participate, through the appointment of a representative, in the work of the International Committee which would meet at Geneva for the purpose of examining various questions relating to recommended Liberian social and administrative reforms.<sup>13</sup> A Committee of Experts designated by the International Committee of the Council of the League duly made an elaborate report.<sup>14</sup> To a report by the International Committee on Liberia, adopted by the Council of the League on May 20, 1932,<sup>15</sup> the United States made reservations.<sup>16</sup> On September 27, 1932, the International Committee unanimously adopted a revised text known as "General Principles of the Plan of Assistance to Liberia" designed to serve as a framework within which it might be possible for American interests involved (the Finance Corporation of America) to reach an agreement through

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See Ursula P. Hubbard, *The Coöperation of the United States with the League of Nations, 1931-1936*, *Int. Conciliation*, April, 1937, No. 329, 350-363. These pages, pertaining to Liberia, are understood to have been examined and revised in accordance with the suggestions of a person associated with the Department of State, and who represented the United States on a Committee of the Council of the League of Nations in respect to Liberian affairs in 1931.

<sup>11</sup> See Memorandum from the Secy. of State, delivered to the Liberian Consul-General, Nov. 17, 1930, League of Nations, *Official Journal*, 1931, 468; Dept. of State Press Releases, Jan. 10, 1931, 21.

<sup>12</sup> Dept. of State Press Releases, Jan. 24, 1931, 40. There was added the statement: "The method by which our traditional interest in this matter can be continued effectively to remedy the evils which have been disclosed by the slavery report has been under active discussion with representatives of other signatories of the slavery convention of 1926, including Liberia, Great Britain, Germany, Italy, and Japan."

<sup>13</sup> Dept. of State Press Releases, Feb. 7, 1931, 69, in which there was announced the appointment upon the Committee of Mr. Samuel Reber, Jr., an American diplomatic officer.

See Preliminary Report of the Committee of the Council, of May 21, 1931, in relation to American representation thereon, League of Nations, *Official Journal*, 1931, 1448.

<sup>14</sup> League of Nations, *Official Journal*, 1932, 1359.

See, in this connection, R. L. Buell, "The Reconstruction of Liberia," *Foreign Policy Reports*, Aug. 3, 1932.

<sup>15</sup> League of Nations, *Official Journal*, 1932, 1222, 1224.

<sup>16</sup> Dept. of State Press Releases, May 21, 1932, 515.

On Feb. 27, 1933, the Dept. of State announced the designation by the President of Maj. Gen. Blanton Winship, U.S.A., as representative of the President of the United States on special mission to Liberia. Dept. of State Press Releases, March 4, 1933, 150.



direct negotiations with Liberia. Those principles were, in the opinion of the Department of State, "susceptible of use as a basis for the further development of the Liberian problem through direct negotiations between the Finance Corporation and Liberia. . . ." <sup>17</sup> That corporation duly sent a representative to confer with the International Committee at Geneva. On December 17, 1932, the adoption by the Liberian Legislature of a joint resolution, which in the opinion of the American Government was in contravention of the Loan Agreement of 1926, caused sharp remonstrance by the United States. <sup>18</sup> Moreover, the International Committee was urged by the American Government to bring pressure upon Liberia to withdraw its action in contravention of that agreement. <sup>19</sup>

Financial negotiations were had at London in June, 1933. These led the Committee to modify its plan of administrative assistance, and, on the basis of a report from its financial expert, to draw up a protocol to be accepted by the Council and signed by the Liberian Government. <sup>20</sup> A final report embracing the revised Plan of Assistance was adopted by the Council of the League on October 13, 1933, and received the endorsement of the Department of State, which took occasion to declare that "the American Government expects Liberia to accept the Plan of Assistance and will be pleased in this case to cooperate in its successful execution." <sup>21</sup> Liberia declined, however, to accept the plan which, in January, 1934, the League of Nations withdrew. <sup>22</sup> In July, 1934, Mr. McBride, Assistant to the Secretary of State, was detailed by the American Government to proceed to Monrovia to study the Liberian situation. <sup>23</sup> On June 11, 1935, the administration of President Barclay was recognized by the American Government, this action serving to regularize formal diplomatic relations with the Republic which had been in abeyance since 1930. <sup>24</sup>

From the foregoing facts it must be obvious that since the advent of the League of Nations the United States has deemed it feasible to coöperate with that body with respect to matters pertaining not only to the social and economic welfare of Liberia, but also to the financial arrangements of American nationals with the Republic. In its direct relations therewith, the United States has not hesitated, on various occasions, to warn Liberia that failure to follow American advice might serve to alienate, if not terminate, its interest in assisting the Re-

<sup>17</sup> Dept. of State Press Releases, Feb. 4, 1933, 75, 76.

See Appendix I to Report by the Committee of the Council, Oct. 13, 1932, League of Nations, *Official Journal*, 1932, 2053.

<sup>18</sup> Dept. of State Press Releases, Feb. 4, 1933, 75, 78.

<sup>19</sup> *Id.*

<sup>20</sup> See, in this connection, William Koren, Jr., "Liberia, The League and the United States," *Foreign Policy Reports*, X, No. 19, 239, 242.

<sup>21</sup> Liberia, Documents Relating to the Plan of Assistance Proposed by The League of Nations, Dept. of State, Publication No. 535, Washington, 1933. See statements by Maj. Gen. Blanton Winship, American Representative on the League Committee, embraced in annexes I and II.

<sup>22</sup> League of Nations Doc. No. C. 106. M. 38. 1934. VII. See Sir John Simon, British Secy. for Foreign Affairs, to Sir R. Lindsay, British Ambassador at Washington, May 29, 1934, Liberia No. 1 (1934), Cmd. 4614, 49.

<sup>23</sup> Dept. of State Press Releases, July 28, 1934, 66.

<sup>24</sup> Dept. of State Press Releases, June 15, 1935, 445. On October 4, 1935, Mr. Lester A. Walton presented his letters of credence to President Barclay, as the diplomatic representative of the United States. See *New York Times*, Oct. 5, 1935.

public.<sup>25</sup> Moreover, it has threatened, under certain contingencies, to prevent the extension to it of financial aid from any source.<sup>26</sup> It is not to be concluded, however, that American relations with Liberia have generally been other than friendly. Nevertheless, in method of approach and tone of communication the attitude of the United States towards Liberia in the brief period between 1930 and 1935 oftentimes resembled that of a protector in its dealings with a backward ward.<sup>27</sup> The former has not, however, availed itself of its relatively superior position to safeguard the Republic against the conclusion of contractual arrangements with American nationals that at least in foreign quarters have not always been regarded as wholly beneficial to the interests of Liberia.<sup>28</sup>

It may be observed that on August 8, 1938, there was concluded between the United States and Liberia a treaty of Friendship, Commerce and Navigation;<sup>29</sup> and also that on October 7, 1938, a consular convention was concluded between them and that it was the first consular convention ever signed in behalf of Liberia.<sup>30</sup>

<sup>25</sup> See Mr. Wilson, Acting Secy. of State, to the American Minister, March 28, 1912, For. Rel., 1912, 654. Also, Memorandum delivered to the Liberian Consul General by the Secy. of State, Nov. 17, 1930, in relation to the conditions disclosed by the Report of the International Commission of Inquiry into the existence of slavery and forced labor in Liberia, League of Nations, *Official Journal*, 1931, 468.

"Unless the Liberian Government proceed without delay to act upon the advice and suggestions herewith expressed, this Government will be forced, regretfully, to withdraw the friendly support that historic and other considerations have hitherto prompted it to extend." (Mr. Lansing, Secy. of State, to Minister Curtis, April 4, 1917, For. Rel., 1917, 877.)

<sup>26</sup> On Dec. 23, 1932, the Liberian Government was informed that the American Government viewed with very deep concern action by Liberia leading to repudiation or unilateral modification of Liberia's contractual engagements with an American company; that such action would be construed by the American Government "not only as an effort by Liberia to repudiate a legitimate contract, legitimately acquired, but also to nullify Liberia's engagements with the International Committee." It was added that, in the circumstances, "the American Government would feel that Liberia was blocking American participation in the international efforts to assist Liberia and that, moreover, the American Government would be prepared to protest the extension of financial aid to Liberia from whatever source, unless and until the prior rights of American citizens had either been met in full or the Loan Agreement had been modified on a basis of mutual consent." (Dept. of State Press Releases, Feb. 4, 1933, 75, 78.)

<sup>27</sup> The assertion of the United States of the right so to approach Liberia, under the conditions which inspired the former to do so, is as important from a legal point of view as manifestations of friendliness which have generally and for a long period happily characterized the relationship between the American Government and that of Liberia, and which events of the past five years have served to strengthen.

<sup>28</sup> See Report of Experts designated by the Committee of the Council of the League of Nations appointed to study the problem raised by the Liberian Government's request for assistance, League of Nations, *Official Journal*, 1932, 1359, 1365; Appendix VI, *id.*, 1379, 1381; also, discussions in Second Preliminary Report by the Committee of the Council, League of Nations, *Official Journal*, 1932, 523-528.

It is not suggested, however, that official opinion at Washington has necessarily shared the view that particular concessions granted by the Liberian Government to American corporate interests have not been beneficial to the grantor.

See in this connection Dept. of State Press Releases, Feb. 4, 1933, 75-80; also documents in Hackworth, Dig., I, § 49.

<sup>29</sup> U. S. Treaty Series, No. 956.

<sup>30</sup> U. S. Treaty Series, No. 957. Also Air Navigation Arrangement, effected by exchange of notes, signed June 14, 1939, U. S. Executive Agreement Series, No. 166.

## 2

## STATES IN RELATION TO THEIR STRUCTURE AND COMPOSITION

## a

§ 30. **In General.** The structure of a State is not necessarily a matter of international concern. Thus whether it be what is described as simple,<sup>1</sup> or composite,<sup>2</sup> is unimportant. Nor is the mode by which a group of political entities have united and formed a person of international law a matter of concern, so long as a single State of international law has resulted. To the outside world, the method by which the United States came into being, with respect at least to the nature of its statehood, is merely a matter of historic interest.

## b

## Unions of States

## (1)

§ 31. **Where International Personality of Members Is Not Relinquished.** States may and oftentimes do unite. In such event it becomes a matter of international concern whether any constituent member of the new State has retained its international personality by not relinquishing wholly its right to participate in foreign affairs. If such be the case the union, however described, is in a strict sense a group of states of international law each of which remains to be regarded as a distinct person in the family of nations. Unions of such a kind have appeared in various forms. In some instances the individual members have retained broadest privileges, reducing proportionally the importance of the bond uniting them.<sup>1</sup> In others, the union has itself predominated in importance, notwithstanding

§ 30. <sup>1</sup>"The characteristic of the simple State is that it has one supreme government, and exerts a single will, whether it be the individual will of a sovereign ruler, or the collective will of a popular body or of a representative assembly." Moore, Dig., I, 21.

<sup>2</sup>"A composite State is one composed of two or more States." (*Id.*, I, 22.) It may be noted that the permanence of a State may be affected by the nature of its structure. Thus a composite State is likely to find that its durability is jeopardized by reason of its composition. Nevertheless, while such a State holds its place as a member of the family of nations, its rights as such are not affected by that circumstance. See statement in Hackworth, Dig., I, § 14, and documents there cited.

§ 31. <sup>1</sup>Thus when, in 1885, the King of the Belgians assumed the title of sovereign of the Independent State of the Congo, that State and Belgium, remaining separate and distinct, were united only by reason of their having the same monarch. The relationship constituted what has been described as a personal union. See letter of King Leopold to President Cleveland, Aug. 1, 1885, For. Rel. 1885, 58.

*Cf.* also the relationship between Great Britain and Hanover, 1714–1837, as described by Coleridge, C. J., in *Isaacson v. Durant*, 17 Q. B. D. 54, 59.

Westlake refers to the advance from a personal union to one where "the rules of succession in the two monarchies may be assimilated to one another, so as to exclude the chance of the crowns being separated by their operation," declaring that "this was done for Austria and Hungary by the Pragmatic Sanction of 1723, which provided for the succession of Maria Theresa in both countries in accordance with the Hungarian rule, while enacting the Austrian exclusion of females as the rule in both countries thereafter." He notes also the situation where "the common sovereign, instead of habitually taking international

ing the definite participation in foreign affairs enjoyed by its constituents.<sup>2</sup> In still others, that predominance has been such as to leave to the individual member slight although technical freedom to deal with the outside world, and to present accordingly for all practical purposes a united front in international affairs. The German Empire under the constitution of April 16, 1871, is illustrative.<sup>3</sup> While the several States comprising it retained rights to enable them technically to preserve their individual membership in the family of nations, to the outside world it was the German Empire — the *Bundesstaat* — which was of chief significance.<sup>4</sup> It may be said to have attained itself the status of a person of international law, notwithstanding the character of its constituent members.

The German Republic under the constitution adopted at Weimar, July 31, 1919, and promulgated on August 11, 1919, appeared to indicate the welding together of a still closer union such that the constituent States almost completely relinquished their international personalities for the sake of the national entity. Thus the Republic became practically if not technically the only State of international law within the limits of its domain.<sup>4a</sup> By the law of January 30, 1934,

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action for his countries separately, may habitually unite them in his international action, so that the one being at war while the other is at peace becomes a contingency which, though theoretically possible, is not dreamed of in practical politics so long as the crowns continue to rest on the same head." (2 ed., I, 32-33.)

<sup>2</sup> The German Confederation, 1815-1866, may be taken as illustrative. See Dana's Wheaton, §§ 47-51. This union was described as a *Staatenbund*.

<sup>3</sup> See Edwin H. Zeydel, "Constitutions of the German Empire and German States," Dept. of State, confidential document, 1919; also Karl Binding, *Deutsche Staatsgrundgesetze*, I, 18; For. Rel. 1871, 383-393; *id.*, 1877, 183.

<sup>4</sup> Declared Prof. Moore, in 1906: "The several [German] States preserve the right of legation; they grant exequaturs to foreign consuls within their territories, although all German consuls are sent out by the Empire; they may enter into conventions with foreign powers concerning matters not within the competence of the Empire or of the Emperor, and within the limits fixed by the laws of the Empire; they may conclude *concordats* with the Holy See. On the other hand, by the constitution of 1871, the laws of the Empire are within their proper sphere supreme. There is one citizenship for all Germany, and all Germans in foreign countries have equal claims upon the protection of the Empire. The supervision of the Empire and its legislature comprehends, among other things, the right of citizenship; the issuing and examination of passports; the surveillance of aliens; colonization and emigration; customs duties and commerce; coinage, and the emission of paper money; foreign trade and navigation, and consular representation abroad; and the imperial army and navy. The Emperor represents the Empire among nations; enters into alliances and other conventions with foreign countries; sends and receives ambassadors; and declares war and concludes peace in the name of the Empire, with the proviso, however, that for a declaration of war, the consent of the federal council is required, except in case of 'an attack upon the territory of the confederation or its coasts.'" (Dig., I, 25.)

<sup>4a</sup> According to Art. VI, the Government of the Republic was given the exclusive right of legislation over foreign relations. Art. XLV declared that the President should represent the Republic in matters of international law, that he should, in the nation's name, conclude alliances and other treaties with foreign powers, and that he should accredit and receive ambassadors. The declaration of war and conclusion of peace were to be subject to national law. Alliances and treaties with foreign States, in relation to subjects covered by national law, were to require the approval of the Reichstag. Art. LXXVIII announced that the relations with foreign States concerned the nation exclusively. It was there provided, however, that in matters regulated by provincial law, the confederated States might conclude treaties with foreign States. These treaties were, however, to require the consent of the nation. Agreements with foreign States regarding change of national boundaries were to be concluded by the nation on consent of the State involved. In order to assure the representation of interests arising for special States through their special economic relations or their proximity to foreign countries, the Government was to decide on the measures and arrangements required in concert with the States involved.

concerning the reconstruction of the Reich,<sup>5</sup> the German States "ceased to exist in their capacity as international legal subjects."<sup>6</sup> Their privileges of statehood thereupon seemingly disappeared.<sup>7</sup>

The establishment of the Swiss Confederation under the constitution of May 29, 1874,<sup>8</sup> did not deprive the constituent Cantons of an international personality. They retained the right to conclude certain minor and specified classes of agreements with foreign States, such as those respecting "the administration of public property and border and police intercourse."<sup>9</sup> All separate alliances and all treaties of a political character between the Cantons were forbidden.<sup>10</sup> To the Confederation was entrusted the "sole right of declaring war or making peace, and of concluding alliances and treaties with foreign powers, particularly treaties relating to tariffs and commerce."<sup>11</sup> Official intercourse between the Cantons and foreign governments, or their representatives, was to take place through the Federal Council of the Confederation.<sup>12</sup> To the outside world Switzerland appeared to take its stand as itself a State of international law endowed with the right of controlling generally the foreign affairs of the several Cantons, notwithstanding the retention of statehood by the latter.

However attributable to a "forcible and violent invasion" which Secretary Hull did not hesitate to censure,<sup>13</sup> the Constituent Assembly of Albania on April 12, 1939, proceeded to offer the Crown of that country, "in the form of a personal union" to His Majesty Victor Emmanuel III, King of Italy and Emperor of Ethiopia for him and his royal descendants.<sup>14</sup> The King of Italy duly accepted the Crown of Albania, assuming for himself and his successors the title of King of Italy and Albania, Emperor of Ethiopia. He was to be represented in Albania by a Lieutenant-General, who was to reside at Tirana.<sup>15</sup>

The existence or retention of international personality is necessarily revealed when a country continues to hold itself out to the world as a distinct entity in

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In March, 1920, the Department of State reported the announcement of the abolition of the Ministry of Foreign Affairs by Bavaria, as part of a movement towards greater centralization of the Government at Berlin.

For an English translation of the Constitution, see McBain and Rogers, *New Constitutions of Europe*, New York, 1922, 176.

<sup>5</sup> Reichsgesetzblatt I, Jan. 30, 1934, p. 75.

<sup>6</sup> German Supreme Court in Criminal Matters, decision of Aug. 13, 1936 (Extradition Treaties of the German States), translation by Dr. Stefan Riesenfeld, *Am. J.*, XXXI, 739, 740.

<sup>7</sup> See Stefan Riesenfeld in *Am. J.*, XXXI, 720.

<sup>8</sup> For an English translation of the federal constitution of the Swiss Confederation, see "Old South Leaflets," General Series, No. 18, reprinted as Appendix II to "Government in Switzerland," by John Martin Vincent, New York, 1900. See also, *Die Schweizerische Bundesgesetzgebung*, Basel, 1890-1891, edited by Prosper Wolf. Also in this connection, S. B. Crandall, *Treaties, Their Making and Enforcement*, 2 ed., § 148.

<sup>9</sup> Art. IX.

<sup>10</sup> Art. VII.

<sup>11</sup> Art. VIII. By an Act of Jan. 22, 1892, matters of extradition were placed in the hands of the Federal Council which was authorized to conclude treaties with foreign States, Brit. and For. State Papers, LXXXIV, 671. An extradition treaty was concluded with the United States, May 14, 1900, Malloy's *Treaties*, II, 1771.

<sup>12</sup> Art. X.

<sup>13</sup> See statement by Mr. Hull, Secy. of State, released April 8, 1939, Dept. of State Press Releases, April 8, 1939, 261.

<sup>14</sup> See Völkerbund, *Journal for International Politics*, VIII, Geneva, April 20, 1939, 169.

<sup>15</sup> See bill approved by the Italian Council of Ministers, April 14, 1939, *id.*, 170.

whose behalf as such foreign relations are to be conducted.<sup>16</sup> A union of two States may pay heed to such a fact, regardless of the singleness of the instrumentality through which those relations are held.

The union of Denmark and Iceland is illustrative. By the agreement contained in their law of union of November 30, 1918, they declared themselves to be "free and sovereign States united under a common King," the names of both States to be included in the King's title.<sup>17</sup> It was provided that Denmark should "attend on Iceland's behalf to its foreign affairs."<sup>18</sup> All agreements which had been entered into between Denmark and other countries and had been published were, in so far as they concerned Iceland, "also to be valid" for that country. After the ratification of the law of union, agreements entered into by Denmark with other States were not to be binding for Iceland without the consent of the proper Icelandic authorities.<sup>19</sup> On May 15, 1930, an arbitration treaty was concluded in the name of His Majesty, the King of Iceland and Denmark, in behalf of Iceland with the United States.<sup>20</sup> Iceland and Denmark, through their respective representatives, were separate and distinctive signatories to the Final Act of The Hague Conference of 1930, for the Codification of International Law, and to the convention there concluded Concerning Questions Relating to the Conflict of Nationality Laws.<sup>21</sup> Following the German occupation of Danish territory in April, 1940, the Icelandic parliament (the Althing), on April 10 passed resolutions declaring that in view of the existing situation which made it impossible for His Majesty the King to execute the royal power given him under the Constitutional Act, the Ministry of Iceland was "for the time being entrusted with the conduct of the said power"; and that as Denmark was not in a position to execute the authority to take charge of the foreign affairs of Iceland granted to it by the provisions of article 7 of the Danish Icelandic Union, and could not carry out the fishery inspection within Icelandic territorial waters in accordance with article 8 of the same Act, Iceland would "for the time being take entire charge of the said affairs."<sup>22</sup> This action, important as it was, marked a suspension of the operation, rather than a dissolution, of the bond with the King and with Denmark.<sup>23</sup> On May 17, 1941, certain joint resolutions were

<sup>16</sup> See Requisites of a State of International Law, *supra*, § 7.

<sup>17</sup> § 1, Brit. and For. St. Pap., CXI, 703.

According to § 2: "The succession to the throne shall be that fixed in the Law of the 31st July, 1853, regarding the succession to the throne, Articles I and II, and cannot be changed without the consent of both States."

See in this connection, Higgins' 8th ed. of Hall, 26, note 2; Lauterpacht's 5 ed. of Oppenheim, I, § 87, note 2, p. 158.

<sup>18</sup> § 7.

<sup>19</sup> *Id.* Declared the Danish Minister at Washington in a note to the Secy. of State, Dec. 10, 1918: "The Danish Government has, in accordance with a federal act of November 30th 1918 passed by the parliaments of Denmark and Iceland, recognized Iceland as a sovereign State. Denmark and Iceland are united under the same sceptre and His Majesty the King has in His title adopted the names of the two States. Denmark takes care of the foreign affairs on behalf of Iceland, and Iceland declares itself perpetually neutral." (Hackworth, Dig., I, 59.)

<sup>20</sup> U. S. Treaty Vol. IV, 4074. See note from Dept. of State to Mr. Robertson, Jan. 5, 1935, Hackworth, Dig., I, 59. See also documents in Hackworth, Dig., I, 213-214.

<sup>21</sup> *Am. J.*, XXIV, *Official Documents*, 190-191; 200.

<sup>22</sup> See Gudmundur Grimson and Sveinbjorn Johnson, "Iceland and the Americas," being separate papers in *Am. Bar Ass. J.*, XXVI, June, 1940, 505 and 506.

<sup>23</sup> The following statement was released to the press by the Department of State, April 16,

passed by the Icelandic Althing to the effect that the Parliament considered that Iceland had acquired the right of completely severing the Union due to the circumstance that it had been obliged to take into its own hands the handling of its foreign affairs, as a consequence of the inability of Denmark to handle them; that there would be no question of renewing the Treaty of Union, so far as Iceland was concerned, but that it was thought to be inopportune at the time to proceed to the formal severance of the Union or to establish the eventual constitutional arrangement of the country, which would not however be postponed longer than the termination of the existing war; that a republic should be established in Iceland directly upon the formal severance of the Union with Denmark, and that the Althing resolved to elect a regent to exercise the powers with which the Government was entrusted under the joint resolution of April 10, 1940.<sup>24</sup> The American-Icelandic agreement announced on July 7, 1941, set forth the promise of the United States to withdraw all military forces, land, air, and sea, from Iceland immediately on the conclusion of the existing war, as well as the further promise of the United States to recognize the absolute independence and sovereignty of Iceland, and to exercise its best efforts with the powers which should negotiate the peace treaty at the conclusion of the war, in order that that treaty should likewise recognize that independence and sovereignty.<sup>25</sup>

## (2)

**§ 32. Where International Personality of Members is Relinquished.** The terms of a union of States may mark the relinquishment by the members thereof of the privilege of dealing with the outside world, or of being held out to it as distinctive entities in whose behalf as such foreign relations are conducted by an appropriate instrumentality. In such case the union becomes a person or State of international law of which the composition is a matter of unconcern to foreign powers. They recognize the completeness of the merger, and while it lasts, necessarily regard as non-existent the former States which surrendered their international personality. The Austro-Hungarian Monarchy created in 1867 by a union of the Empire of Austria and the Kingdom of Hungary was until its dissolution, a State of international law. Nevertheless, during that period, neither Austria nor Hungary was completely bereft of an international personality, and neither ceased to be a State.<sup>1</sup>

1940: "The Secretary of State is in receipt of a telegram from the Prime Minister of Iceland, Mr. Hermann Jonasson, informing him that the Icelandic Government is anxious to enter into direct relations with the United States. Mr. Hull has replied that this Government is agreeable in the existing circumstances to the establishment of Icelandic representation and hopes itself to open a consular office at Reykjavik in the near future." (Dept. of State Bulletin, April 20, 1940, 414.)

<sup>24</sup> The statement in the text is based upon data furnished the author through the kindness of Mr. H. G. Andersen, a citizen of Iceland.

<sup>25</sup> Dept. of State Bulletin, July 12, 1941, 15-18.

§ 32.<sup>1</sup> See in this connection, The Dismemberment of the Austro-Hungarian Dual Monarchy, *infra*, § 107A.

In 1896, the Republics of Honduras, Nicaragua, and Salvador united in forming a "single political entity, for the exercise of their sovereignty as regards their intercourse with foreign nations," which was known as the Greater Republic of Central America. See text of treaty of union, of June 20, 1895, For. Rel. 1896, 390. Concerning the dissolution in 1898 of the

As a result of the World War the Serb, Croat and Slovene peoples of the former Austro-Hungarian Monarchy united of their own free will with Serbia in a permanent union for the purpose of forming "a single sovereign independent State under the title of the Kingdom of the Serbs, Croats and Slovenes."<sup>2</sup>

It suffices to observe that quite apart from the appropriateness of the accepted description of such types of unions,<sup>3</sup> the family of nations is concerned solely with the result effected, namely, the single political entity asserting an international personality which has supplanted for purposes of statehood the several constituents which were thus welded together.

### (3)

#### § 33. Countries not Familiar with Accepted Standards of Civilization.

The existence and observance of principles of an international system of law designed to regulate the conduct of the members of the society of nations, is due in part to the circumstance that there are common standards of civilization familiar to, and recognized as such, by each of them. Each is, therefore, capable of fashioning its conduct in harmony with injunctions that are closely responsive to those standards. States, therefore, despite the differences between them, are alike in their common possession of such a faculty. If they may fairly call themselves civilized, it is because they have reached a stage where they are capable of making complete response to what a common civilization,<sup>1</sup> and the law that has sprung from it, may exact.

The attainment of such capacity must be the goal of all peoples, however undeveloped. In the course of their progress towards it, communities and countries have followed, and are following, different paths. In so doing some have developed standards of their own, rising that mark a deference for high purposes, and give promise of early capacity to respect those recognized by the international society when they shall have been understood and their value duly appraised. Others have been slow to perceive the need of conformity to the standards of the international society. This has been manifest in the treatment accorded foreign life and property, and particularly in the nature of penalties imposed upon alien offenders.<sup>2</sup> The fact merely illustrates the different stages of development attained by entities, not acknowledged to be States, which not

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union which had assumed the name of the Republic of the United States of Central America, see For. Rel. 1898, 172-178.

<sup>2</sup> See preamble of treaty between the Principal Allied and Associated Powers, and the Serb-Croat-Slovene State, signed at Saint-Germain-en-Laye, Sept. 10, 1919, British Treaty Series, 1919 (Cmd. 461).

<sup>3</sup> The Austro-Hungarian Monarchy was described as a "real union." Moore, Dig., I, 22.

Concerning the United States as a federal union, see J. B. Scott, *The United States of America: A Study in International Organization*, New York, 1920, Chap. III, and documents there quoted.

Concerning the effect of the law of January 30, 1934, relating to the reconstruction of the German Reich see *supra*, § 31.

§ 33.<sup>1</sup> That civilization has frequently been described as "European." See, for example, Westlake, 2 ed., I, 40. This author so referred to it in the first edition of this work.

<sup>2</sup> See, for example, the participation by the Imperial Government of China in the so-called Boxer uprising in that country in 1900. In this connection, see President McKinley, *Annual Message*, Dec. 3, 1900, For. Rel. 1900, xii-xiii.



infrequently occupy and control well-defined territorial areas, and which have dealings with the outside world.<sup>3</sup>

Contacts with backward peoples have, however, oftentimes been marred by harsh and ruthless practices. Protectorates have at times been established or imposed as the first steps towards annexation; or sheer conquest, without waiting for such preliminaries, has wrought subjugation. Even the Nineteenth Century revealed contempt for the culture, aspirations, and equities of peoples regarded as uncivilized when they lacked the power by their own strong arm to resist the demands of an invading or annexing State.<sup>4</sup> Many countries proved, however, to be strong enough to hold their own, and to compel recognition of their place in the international community while they strode forward on the way to eligibility for statehood. As they did so, they could not in fact be subjected to wardship; but they were compelled to yield important privileges of jurisdiction over the nationals of contracting States — concessions which those States as members of the family of nations were not yielding, and felt no obligation to yield, to each other. Those granted by China, Japan, and Siam, and in earlier times by Turkey, were illustrative.<sup>5</sup>

The close of the Nineteenth Century followed by the years that marked the termination of the World War witnessed transformations in thought and conduct that were universal. Countries which in earlier decades had been deemed unfamiliar with the accepted standards of civilization proved their capacity and disposition to respect them and to be dealt with accordingly as full-fledged members of the international society. Japan furnished an impressive instance. Its recognition not only as such a member of that society, but also as one of the Principal Allied and Associated Powers marked a development wrought in the narrow space of sixty years.<sup>6</sup> Turkey, which in 1856, had been admitted to membership in the international society for certain purposes,<sup>7</sup> acquired a new place on a new plane when as a Republic it signed the Treaty of Lausanne on

<sup>3</sup> Declared Westlake, in 1910: "The European and American States maintain diplomatic intercourse and conclude treaties with them [Morocco, Turkey, Muscat, Persia, Siam and China], they regard their territories as being held by titles of the same kind as those by which they hold their own, and when at war with them they regard the laws of war as being reciprocally binding just as between themselves. But the civilisation of those countries differs from that of the Christian world in such important particulars, especially in the family relations and in the criminal law and in its administration, that it is deemed necessary for Europeans and Americans among them to be protected by the enjoyment of a more or less separate system of law under their consuls." (2 ed., I, 40.)

<sup>4</sup> See The Protection of Backward Communities or of Countries of a Unique Civilization, *supra*, § 25.

<sup>5</sup> See Extraterritorial Jurisdiction, *infra*, §§ 259-260.

<sup>6</sup> See treaty between the United States and Japan of Nov. 22, 1894, in revision of previous agreements, Malloy's Treaties, I, 1028; Imperial rescript on the new treaties of Japan, June 30, 1899, For. Rel. 1899, 469. See, also, Moore, Dig., V, 758-762, and documents there cited, referring to acts on the part of Japan recognizing principles of international law prior to its admission to full membership in the family of nations. Cf. Holland, Studies, 112-129; S. Takahashi, Cases on International Law during the Chino-Japanese War; John W. Foster, American Diplomacy in the Orient, 344-364.

See M. Matsushita, Japan in the League of Nations, New York, 1929. It is not without significance that in 1931, Japan furnished in the person of Dr. Adatci, the individual who was chosen as the President of the Permanent Court of International Justice.

<sup>7</sup> By Art. VII of the Treaty of Paris of March 30, 1856, the signatory parties comprising Great Britain, France, Russia, Sardinia, Austria and Turkey "declare the Sublime Porte admitted to participate in the advantages of the public law and system of Europe." (*Nouv. Rec. Gén.* XV, 770.)

July 24, 1923.<sup>8</sup> Siam advanced by leaps and bounds.<sup>9</sup> China went steadily forward over hard and devious paths, and felt itself entitled to demand release from the concessions of extra-territorial jurisdiction that its treaties recorded.<sup>10</sup>

States long acknowledged to be such had made equal progress. The establishment of the mandates system marked the acceptance by some that were victors in the World War of a legal duty towards each other to deal equitably with the backward peoples of areas that came under their control.<sup>11</sup> Moreover, the establishment and successful application of that system went far to challenge the soundness of the pretensions of States that thereafter might regard colonial aggrandizement at the expense of backward peoples as a matter of purely domestic concern. In another fashion civilization so-called had partly learned its lesson. There was brought home to it a fresh realization of the fact that the family of nations embraced nothing short of the peoples of the entire world, that all of them should be deemed to be capable of ultimate understanding of and respect for the common standards accepted by those entities which constituted States, and of heeding the law which those standards appeared to demand; and that in the interval before the attainment of full capacity they were not to be regarded as beyond the pale, but rather as within the bosom of a family of which they were a part, and to which they were expected eventually to make a distinctive contribution.

Constant realization and emphasis of these facts by States in their intercourse with countries as yet unfamiliar with accepted standards and of the law springing from them must serve to dispel antagonism, remove distrust, and inculcate zeal for early attainment of eligibility for statehood.

(4)

ASPECTS OF INTERNATIONAL COÖPERATION

(a)

§ 33A. **In General.** The coöperation of States characterizes the life of the international society. It may express itself in a variety of ways, as by treaty, or

<sup>8</sup> *Am. J.*, XVIII, *Official Documents*, 1.

See Turkey, *supra*, § 28; also, Steps towards the Relinquishment of Extraterritorial Jurisdiction, *infra*, § 265.

<sup>9</sup> See Francis B. Sayre, "The Passing of Extraterritoriality in Siam," *Am. J.*, XXII, 70; also Siam: Treaties with Foreign Powers 1920-1927, edited by Phi Kalyan Maitri (Francis B. Sayre), Siamese Ministry of Foreign Affairs, 1928.

By the Treaty of Peace of Versailles of June 28, 1919, Germany recognized that all contractual rights of extraterritorial jurisdiction in Siam were terminated as from July 22, 1917. Art. 135. Austria, in the treaty of peace of St. Germain-en-Laye, of Sept. 10, 1919, made like acknowledgment. Art. 110.

On December 16, 1920, there was signed, on behalf of the United States and Siam, a treaty and protocol providing for the complete relinquishment of rights of extraterritorial jurisdiction by the former in the territory of the latter, five years after the promulgation by Siam of a series of judicial codes to which reference was made, and for the conditional relinquishment of those rights pending the lapse of that interval, U. S. Treaty Vol. III, 2829 and 2835.

<sup>10</sup> See Art. XV of treaty between the United States and China, of Oct. 8, 1903, Malloy's Treaties, I, 261. See, also, notes of the Chinese Government on Extraterritorial Jurisdiction, embraced in Dept. of State Press Releases of Sept. 4 and 12 of 1929.

See Steps towards the Relinquishment of Extraterritorial Jurisdiction, *infra*, § 265.

<sup>11</sup> See Mandates Under the League of Nations, *supra*, § 26.

in less formal, though no less influential, fashion. International Law is the fruit of that coöperation, and is an expression thereof which is necessarily favorable to a régime of justice applicable to the entire membership of the society. In this fact lies the hope of civilization. International coöperation may, however, be for bad as well as good purposes. The estimate of civilization as to the sinister aspect of a particular coöperative achievement will doubtless vary from generation to generation. Yet the ultimate appraisal may be expected to be influenced or tested by what the standards or decrees of the law of nations appear at the time to demand.

Long before the United States came into being alliances between groups of States were familiar events. Thus, for example, in October, 1596, the United Netherlands acceded to the League between France and England against Spain.<sup>1</sup> Again, in May, 1698, a defensive Triple League between the Kings of England and Sweden and the States General of the United Netherlands was consummated;<sup>2</sup> and this was supplemented by a Treaty of Alliance, with secret and separate articles, in January, 1700.<sup>3</sup> These were instruments that registered the community of interest and coöperative power of a group of States for a common purpose. Barely three years before the Battle of Lexington, Prussia, Russia and Austria united to bring about the first partition of Poland;<sup>4</sup> and the second and third partitions were contemporaneous with the consummation of the Jay Treaty.<sup>5</sup> In 1815 a common interest that welded together the adversaries of Napoleon and produced his downfall expressed itself in a Holy Alliance which resulted in achievements that paid scant respect for principles of political independence.<sup>6</sup> Yet the General Act of the Congress of Vienna laid down rules for the classification of diplomatic officers,<sup>7</sup> as well as a basis for a conventional régime touching the navigation of international rivers, that proved to be of lasting influence.<sup>8</sup> In 1856, a multi-partite treaty emanating from the Congress of

§ 33A.<sup>1</sup> For the text, and a commentary thereon, with bibliographical note, see, Frances Gardiner Davenport, *European Treaties bearing on the History of the United States and its Dependencies to 1648*, Washington, 1917, Document 23, p. 229.

<sup>2</sup> General Collection of Treatys of Peace and Commerce, from the Year 1642, to the End of the Reign of Queen Anne, London, 1732, 344.

<sup>3</sup> *Id.*, 347.

<sup>4</sup> *Traité entre la Russie et l'Autriche, touchant le démembrement de la Pologne, signé à St. Pétersbourg le 25, Juillet 1772*, Rec., II, 89; *Traité entre la Russie et la Prusse, touchant le démembrement de la Pologne, signé à St. Pétersbourg le 25, Juillet 1772*, *id.*, II, 93; and *Déclarations des trois cours à la Pologne au sujet de leurs prétensions, et réponse 1772*, *id.*, II, 97.

<sup>5</sup> *Traité de cessions et de limites entre S. M. l'Impératrice de toutes les Russies et S. M. le Roi et la République de Pologne; signé à Grodno, le 13, Juillet 1793*, Rec., V, 530; *Traité entre S. M. le Roi de Prusse d'une part, et S. M. le Roi et la sérénissime république de Pologne de l'autre, conclu et signé à Grodno, le 25, Septembre 1793*, *id.*, V 544; and *Convention conclue entre les trois Cours; à St. Pétersbourg le* <sup>13</sup>/<sub>24</sub> *Octobre 1795*, Rec., VI, 171.

<sup>6</sup> Brit. and For. State Pap., III (1815-1816), 211.

<sup>7</sup> *Nouv. Rec.* II, 2, 429.

See Diplomatic Missions, Classification of Diplomatic Representatives, *infra*, § 411.

<sup>8</sup> Brit. and For. State Pap., XIX, 86, *Nouv. Rec.*, II, 414.

See The Rhine, *infra*, § 169.

See John Bassett Moore, "The Second Hague Peace Conference and the Development of International Law as a Science," *Proceedings*, Am. Soc. Int. Law, I, 252, in which attention is called to the achievements of the Congress of Vienna, of 1815, and to those of the Congress of Paris of 1856.

Paris marked the success of a coöperative effort to enunciate four rules pertaining to maritime warfare that came to be accepted as a part of the law thereof.<sup>9</sup> The Hague Peace Conferences of 1899, and of 1907, manifested likewise successful coöperative efforts in a kindred field.<sup>10</sup>

Some manifestations of international coöperation appearing in the course of the Nineteenth Century and early in the Twentieth, assumed the form of international organizations established by treaty for the fulfillment of certain international tasks.<sup>11</sup> These achievements revealed the consciousness of States of the existence of a community of interest that might be furthered through the agency of a single international entity clothed with appropriate powers, embracing even one of administration. The practices of the time in this regard served, however, to emphasize two contrasting facts—first, the taking cognizance of the potentialities of international organization as a means of furthering an interest common to numerous States without detriment to that of any one concerned; and secondly, the relatively narrow field in which States generally acknowledged the desirability of acting together in such a way. The use of the international organization, even for a public end, was generally confined to matters of non-political import, attracting relatively slight public attention, and concerning which international controversies, should they arise, would not be calculated to arouse people against people.<sup>12</sup> Rarely did a community of industrial interests that overlapped national boundaries suffice in strength to cause the organization of States in support of a particular activity or industry of private, yet international concern. Nor did the coöperative effort that found expression in international organizations of the period play an important part in the development of international law.<sup>13</sup> That effort did, however, point to means whereby States might collectively, through kindred processes, not only enhance the power to protect and sustain a common interest of first importance, but also incidentally modify the applicable law as among the coöperating entities.

The waging and conclusion of the World War of 1914–1918 were stimuli to coöperative efforts on a broader scale. Certain arrangements for organized action doubtless suffered, however, from the fact that they were the product of the thought and determination of Powers that emerged as victors from that conflict rather than the expression of the common opinion of all concerned, and

<sup>9</sup> Hertslet's Map of Europe by Treaty, II, 1282; Moore, Dig., VII, 561.

<sup>10</sup> Malloy's Treaties, II, 2016 and 2220.

<sup>11</sup> These embraced (to employ a classification made by the late Paul S. Reinsch, in "International Unions and their Administration," *Am. J.*, I, 579), matters of communication, economic interests, sanitation and prison reform, police powers, scientific purposes, international commissions and unions for special and local purposes, and the so-called American International Unions. See also, Paul S. Reinsch, *International Public Unions*, 2 ed., Boston, 1916.

<sup>12</sup> This was not always the case. The European Commission of the Danube, as established and developed by the Treaty of Paris of March 30, 1856, and the Treaty of Berlin, of July 13, 1878, was an instance where large public and private interests were involved. See, in this connection, J. P. Chamberlain, *The Régime of International Rivers; The Danube and the Rhine*, New York, 1923, Chap. III.

<sup>13</sup> It may have played some part; yet that was a minor one. The important rule-claiming provisions embraced in the Conventions emanating from the First and Second Hague Peace Conferences of 1899 and 1907, respectively, are not to be assigned to international organizations as such.

also from the circumstance that one of those Powers — the United States — was not prepared to accept a contemplated régime in the advocacy of which its own President had taken a leading part. A League of Nations outside of which important States appeared content to remain could not well speak for the international society as a whole. Moreover, any scheme of international coöperation that demanded complete respect for those features of the Treaty of Versailles and others of the treaties of peace, which were subversive of the political independence of defeated States, could not commend itself to them. This circumstance did not, however, diminish the momentum of the general demand for international coöperation wherever it seemed possible, and especially in situations where a common interest of non-political aspect not only was apparent in States in every quarter, but also was not adversely affected by the nature of particular alignments in the World War. The United States, although not a member of the League of Nations, endeavored in a variety of ways to coöperate with organized efforts made under its auspices to sustain and further interests acknowledged to be common to the international society.<sup>14</sup> With and without the good offices of that body, the cause of coöperation was generally and vigorously pressed. It will be recalled that on September 10, 1934, the President proclaimed acceptance for the Government of the United States of membership in the International Labor Organization, pursuant to authority conferred upon him by a Joint Resolution of the Congress approved June 19, 1934, under conditions set forth therein, and made public the Constitution of that organization.<sup>15</sup>

Long before the outbreak of the war that was initiated in 1939, fresh coöperation on the part of the United States with its American neighbors was increasingly exemplified through numerous multi-partite conventions emanating from their common conferences.<sup>16</sup> After that outbreak, and notably at Panama

<sup>14</sup> Thus, on Oct. 12, 1933, Mr. Wilson, Minister to Switzerland, sat with the Council of the League of Nations, as a participant in proceedings pertaining to the appointment of the Permanent Central Opium Board, in the exercise of a privilege conferred upon the United States through the Opium Convention of 1925. See, *New York Times*, Oct. 13, 1933.

See also response of Mr. Stimson, Secy. of State, of Feb. 25, 1933, to communication from the Secretary General of the League of Nations of Feb. 24, 1933, transmitting copy of League of Nations Assembly Report of that date, on the Sino-Japanese Dispute, Dept. of State Press Releases, Feb. 25, 1933, 146. For text of the League of Nations Assembly Report see, *Am. J.*, XXVII, *Official Documents*, 119.

Declared President Franklin D. Roosevelt, at a dinner of the Woodrow Wilson Foundation, at Washington, Dec. 28, 1933: "Today the United States is co-operating more openly in the fuller utilization of the League of Nations machinery than ever before. . . . We are not members and we do not contemplate membership. We are giving co-operation to the League in every matter which is not primarily political and in every matter which obviously represents the views and the good of the peoples of the world as distinguished from the views and the good of political leaders, of privileged classes, or of imperialistic aims." (Dept. of State Press Releases, Dec. 30, 1933, 380, 382.)

See also Ursula P. Hubbard, *The Coöperation of the United States with the League of Nations, 1931-1936*, *Int. Conciliation*, April, 1937, No. 329.

<sup>15</sup> U. S. Treaty Vol. IV, 5531.

See *The International Labour Organisation: Membership of the United States and its Possibilities* (Articles by E. J. Phelan, Manley O. Hudson, and James T. Shotwell), *Int. Conciliation*, April, 1935, No. 309; *The Origins of the International Labor Organization*, edited by James T. Shotwell, New York, 1934.

<sup>16</sup> See, for example, the Anti-War Treaty of Nonaggression and Conciliation, between the United States of America and Other American Republics, signed at Rio de Janeiro, Oct. 10, 1933, U. S. Treaty Vol. IV, 4793; Convention for the Maintenance, Preservation, and Re-

in 1939,<sup>17</sup> and at Habana in 1940,<sup>18</sup> the growing alignment of the American Republics revealed the forward strides of Pan-American coöperation. Still again, in 1940 and 1941, a vigorous American-British coöperative effort in relation to the existing conflict loomed on the horizon,<sup>19</sup> and this embraced special coöperative measures on the part of the United States and Canada.<sup>20</sup>

Within recent years some significant developments have taken place. These have been apparent with respect both to the objectives sought to be achieved and the machinery regarded as appropriate for their attainment. The significant thing has been the taking cognizance of a common interest unbounded by territorial limits or racial differences or national aspirations, as well as the vigor of the endeavor to conserve it by organized efforts through a common sacrifice. That vigor has, moreover, derived sustenance from peoples as well as governments and, like a tidal wave that overtops all customary barriers, has at times swept aside the opposition of statesmen in ostensible control of foreign affairs. Yet there have also been influences tending to thwart the coöperative endeavor. The very coming into being of World War II in 1939 is an instance.

Since the close of World War I instances have not been wanting where a community of interest peculiarly affecting the activities of private individuals in numerous, and oftentimes contiguous, countries has been apparent, and has also proved to be influential in producing coöperation by States themselves.<sup>21</sup> In the field of international transit,<sup>22</sup> and in the matter of the control of radio,<sup>23</sup> there have been instances. On the other hand, where a common interest, however real, has not been understood or appreciated generally by the peoples of the international society, opportunity for dissension has flourished and statesmen have lacked zeal to coöperate; and when political considerations were deemed to be at stake, there has been found a sufficient reason to breed an opposition that no popular interest sufficed to overcome. Thus it has proved to be easier to produce and consummate a general arrangement pertaining to the control of radio than one marking the delimitation of the territorial sea. Such experiences reveal the fields in which international coöperation is likely to

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establishment of Peace, between the United States of America and Other American Republics, signed at Buenos Aires, Dec. 23, 1936, *id.*, 4817; Convention to Coördinate, Extend and Assure the Fulfillment to the Existing Treaties between the American States, signed at Buenos Aires, Dec. 23, 1936, *id.*, 4831.

See also The Declaration of Lima, 1938, referred to *infra*, § 94A.

<sup>17</sup> See The Declaration of Panama, *infra*, § 888B.

<sup>18</sup> See The Act of Habana and Convention of July 30, 1940, *infra*, § 94B.

<sup>19</sup> See The Transfer of Destroyers to Britain in 1940, *infra*, § 83C; also The Alignment of the United States with America and Non-America, *infra*, § 97A.

<sup>20</sup> See the American-Canadian agreement of Aug. 18, 1940, for a Permanent Joint Board on Defense, Dept. of State Bulletin, Aug. 24, 1940, 154.

<sup>21</sup> See F. S. Dunn, *The Practice and Procedure of International Conferences*, Chap. IX.

The author acknowledges his debt to his eminent colleague, Professor Joseph P. Chamberlain, for his observations accentuating the significance of the facts stated in the text.

<sup>22</sup> See, Geneva Convention on the International Régime of Railways, of Dec. 9, 1933, League of Nations Treaty Series, Vol. XLVII, p. 57, No. 1129.

<sup>23</sup> See *Règlement Général Des Radiocommunications*, Annex to *La Convention Internationale des Télécommunications*, of Dec. 9, 1932, *Documents de la Conférence Radio-télégraphique Internationale*, Madrid, 1932 (Published by Bureau International de l'Union Télégraphique), Berne, 1933, II, 1329.

find slight resistance and surest nurture; and they point also to those wherein the consciousness of a need of coöperative effort is least apparent to both governments and peoples. As will be noted later, however, the acknowledgment and assertion of public interest in matters previously regarded as chiefly of private concern, and the projection of governmental control therein, have served to lessen the importance of a distinction that formerly seemed to be a real one, and have greatly complicated the task of peoples in causing their respective States to coöperate in desired ways. Cognizance must, of course, be taken of the fact that when by any process in any country a public interest is proclaimed in a matter previously regarded as of essentially private concern, the development of thought so manifested marks in reality popular tolerance or approval of what takes place.<sup>24</sup>

(b)

§ 34. **The Use of International Organizations.** An efficacious mode of maintaining and developing a particular interest, common to States generally, may appear to be through the agency of an appropriate international organization.<sup>1</sup> The United States has long witnessed endeavors to employ one.<sup>2</sup> These

<sup>24</sup> In the case of the United States, the projection of a governmental interest in any matter of international import, howsoever related to the activities of private individuals, signifies that the American people as such regard that projection as advantageous to their interest.

§ 34.<sup>1</sup> See, generally, Simeon E. Baldwin, "The International Congresses And Conferences Of The Last Century As Forces Working Toward The Solidarity Of The World" and Appendix, *Am. J.*, I, 565 and 808;

Frederick S. Dunn, "International Legislation," *Pol. Sc. Quar.*, XLII, No. 4, Dec. 1927; The Practice and Procedure of International Conferences, Baltimore, 1929;

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Francis Bowes Sayre, *Experiments in International Administration*, New York, 1919;

W. Schücking, *Die Organization der Welt*, Leipzig, 1909;

J. B. Scott, *United States of America*, New York, 1920;

Harold M. Vinacke, *International Organization*, New York, 1934;

L. S. Woolf, *International Government*, New York, 1916.

<sup>2</sup> See, for example, Convention for Regulation of the Transmission of Telegraphic Corre-

have greatly increased in frequency within recent years.<sup>3</sup> In numerous instances the international organization, established by virtue of a multi-partite arrangement reflecting the willingness of the parties to coöperate for a common cause and to make some concessions in its behalf, has not been clothed with powers which involved a relinquishment of much that the individual member previously enjoyed in the exercise of independent statehood. The organization has, for example, oftentimes been created and employed as a collector or distributor of useful information, or possibly as an adviser in the event of certain contingencies, rather than as a controller of State conduct. The United States has been and remains actively associated with some international organizations of such a character. In two distinctively American organizations, embraced within this broad category, the Pan American Union,<sup>4</sup> and the International High Commission (which resulted from the recommendation of the First Pan American Financial Conference of 1915),<sup>5</sup> the United States has been an active and interested participant. As has been noted above, the Government of the United States in 1934 became a member of the International Labor Organization.<sup>6</sup> It has found

spontaneous, between France, Belgium and Prussia, of Oct. 4, 1852, De Clercq, VI, 224; International Telegraph Convention of May 17, 1865, Brit. and For. State Pap., LVI, 295. See in this connection, Paul S. Reinsch, "International Unions and their Administration," *Am. J.*, I, 579, 582.

The Panama Congress, of 1826, participated in by the representatives of four States and at which, through accident, the United States was not represented, marked an early if unsuccessful effort to organize the American Republics. See instructions from Mr. Clay, Secy. of State, of May 8, 1826, to the American Commissioners, Dept. of State, Instructions, XI, 35; Theodore E. Burton, Sketch of Henry Clay, American Secretaries of State and Their Diplomacy, IV, 131-155.

<sup>3</sup> See, for example, among recent instances, Convention for the Creation of an International Institute of Agriculture, June 7, 1905, Malloy's Treaties, II, 2140; Convention for the Protection of Industrial Property, June 2, 1911, U. S. Treaty Vol. III, 2953; International Wireless Telegraph Convention, July 5, 1912, U. S. Treaty Vol. III, 3048; Arrangement for the Establishment of the International Office of Public Health, Dec. 9, 1907, Malloy's Treaties, II, 2214; Convention concerning the Protection of Trade-Marks (Fourth International Congress of American States), Aug. 20, 1910, U. S. Treaty Vol. III, 2935; International Radiotelegraph Convention, Nov. 25, 1927, U. S. Treaty Vol. IV, 5031; Convention for the Protection of Commercial, Industrial and Agricultural Trade-marks and Commercial Names (Fifth International Congress of American States), April 28, 1923, U. S. Treaty Vol. IV, 4681; General Inter-American Convention for Trade Mark and Commercial Protection, Feb. 20, 1929, U. S. Treaty Vol. IV, 4768; Convention of Union for the Protection of Industrial Property (revising Convention of March 20, 1883), Nov. 6, 1925, U. S. Treaty Vol. IV, 4945; International Sanitary Convention (revising International Sanitary Convention of Jan. 17, 1912), June 21, 1926, U. S. Treaty Vol. IV, 4962; Universal Postal Convention of Stockholm, Aug. 28, 1924, League of Nations Treaty Series, XL, 19, No. 1002; Universal Postal Convention of London, June 28, 1929, 46 Stat. 2523; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, U. S. Treaty Vol. IV, 5351.

<sup>4</sup> See The Pan American Union and the Pan American Conferences, Congress and Conference Series No. 8, The Pan American Union, Washington, 1931; L. S. Rowe, The Pan American Union and The Pan American Conferences (The Pan American Union, 1890-1940), Washington, 1940; W. S. Penfield, "The Legal Status of the Pan American Union," *Am. J.*, XX, 257.

See The International Conferences of American States, 1889-1928, edited with introduction by James Brown Scott, New York, 1931.

See also League of Nations Handbook of International Organizations, Geneva, 1938, p. 7.

<sup>5</sup> See W. G. McAdoo, "The International High Commission and Pan American Coöperation," *Am. J.*, XI, 772. It is understood that in 1933 the work of the International High Commission came to an end, in so far as the United States was concerned.

<sup>6</sup> See *supra*, § 33A; *infra*, § 506.

See Ursula P. Hubbard, "The Co-operation of the United States with the League of Nations and with the International Labour Organization," *Int. Conciliation*, 1931, No. 274.



it expedient, moreover, to participate in a variety of other organizations.<sup>7</sup>

The establishment and use of an international organization may give rise to problems of an essentially legal character affecting both participating and non-participating States. Those pertaining to the former are natural consequences of the arrangement productive of the organization, involving inquiry, for example, as to the power of a central representative body to legislate for, or otherwise bind, the several constituent members. Those pertaining to the latter are of a different kind. They raise questions concerning the extent to which the States comprising the organization may through their united action modify the rights or enlarge the obligations of non-participating States, and incidentally compel them to unite with the organization. Thus the inquiry may present itself whether the effect of the establishment of, and participation in, the organization is to clothe its members collectively with rights in relation to the outside world which they previously as individual States did not possess. The solution must be sought in those principles of international law which always afford the test of the propriety of intervention, and which are discussed elsewhere.<sup>8</sup> It suffices here to observe that the United States is as yet far from admitting that a legal obligation rests upon it to become a member of any international organization in which for any reason it is deemed inexpedient to participate, and that it has refrained from asserting that any organization not representative of substantially the entire membership of the international society may lawfully impress fresh obligations upon non-participating States without their consent.

(c)

**§ 34A. Some Features of Administration.** Two or more States may unite in an endeavor to administer some thing or entity. The objective may be of small or large importance; any human agency may be employed as the administrator.

States oftentimes agree to set up international bodies or organizations as a means of accomplishing tasks that are not in their essence administrative, or which call for the exercise of the administrative function within a narrow field. In such a situation the successful operation of the international agency may, nevertheless, involve the creation and management of an elaborate mechanism; and there may in fact spring into being a form of administrative machinery highly useful in the accomplishment of some international yet chiefly non-administrative work.

The success of an international coöperative endeavor may, however, be deemed to call for the yielding to an international organization or entity of a control over particular matters which States were previously in the habit of exercising without external restraint, and also the power to restrict the individual action of the States concerned. In recent years there has been an increasing disposition on the part of numerous States to conclude agreements

<sup>7</sup> See Laurence F. Schmeckebier, *International Organizations in Which the United States Participates*, Washington, 1935.

<sup>8</sup> See *Intervention, In General*, *infra*, § 69; *The League of Nations and Intervention*, *infra*, § 84; *Rights of Independence during Existence, In General*, *infra*, 52.

expressive of such a design. This circumstance is believed to be of large moment. If the requisite sacrifice is repaid by the successful operation of the international organization or agency, coöperating States may, as among themselves, become indisposed to supplant it by reversion to unorganized endeavors in the same field, and the privilege of so doing may even sink into desuetude. Accordingly, from the practice of prolonged coöperation through the medium of the organization, the international law applicable to members thereof in relation to matters entrusted to it, may gradually undergo a change. Again, if the international administrative effort proves to be advantageous to all concerned, the achievement tends not only to strengthen the appeal for widest coöperation, but also to encourage similar efforts in kindred fields. As these in turn bear fruit, grounds for dissent and reasons for non-participation diminish in value and influence; and if in the course of time they disappear, practice may reflect wide acquiescence in the utilization of the international administrative organization as the appropriate and necessary mode of managing or controlling matters such as those which have been entrusted to them. Such a conclusion on the part of the family of nations might be expected to cause the exercise of the privilege or right of non-participation with respect to numerous matters to disappear beyond the horizon; and the resulting effect upon the law might thus become definite and broad.

The United States, however active as a participant in international coöperation through the good offices of appropriate agencies, whether administrative or otherwise, has rarely been disposed to yield to an international organization powers of control over matters which it previously managed without external restraint, and still less to subject itself, in relation to them, to the domination of an international body.<sup>1</sup> In a few instances, however, it appears to have made such concessions. Arrangements for the use of the International Joint Commission in the Convention with Great Britain of January 11, 1909, concerning the boundary waters between the United States and Canada,<sup>2</sup> as well as for the use of The Permanent Central Board under provisions of the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, of July 13, 1931, are instances.<sup>3</sup> Again, the United States has at times been willing to agree to confer upon an international body, such as one designed to effect the solution of an international controversy, a measure of control during the period of, and incidental to, adjudication or conciliation.<sup>4</sup>

The Covenant of the League of Nations, embodied in the Treaty of Versailles, of June 28, 1919, was a far-reaching manifestation of coöperation whereby there was conferred upon a new international organization a large measure of

§ 34A. <sup>1</sup> Here a distinction is to be noted between the right to reject a proposal or conclusion made by a particular organization, and the obstacles or difficulties that may stand in the way of, and effectually retard the exercise of that right.

See, in this connection, Art. XI of Convention of London, of June 28, 1929, in relation to the Universal Postal Union, 46 Stat. 2523.

<sup>2</sup> U. S. Treaty Vol. III, 2607.

<sup>3</sup> U. S. Treaty Vol. IV, 5351.

<sup>4</sup> See, for example, Art. XIII of Convention between the United States and the Central American Republics for the Establishment of International Commissions of Inquiry, of Feb. 7, 1923, U. S. Treaty Vol. IV, 4677.

governmental authority in a broad field, embracing the power to control, under certain conditions, the action of its several members.<sup>5</sup> That organization was designed to act largely through its own members, and purported to be a means whereby their united action for a common cause, such as that for the maintenance of peace, could become a strong deterrent of what might be deemed to be hostile to it.

States occupying a predominant position in the League as permanent members of its Council have in turn themselves been disposed to coöperate with each other in relation to their action therein. Accordingly, powers enjoying the largest authority within the League have sought at times outside thereof to provide for the reaching of understandings as to the use of their common authority within the body whose action might be controlling upon all concerned.<sup>6</sup> Again, other States of lesser power, acknowledging a special and common interest, such as members of the Little Entente, so-called, have sought to unite to maintain a single front, in harmony with their relations with the League.<sup>7</sup> The field of humanitarian, as distinct from political, endeavor has offered fertile soil for the appreciation and development of interests common to all members of the international society through the agency of the League.<sup>8</sup> These are obviously universal in character and acknowledge no national boundaries. Thus, both members and non-members, embracing the United States, have striven through the aid of the League to coöperate to achieve a common victory over forces regarded as destructive of the health, the morality, and the social welfare of the international society.<sup>9</sup>

(d)

§ 34B. **International Conferences.** Conference is the handmaiden of international coöperation, and always has been. From earliest times opposing groups have sought to deal with each other.<sup>1</sup> A conference of States may be confined to two,<sup>2</sup> or may embrace substantially the entire membership of the interna-

<sup>5</sup> For a text of the Covenant, see, U. S. Treaty Vol. III, 3336.

See, David Hunter Miller, *The Drafting of the Covenant*, New York, 1928.

Also, *Bibliography Concerning the Covenant in Foreign Affairs Bibliography* (1919-1932), 48-54.

<sup>6</sup> See, *Agreement of Understanding and Coöperation between France, Germany, Great Britain, and Italy*, of June, 1933, *British White Paper*, Cmd. 4342, Misc. No. 3 (1933); U. S. Treaty Information Bulletin, No. 45, June, 1933, 42.

<sup>7</sup> See *The Little Entente Pact between Yugoslavia, Rumania, and the Czechoslovak Republic*, of Feb. 16, 1933, *Am. J.*, XXVII, *Official Documents*, 117.

<sup>8</sup> See Art. XXIII of the Covenant; also, Part XIII of the Treaty of Versailles in relation to Labor, U. S. Treaty Vol. III, 3503-3514.

Concerning the work of the International Labor Office see, "The International Labor Organization" (a survey by twenty-one experts of its work and relations), *Annals*, American Academy of Political and Social Science, March 1933, Vol. 166.

See *Bibliography on The International Labor Office in Foreign Affairs Bibliography* (1919-1932), 1933, 64-65.

<sup>9</sup> See, for example, *Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs*, of July 13, 1931, U. S. Treaty Vol. IV, 5351.

§ 34B.<sup>1</sup> See Joshua, IX, 1-15, concerning the steps taken by the Gibeonites to obtain a league with Joshua.

<sup>2</sup> See, for example, conferences of the Joint High Commission that produced the treaty between the United States and Great Britain of May 8, 1871, contained in Malloy's *Treaties*, Vol. I, 700. Concerning the procedure of the Commission, see, Moore, *Arbitrations*, I, 537.

tional society.<sup>3</sup> It may offer a highly useful means of smoothing out differences, ascertaining bases of accord, formulating expressions of it, and of thus begetting treaties that reveal the common designs of both conferees and principals. Through conference the actual value to the family of nations of a particular interest regarded as of common concern may be closely appraised. That appraisal may, however, reveal differences of opinion that are as acute and, therefore, as influential, in their effect, as any of the disclosures obtainable from the exchanges of thought.

International conferences may be variously classified, according, for example, to the nature of their objectives; and these may be numerous. In reference to the processes by which such bodies may most effectively serve as instruments of international coöperation, attention has been called to the value of holding assemblages at stipulated intervals,<sup>4</sup> as well as to special advantages to be derived from recourse to appropriate agencies of the League of Nations.<sup>5</sup> It has also been observed that from the habit of conferring, States do not appear to have accepted rules of procedure that bind them when they embark upon fresh conferences, or to have incorporated into the law of nations what may be described as an international conference law.<sup>6</sup>

It is believed that the strength of the appeal of the conference to a State invited to participate therein may be fairly deemed to be proportional to its conviction that the body about to convene is unrestrained by any external entity, such as that which may initiate it, or under whose auspices it may be held, in relation to the matter of a presiding officer, the character of agenda, period of time allotted to sessions, and achievements to be wrought. In American opinion, at least one international conference in which it has been a participant suffered grievously from a lack of freedom from such restraint. As an agency for the promotion of such coöperation as shall betoken sincerity of effort to advance, for example, the cause of international law, the international conference should offer broadest opportunity for agreement-making that is unfettered by any attempt of the initiating body, for sake of its own prestige or otherwise, to produce a desired convention, and one in harmony with special policies of its own.

(c)

§ 34C. **Conventional Manifestations.** International coöperation inspires, accelerates and even demands agreement-making between States. Both bi-

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Concerning the conference in 1933 between representatives of the United States and Russia, looking to the recognition by the former of the Soviet régime as the government of the latter, see *infra*, § 45B.

<sup>3</sup> Representatives of 72 entities signed the Telecommunication Convention produced by the International Radiotelegraphic Conference at Madrid in 1932. See *Documents de la Conférence Radiotélégraphique de Madrid* (1932), Berne, 1933, 1319-1327.

<sup>4</sup> See F. S. Dunn, *The Practice and Procedure of International Conferences*, Baltimore, 1929, 191, 200.

<sup>5</sup> *Id.*, 12, 191-192; N. L. Hill, *The Public International Conference*, Stanford University, 1929, Chap. VI.

<sup>6</sup> Hudson, *International Legislation*, § 15, where it is declared that "the exploration of the subject by the League of Nations Committee of Experts for the Progressive Codification of International Law in 1926 and 1927 cannot be said to have yielded any positive results." For the text of that Report see *Am. J., Special Supplement*, XX, 204.

partite and multi-partite arrangements, accordingly, come into being and play their part. These establish restraints upon the entities that have produced and accepted them; and they do more. They facilitate united efforts in affirmative ways looking to the accomplishment of particular ends. Inasmuch as rights and obligations attributable to such conventional achievements are based upon agreement and upon the consequences of them, the parties to such instruments may be fairly described as contracting parties, and are so referred to in practice by the States concerned in texts of their own devising.<sup>1</sup> This does not necessarily imply that analogies from the private law of contracts as variously understood in particular countries, are necessarily fully applicable in seeking the solution of controversies arising from public international agreements. It merely accentuates the fact that an international conventional law—one to be deemed attributable to the consequences of agreement-making—must, by reason of its foundation, make close response in its form and growth to the requirements of logic as focused upon the act of consent.<sup>2</sup> This will be seen to be the most striking aspect of what is looked upon as the relevant law in relation to the making, the interpretation, and the termination of agreements between States. Nor is it obscured by the character of the instrumentality by which such arrangements are sometimes wrought, or by the number of parties that unite in accepting them, or by the processes by which the assent of each is yielded, or even by the particular circumstances that encourage that yielding or dissuade the withholding of it. Nor does the fact that a particular convention may purport to be declaratory of a principle which is at the time, or subsequently comes to be acknowledged to be a part of the general law of nations applicable to the entire membership of the international society, change that aspect.<sup>3</sup> In such case the agreement, whether bi-partite or multi-partite is the mere setting that serves to hold and make clear to all concerned the idea to which it gives expression; and that idea as thus projected makes its own appeal of which the influence depends upon its inherent worth.

Manifestation of international coöperation through the conclusion with increasing frequency of multi-partite treaties has, within recent years, attracted wide attention. Such arrangements have been referred to in certain quarters as an expression of what is termed "international legislation."<sup>4</sup> If a treaty has a

§ 34C. <sup>1</sup> See, for example, Convention between the United States, Great Britain, Russia, and Japan for the Preservation and Protection of Fur Seals, July 7, 1911, U. S. Treaty Vol. III, 2966; Treaty for the Limitation and Reduction of Naval Armament, of London, April 22, 1930, U. S. Treaty Vol. IV, 5268; Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, U. S. Treaty Vol. IV, 5351.

<sup>2</sup> Declares Lauterpacht: "The legal nature of private law contracts and international law treaties is essentially the same. The autonomous will of the parties is, both in contract and in treaty, the constitutive condition of a legal relation which, from the moment of its creation, becomes independent of the discretionary will of one of the parties." (Private Law Sources and Analogies of International Law, § 70, p. 156.)

<sup>3</sup> See, for example, the neutrality rules contained in Article VI of the Treaty of Washington, between the United States and Great Britain, of May 8, 1871, Malloy's Treaties, I, 703; also, the rules of the Declaration of Paris of April 16, 1856, Hertslet's Map of Europe by Treaty, II, 1282; Moore, Dig., VII, 561, 562.

<sup>4</sup> Prof. Hudson has entitled his excellent compilation of multi-partite treaties beginning with the Covenant of the League of Nations and continuing to 1937, "International Legislation." See his Introduction §§ 1-5. In the course of a review of Volume 5 of the series (which

legislative quality, it is the possession of bi-partite as well as of multi-partite arrangements. All treaties made under the authority of the United States are declared by its Constitution to be the supreme law of the land.<sup>5</sup> Thus whenever the United States concludes a treaty, it makes law in a domestic and constitutional sense. To refer to treaties concluded by three or more States as marking an international legislation not apparent in contractual arrangements between two States is not believed to be helpful. Nor is the reason for so doing altogether clear. As multi-partite agreements are binding solely upon the parties thereto, they attain no special position in international law from the fact that three or more States are parties to them.<sup>6</sup> Their influence as models to be followed by non-contracting States depends, as has been suggested above, upon other considerations. Nor is it obvious why the legislative quality of particular groups of treaties, rather than of others, deserves emphasis, unless it be sought to intimate that a special position in law is to be assigned to such groups, possibly in consequence of the methods by which they have come into being or the number of States that are parties to them.

There has also been a tendency on the part of statesmen as well as writers to refer to certain groups of international agreements as "law-making treaties."<sup>7</sup>

was published in 1936) Professor Joseph P. Chamberlain made the following observations. "The instruments included fall, it appears to the reviewer, into two classes, those which contain arrangements between a group of governments for the settlement of inter-governmental problems, and secondly, those agreements which seem to merit more accurately the term 'international legislation' as they control the actions of the individuals forming the international society. Of the first class are, notably, many treaties to carry out agreements contained in or resulting from the peace treaties. Prominent among these are the agreements in respect to the Treaty of Trianon, the agreements in respect to reparations, and the agreement concerning the regulation of Bulgarian reparations. These arrangements may be said to be contracts resulting from bargains between governments. Indirectly, they do, of course, contribute to the order of the international society, but they differ materially, it appears to the reviewer, from such treaties as that of Warsaw regulating the transport of passengers and merchandise by air, the treaty of 1931 regulating narcotic drugs and the treaty of Bangkok regulating smoking opium. These conventions contain rules regulating the actions of individuals and fixing their obligations. They are not the result of bargains between governments, such as are common in bilateral treaties and in multilateral treaties of the first class mentioned, but they are in a different sense international legislative instruments framed by technical persons. Their provisions are the result of give and take at a conference participated in for the greater part not by diplomats but by experts, and inspired by the necessity felt by the international society of a single rule to govern the subject matter of the convention. It is usual for non-governmental groups, private corporations or associations to take part in the deliberations of such conventions and to submit their suggestions as memorials, although they do not vote. Although only enforceable as against individuals by action of the governments, these conventions are international legislation in a different sense than the treaties of the first type." (*Univ. Penn. Law Rev.*, LXXXV, 864.)

<sup>5</sup> Art. VI, paragraph 2.

<sup>6</sup> See, Lauterpacht, *Private Law Sources and Analogies of International Law*, § 70.

<sup>7</sup> In preliminary observations submitted in behalf of Great Britain and Northern Ireland, April 28, 1931, to the Secretary-General of the League of Nations in relation to the Progressive Codification of International Law, the following significant statement was made in a footnote: "In international law, a treaty or convention is the form which has to be adopted both for the purpose of legislating (i.e., of laying down general rules of conduct) and for the purpose of making a contract about a particular case (i.e., the grant of a privilege or the settlement of a dispute). Consequently, treaties or conventions may fall either into the class of international legislation or into the class of particular contracts, and in some cases one and the same convention may contain some provisions which fall into the one class and others which fall into the other. This distinction between law-making or legislative provisions and particular contracts has to be borne in mind when such provisions are being studied in relation to the development of international law." (*League of Nations, Official No.: A. 12. 1931. V., p. 7.*)

Such a grouping, unless carefully defined, is likewise confusing.<sup>8</sup> If all agreements between States possess a legislative quality, it is obviously unsatisfactory to point to a particular class of arrangements as "law-making." It should be observed, however, that through this appellation there is usually sought to be placed in a special group treaties which fulfill a unique function in laying down rules of conduct of broad applicability, worthy of approval by States generally. Such arrangements may bear slight resemblance to commercial bargains as such; they reflect rather what, according to the judgment of the contracting parties, should be the character of the law generally applicable under like conditions in a particular field. As a means of isolating them without running counter to the objections above noted, it is suggested that they may be fairly described as *rule-proclaiming* instruments. The practice of States in relation to the matter is perhaps, however, of greater moment than the nomenclature employed in reference to it.<sup>9</sup> Whenever States attempt through agreements of any kind, and howsoever described, to propose to the international society rules of conduct that are regarded by the contracting parties either as declaratory of what international law prescribes, or as amendatory of the requirements of that law, the fact is important. Moreover, if this form of international coöperative effort commonly or notably finds expression in multi-partite arrangements, the fact is likewise important.

In another sense conventional manifestations of international coöperation are important. The readiness manifested through agreements of various types, to accept restraints in regard to particular matters, may be productive of willingness to accept similar restraints in like matters even when no treaty imposes them. If, for example, numerous States through bi-partite or multi-partite arrangements yield to foreign consular officers certain immunities from criminal jurisdiction, the habitual concession may encourage the grantor States to lose interest in denying the concession when no treaty is involved. Thus the conventional practice may pave the way for a modification of the customary right of jurisdiction which a State may have been supposed to possess in relation to such officers. The law of nations pertaining to consular officers is believed to be replete with instances of such events. Inasmuch, therefore, as the conventional law of nations may prove to be a decisive amendatory influence, international coöperation that projects itself in such fashion always merits close observation and appraisal. That appraisal must ever demand, however, an exact and impartial weighing of the relevant facts in each particular instance, as a means of ascertaining whether the practice of the time establishes that States which are parties to a series of sacrificial treaties shot through with concessions and restraints, no longer possess, or even claim the right to assert as normal privileges of political independence, what they have relinquished by agreements

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See also A. D. McNair, "The Legal Character of Treaties," *Brit. Y.B.*, 1930, XI, 100, 105, 112-113.

<sup>8</sup> See Lauterpacht, *op. cit.*, § 70.

<sup>9</sup> Nevertheless, descriptive phrases that beget confusion of thought ill serve the international society, even when effort is made to gloss over their insufficiencies by referring to particular terms as words of art.

with other contracting States. In a word, international conventional coöperation may produce abandonment of customary legal privileges, and therefore it calls for faithful inquiry to determine whether in fact in a particular case abandonment is to be deemed to have taken place.

(/)

§ 34D. **Prospective Explorations.** The field of international coöperation remains largely unexplored. Its riches are believed to be obvious in some areas from which statesmen have thus far made meagre effort to extract them.

States that have a common boundary, have a common interest that is peculiarly their own. There is, for example, an American-Canadian interest of which the maintenance is beneficial to the States on both sides of an extensive frontier. The exercise of the full measure of its legal rights by either the United States or Canada may serve to inflict injury upon the other, and so weaken proportionally that interest even where it is most obvious. This has been apparent in relation to the possible uses of waters that constitute the international boundary. An International Joint Commission has, therefore, been created as a practical means of averting harmful diversions on either side of the line.<sup>1</sup> This sensible coöperative effort has inspired the suggestion that a permanent joint commission composed of private citizens representative of Canada and the United States might well be permitted to exercise somewhat similar functions in a broader field, as by advising the governments of both countries as to the harmful effect, if any, upon the one of any action contemplated by the other, as an amicable means of retarding conduct that would be prejudicial to their common interests, quite regardless of the propriety in a legal sense of what either State might essay to do.<sup>2</sup> The coöperative effort would, in such case, serve to cause both the United States and Canada to be made aware of the sinister effect upon its neighbor of contemplated action, and in consequence, to feel the full and deterring effect of such a realization.<sup>3</sup> Such a scheme of coöperative effort is of wide applicability. It suggests the inquiry whether a

§ 34D.<sup>1</sup> See Convention between the United States and Great Britain Concerning the Boundary Waters between the United States and Canada, of Jan. 11, 1909, U. S. Treaty Vol. III, 2607.

Also, Division of Waters, Certain Contractual Arrangements of the United States, *infra*, § 184.

See, in this connection, C. J. Chacko, *The International Joint Commission between the United States of America and the Dominion of Canada*, New York, 1932.

See Joint Commissions, *infra*, § 584.

<sup>2</sup> "While I do not undertake to speak officially upon this subject, I may take the liberty of stating as my personal view that we should do much to foster our friendly relations and to remove sources of misunderstanding and possible irritation, if we were to have a permanent body of our most distinguished citizens acting as a commission, with equal representation of both the United States and Canada, to which automatically there would be referred, for examination and report as to the facts, questions arising as to the bearing of action by either government upon the interests of the other, to the end that each reasonably protecting its own interests would be so advised that it would avoid action inflicting unnecessary injury upon its neighbor." (Charles E. Hughes, "The Pathway of Peace," address before Canadian Bar Association, at Montreal, Sept. 4, 1923, contained in collection of addresses by that author, entitled, *The Pathway of Peace*, New York, 1925, 3, 16-17.)

<sup>3</sup> See, "The Influence of Mental Reactions on the Development of International Law," *Am. J.*, XXIV, 357.



community of interest acknowledged by numerous States to be of special concern to each, may not be deemed to justify or even demand the use of a common body to advise them of the injury to that interest surely to be anticipated from contemplated acts that any one of those States may not unlawfully commit. The influence of such a body might operate as a practical deterrent of lawful, although harm-producing, action within a broad field; and it might cause the coöperating States ultimately to relinquish any claim of right to have recourse to it. It is not unreasonable to anticipate that international coöperative endeavors through such advisory agencies may greatly expand in the course of the present century.

(g)

§ 34E. **Some Conclusions.** The success of international coöperative efforts on a broad scale has been shown to depend upon a variety of considerations, embracing a general appreciation of the common interest in the attainment of a particular objective, and the absence of interposing obstacles attributable to political or other considerations. When those obstacles are not apparent, as in matters such as those pertaining to the postal service, or the public health, or to some forms of communication, the coöperative endeavor takes long strides forward.

A coöperative effort demands in point of fact, the acquiescence and approval of States that are called upon to unite. Whether they have a common interest in the achievement of a particular end, as well as in the method to be employed for that purpose, depends upon the conclusions of substantially all that are concerned. A favorable opinion can not be forced from an objector. There is no real acquiescence that is not voluntary. Failure to respect this fact has marked much of the effort to unite the international society that has been put forth since the termination of the World War of 1914–18. International coöperation can not be exacted from States which oppose what their adversaries seek to unite in achieving. A real community of interest is a fact of which the existence awaits the free conclusions of those affected by it. Moreover, those conclusions in the case of a particular State, whether distorted or otherwise, may be adversely influenced by the circumstance that it is called upon, in the midst of extremities confronting it, to accept as beneficial to itself a régime that not only takes cognizance of its weakness but also perpetuates the fact. It is believed, therefore, that the largest success of the coöperative effort in the achievement of objectives of greatest concern to the international society inexorably demands respect for such considerations.

A fresh and distinct element has within quite recent years projected itself in the development of international coöperation; and this has followed close upon the heels of a theory which found exemplification in the practices that came to fruition as late as the Twentieth Century. It has been observed in many quarters that in the field of industry a community of interest was oftentimes apparent to all engaged therein, irrespective of national boundaries, and that that interest sufficed in strength to cause governments to do its bidding and to produce con-

ferences and conventions that seemingly marked international attainments of peoples acting *en masse*.<sup>1</sup> In support of this conclusion, attention has been directed to the fact that in the working out of bases of accord and in the agreements responsive to them, interested States appeared at times to be content to supplant the professional diplomat by the technical expert whose views were unhampered by political influences, and who manifested special deference for the value of accord wherever it proved to be practicable.<sup>2</sup> The success of such relatively unhampered achievements has been attributed to the fact that they were in the field of private as distinct from public endeavor, and that particular objectives were those in which governments as such professed little concern, and that, therefore, they found little reason to thwart what the cooperating peoples of their own and other countries sought to achieve.<sup>3</sup>

The supposition that matters of industry are of private as distinct from public concern and that States as such may be expected to remain the followers or tools of what the commercial or industrial interests as privately controlled may unite in demanding, has, however, in quite recent years sustained a sharp challenge, and in no country more definitely than in the United States. Inspired by the comprehensive character of appropriate legislation, exemplified in the National Industrial Recovery Act of June 16, 1933,<sup>4</sup> its Government as such undertakes to judge of the public interest in the conduct of private affairs, embracing those of international aspect, and consequently, of the desirability of furthering any international community of interest in any field. Thus the value of any distinction between a supposedly public or private interest in matters of international concern has been greatly diminished. If the United States participates in an international coöperative measure of special concern to industry as such, it is because the Government thereof itself approves of the design. If it does not do so, its objections are seemingly unembarrassed by the circumstance that the particular matter involved is one of special concern to private interests within American territory and elsewhere. This sense of governmental freedom found notable exemplification in the action of President Roosevelt in taking a stand

§ 34E.<sup>1</sup> See, for example, F. S. Dunn, *The Practice and Procedure of International Conferences*, 138-140, 198-199; also, Pitman B. Potter, *An Introduction to the Study of International Organization*, 46-47.

<sup>2</sup> The use by a government of a technical expert in connection with the preparation and conclusion of an international convention concerning a highly technical matter does not necessarily imply lack of governmental or public interest in what is contemplated, but rather the fact that a State must always employ the best available human agencies in its various international contacts, and that when those involve the consideration and treatment of highly technical matters governmental representatives must be individuals who are conversant with them. Thus, the reason that impels the United States to utilize a military or naval officer in the negotiation of a convention pertaining to the treatment of prisoners of war, causes it similarly to invoke the aid of a radio expert at an international radio conference, as it did in its representation at the International Radio Conference at Madrid in 1932.

<sup>3</sup> Thus a careful observer did not hesitate to declare as late as 1929 that: "In this collective regulation of the trans-national activities of individuals, the personality and attributes of the State as a political unit are not directly involved and are in fact subordinated to the end of reaching common action." (F. S. Dunn, *op. cit.*, 38.)

<sup>4</sup> 48 Stat. 195. Concerning the unconstitutionality of "codes of fair competition" which the President was authorized to approve under Sec. 3 (a) of the Act, see *Schechter Corp. v. United States*, 295 U. S. 495.

on July 3, 1933, which was influential in causing the cessation of the Monetary and Economic Conference then in session at London.<sup>5</sup> Nevertheless, the Government of the United States like that of any other country may be compelled through the force of popular opinion attributable to the strength of private interests, to heed their demands and to coöperate internationally along lines which they in substance decree. In general, however, American participation in international coöperative endeavors of whatsoever character must be expected to depend in each instance, regardless of the causes responsible therefor, upon the conclusion of the Government of the United States that the common objective is essentially desirable and worth the sacrifice that may be requisite for its attainment.<sup>6</sup>

<sup>5</sup> See President Roosevelt, Message to the Conference, July 3, 1933, Dept. of State Press Releases, July 8, 1933, p. 15; also telegram of President Roosevelt to the British Prime Minister, through Secy. Hull, of July 26, 1933, Dept. of State Press Releases, July 29, 1933, p. 62.

<sup>6</sup> See The Declaration of Lima, *infra*, § 94A; The Act of Habana and Convention of July 30, 1940, *infra*, § 94B; Inter-Continental Arrangements of American States, *infra*, § 95B; The Alignment of the United States with America and non-America, *infra*, § 97A; The Declaration of Panama, *infra*, § 888B.

## PART II

### Normal Rights and Duties of States

#### TITLE A

#### RIGHTS OF POLITICAL INDEPENDENCE

##### 1

§ 35. **The Birth of a State of International Law.** The birth of a State of international law may be due to one of many causes. It may be attributable to the revolution of a colony, or to the secession of the inhabitants occupying a portion of the territory of a State, or to the determination of a controlling group of powers to establish and recognize a new State within territory previously belonging to an existing State.

When a country lays claim to and enjoys the allegiance of a people familiar with the accepted standards of civilization, occupies a well-defined territory, possesses a government exercising control therein, and holds itself out to the world as an entity in whose distinctive behalf as such foreign relations are to be conducted, it has attained the likeness of a State and may in a broad sense be fairly deemed to be one. Such an entity finds itself, nevertheless, unable, by virtue merely of its own condition or acts productive thereof, to enjoy full privileges of intercourse with the several members of the family of nations, and so to live the normal life of a State of international law, until some of them acquiesce and permit it to do so. This is true although the beginnings of state life and the birth of the State as such precede in point of time, and are not, therefore, technically dependent upon external acknowledgment of the fact.<sup>1</sup>

§ 35.<sup>1</sup> "The position of the new State in relation to the international system is not one of admission into a society. This is the fundamental error into which Huber and a great many other writers have fallen, and as long as this view persists we cannot understand the true relationship. When the new State has come into being there is, as has heretofore been pointed out, an indeterminate situation in the existing international order. From the purely juristic standpoint, the whole subsequent relationship between the new State and the existing system is an attempt to reestablish the legal continuity. The most potent argument in favor of the participation of the new State itself in this process is the fact that the period between its existence as a State from the point of view of its internal constitution and the so-called recognition by third States cannot be, as far as policy is concerned, a period totally devoid of law. To accept the doctrine of creative recognition is to deny this proposition. A protracted period without law in the international sense would mean what outlawry means in private law, that the new political entity might be subjected to violence at the hands of other States and in general be treated as beyond the pale, without such treatment being in any way a violation of the international obligation of the third State." Julius Goebel, Jr., *The Recognition Policy of the United States*, New York, 1915, 60.

## 2

## RECOGNITION

## a

§ 36. **In General.** Recognition has been defined as the "assurance given to a new State that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations." "The rights and attributes of sovereignty" are said to "belong to it independently of all recognition," although "it is only after it has been recognized that it is assured of exercising them."<sup>1</sup>

When a country has by any process attained the likeness of a State and proceeds to exercise the functions of one, it is justified in demanding recognition.<sup>2</sup> There may be no reason or disposition on the part of States generally to withhold recognition provided the fact be established that the requisite elements of statehood are present and give promise of remaining. The method by which the new State comes into being may, however, cause delay in the according of recognition. Thus when an outside State proceeds to set up a new State within ter-

§ 36.<sup>1</sup> Moore, Dig., I, 72, adverting to Rivier, I, 57, where it is added: "Recognition is therefore useful, even necessary to the new State. It is also the constant usage, when a State is formed, to demand it. Except in consequence of particular conventions, no State is obliged to accord it. But the refusal may give rise to measures of retorsion. When, after the formation of the Kingdom of Italy, certain German States persisted in refusing to recognize it, Count Cavour withdrew the exequaturs of their consuls. Recognition was then accorded."

"Recognition may be of new States, of new governments, or of belligerency. It is evidenced, in the case of a new State or government, by an act officially acknowledging the existence of such State or government and indicating a readiness on the part of the recognizing State to enter into formal relations with it. The existence in fact of a new State or a new government is not dependent upon its recognition by other States. By recognition of belligerency, as here used, is meant the recognition by a State that a revolt within another State has attained such a magnitude as to constitute in fact a State of war, entitling the revolutionists or insurgents to the benefits, and imposing upon them the obligations, of the rules of war." (Hackworth, Dig., I, 161.)

See, in general, Moore, Dig., I, 72-248, and documents there cited; Hackworth, Dig., I, Chap. 3, and documents there cited; Julius Goebel, Jr., *The Recognition Policy of the United States* (with bibliography), New York, 1915; A. P. C. Griffin, *List of References on Recognition in International Law and Practice*, Washington (Library of Congress), 1904; Memorandum on The Method of "Recognition" of Foreign Governments and Foreign States by the Government of the United States, 1789-1897, by A. H. Allen, Chief of Bureau of Rolls and Library, Department of State, Senate Doc. No. 40, 54 Cong., 2 Sess.; Memorandum upon the Power to Recognize the Independence of a New Foreign State, presented by Mr. Hale in the Senate Jan. 11, 1897, Senate Doc. No. 56, 54 Cong., 2 Sess.; Frederic L. Paxson, *The Independence of the South-American Republics*, Philadelphia, 1903; Frederick Waymouth Gibbs, *Recognition*, London, 1863; *The Recognition of the Confederate States*, by Juridicus, Charleston, 1863; George Bemis, *Hasty Recognition of Rebel Belligerency*, Boston, 1865.

Also Fauchille, 8 ed., §§ 195-213(1); Dana's *Wheaton*, Dana's Note No. 16; Hershey, revised ed., Ch. VIII; Higgins' 8 ed. of Hall, §§ 26-27; Lauterpacht's 5 ed. of Oppenheim, I, §§ 71-75f; Rivier, I, 57-61; Westlake, 2 ed., I, 49-58; Sir John Fischer Williams, "Recognition," *Transactions of The Grotius Society*, XV, 53; "The New Doctrine of 'Recognition,'" *id.*, XVIII, 109; Green H. Hackworth, "The Policy of the United States in Recognizing New Governments during the past Twenty-five Years," *Proceedings, Am. Soc. Int. Law*, 1931, 120; C. A. Berdahl, "The Power of Recognition," *Am. J.*, XIV, 519; Chesney Hill, "Recent Policies of Non-Recognition," *International Conciliation*, No. 293; J. L. McMahon, *Recent Changes in the Recognition Policy of the United States*, Washington, 1933.

<sup>2</sup> See Mr. Adams, Secy. of State, to the President, Jan. 28, 1819, *Am. State Pap. For. Rel.*, IV, 413, Moore, Dig., I, 79.

ritory which prior to such action constituted part of the domain of an existing State, and in opposition to its will, the procedure may cause other States to be reluctant to acknowledge the validity of the achievement, and to withhold recognition of the new State whose birth took place under such conditions. The coming into being of Manchoukuo is illustrative.<sup>3</sup> Non-recognition of statehood may thus reveal a mode of expressing disapproval of, or declining to render beneficial, conduct deemed to be essentially illegal.<sup>4</sup> It should be borne in mind that the Principal Allied and Associated Powers, incidental to their victory in World War I, did not hesitate to carve out of certain territories belonging to their enemies, regions which were to constitute the domain of new States whose birth was the product of the common military achievement, and whose recognition by those enemies was exacted in the treaties of peace.<sup>5</sup>

There can be little or no ground for withholding recognition of a new State whose life is due to a peaceable dissolution of a previous union, as in the case of Norway and Sweden in 1905.<sup>6</sup>

When the demand for recognition comes from a State whose very existence is due to revolution, foreign powers act with deliberation. This is because premature recognition is regarded by the parent State as an act of intervention, and oftentimes, therefore, as a cause of war.<sup>7</sup> It has been found, moreover, that a State resulting from revolution commonly seeks recognition before the conflict is at an end, and that it may do so even when its territory is infested with hostile and unbeaten armies.

## b

**§ 37. Mode of Recognition.** The mode of according recognition is not material, provided there be an unequivocal act indicating clearly that the new State

<sup>3</sup> See in this connection Lauterpacht's 5 ed. of Oppenheim, I, § 75i.

El Salvador on May 19, 1934, formally recognized the statehood of Manchoukuo. See Publications of the Department of Foreign Affairs, Manchoukuo Government, Information Bulletins, February 16, 1934 to January 15, 1935, p. 18.

See also R. H. Sharp, Duties of Non-Recognition in Practice (1775-1934), Geneva Special Studies, V, No. 4, 1934; E. de Vèvre, *La Reconnaissance de Jure de la Régence de Manchourie et le Traité des neuf Puissances*, Paris, 1932.

<sup>4</sup> See Mr. Stimson, Secy. of State, in note addressed to the Chinese and Japanese Governments, Jan. 7, 1932, Dept. of State Press Releases, Jan. 9, 1932, 41.

<sup>5</sup> The cases of Czechoslovakia and Poland are illustrative.

<sup>6</sup> See documents concerning the dissolution of the Union between the Kingdoms of Sweden and Norway, in For. Rel. 1905, 853-874, and especially telegram of Mr. Root, Secy. of State, to the Norwegian Minister of Foreign Affairs, Oct. 30, 1905, *id.*, 865; and communication of Mr. Root to the Swedish Minister at Washington, No. 362, Nov. 8, 1905, *id.*, 866.

<sup>7</sup> "There can be no reason for refusing to recognize a federated State, formed by the union of recognized States, such as the German Empire in 1871 and the North German Confederation in 1866; or as Switzerland in 1848, after the confederation of States became a federated State. For those States, being sovereign, had the incontestable right to bind themselves together by a federal bond. It was a matter which concerned them, and did not concern third powers." (J. B. Moore, in Moore, Dig., I, 72.)

<sup>8</sup> This was true in the case of the United States. Attempts were made to secure recognition in 1776. It was not, however, until the news of Burgoyne's defeat at Saratoga in 1777 reached Europe, that France recognized and contracted with the new Republic. This conduct was understood by France itself as being nothing less than intervention. At that time it was doubtless true that continental statesmen did not believe that international law contemplated any lawful recognition of a new State born of revolution prior at least to its recognition by the parent State. Julius Goebel, Jr., *The Recognition Policy of the United States*, 92-93. See, also, Edward S. Corwin, *French Policy and the American Alliance of 1778*, Princeton, 1916.

is dealt with as such and is deemed to be entitled to exercise the privileges of statehood in the society of nations.<sup>1</sup> The entering into a formal diplomatic or conventional relationship is conduct of such a character.<sup>2</sup>

"In a majority of the cases referred to below, recognition of new States by the United States was accomplished through a formal note sent by the American diplomatic representative at the capital of the country in question to the Foreign Office, under instructions from the Department of State. This was true in the cases of Bulgaria in 1909; Albania, Estonia, Latvia, Lithuania, and Egypt, all in 1922; and Saudi Arabia in 1931. In certain other instances a formal note was sent by the Department of State to the diplomatic representative in the United States of the State in question. This was the method followed in the cases of Armenia in 1920, and Finland and Yugoslavia in 1919. Poland was recognized in 1919 by means of a telegram from the Secretary of State then in Paris, to the President of the Polish Provisional Government. Formal reception by the President of an Afghan mission in 1921 was considered to constitute recognition of Afghanistan. Recognition of the Czechoslovak National Council in 1918 as a *de facto* belligerent government was made through a formal public announcement issued by Secretary Lansing, and the recognition of the Government of the Republic in 1918 was made through establishment of relations with it, including the acceptance of its agent in the United States and the negotiation of loans to it. Iraq was recognized in 1931 by accrediting a *chargé d'affaires* to the King. In the case of Iceland recognition resulted from the conclusion of certain bilateral agreements."<sup>3</sup>

Recognition may be collective. Thus the Treaty of Berlin of 1878, to which Great Britain, Germany, Austria, France, Italy, Russia and Turkey were signatories, registered the collective recognition of Montenegro, Servia and Roumania.<sup>4</sup>

Again, the treaty concluded in behalf of the Allied and Associated Powers with the Polish Republic in June, 1919, contained in its preamble a collective confirmation of the prior acts of those Powers in according to Poland recognition as a new State.<sup>5</sup>

§ 37.<sup>1</sup> "The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; or, lastly, by the Executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the Executive only is competent to make it. In the first and third modes the concurrence of the Senate in its executive character would be necessary, and in the second in its legislative character." (Report of Mr. Clay, Committee on Foreign Relations, Senate, June 18, 1836, Sen. Ex. Doc. 406, 24 Cong., 1 Sess., Moore, Dig., I, 96, 97.)

<sup>2</sup> As Hall states: "Any act is sufficient which clearly indicates intention. . . . Again the official reception of diplomatic agents accredited by the new State, the despatch of a minister to it, or even the grant of an exequatur to its consul, affords recognition by necessary implication." (Higgins' 8 ed., § 26.)

<sup>3</sup> Statement in Hackworth, Dig., I, 167.

<sup>4</sup> Arts. XXVI, XXXIV and XLIII, *Nouv. Rec. Gén.*, 2 Sér., III, 458, 460 and 462, respectively; Holland, *The European Concert in The Eastern Question*, 277 and following.

See, also, treaty concluded by Great Britain, Austria, France, Prussia and Russia, with Belgium, Nov. 15, 1831, with respect to the separation of Belgium from Holland, Brit. and For. State Pap., XVIII, 645.

<sup>5</sup> See text contained in British Treaty Series No. 8, 1919 [Cmd. 223]; also communication of M. Clemenceau, as President of the Peace Conference, to M. Paderewski, Premier of Poland, in transmitting the treaty to the latter, June 24, 1919, *id.*

## c

§ 38. **Conditional Recognition. Joint Recognition.** States are free to accord recognition on such terms as they may see fit to impose. A group of States contemplating collective recognition may lay down those which it deems imperative. According to the Treaty of Berlin of 1878, Bulgaria was recognized as an autonomous and tributary principality of the Sultan of Turkey, but with a Christian government and a national militia; Servia and Roumania were recognized subject to the condition that complete religious toleration should prevail within the territories of those countries; and in the case of Roumania, the further condition was imposed that certain specified territory should be restored to Russia.<sup>1</sup>

If the terms on which recognition is conceded be violated by the new State, the group of States according recognition may assert the right to intervene for the purpose of establishing a state of affairs in accordance with the condition specified. Experience has shown, however, that the exercise of such a right is likely to be ineffective. Consequently a new system was devised and applied with reference to certain of the newer States of Europe, as in the treaty of June 28, 1919, between the Principal Allied and Associated Powers on the one hand, and Poland on the other.<sup>2</sup>

"The United States has not, strictly speaking, accorded conditional recognition to any State in the period since 1906. In two or three instances certain assurances have been required coincidently with recognition."<sup>3</sup> Recognition may obviously be extended by joint action. The Government of the United States has commonly refrained from participating in such procedure. It has, however, on occasion made the matter of recognition the subject of joint consultation with other interested States and has at times acted simultaneously with them in the according of recognition.<sup>4</sup>

It has been observed that European and other States have found it possible to maintain diplomatic relations with countries not familiar with accepted standards of civilization without recognizing them for all purposes as States of international law.<sup>5</sup>

## d

### Time of According Recognition to a New State Produced by Revolution

## (1)

§ 39. **After Recognition by Parent State.** The recognition by the parent State of its former colony which by force of arms has attained independence and

§ 38.<sup>1</sup> Arts. I, V, XXXIV, XXXV and XLIII-XLV. *Nouv. Rec. Gén.*, 2 Sér., III, 451, 453, 460 and 462-463, respectively. See, also, Holland, *The European Concert in The Eastern Question*, 277.

<sup>2</sup> See *States, Certain Minor Impairments of Independence through the Medium of the League of Nations*, *supra*, § 27.

<sup>3</sup> Hackworth, *Dig.*, I, 192.

<sup>4</sup> See *id.*, I, § 32 and documents there cited.

<sup>5</sup> See *States, Countries Not Familiar with Accepted Standards of Civilization*, *supra*, § 33.



won such respect therefor, justifies other States in taking similar action. Under such circumstances their conduct cannot be regarded as premature.<sup>1</sup>

(2)

§ 40. **Prior to Recognition by Parent State.** When recognition by foreign States precedes that accorded by the parent State, complaint on the part of the latter is to be anticipated.<sup>1</sup> Nevertheless, the opinion has long prevailed in the United States that the propriety of recognition is not necessarily dependent upon the approval of such State. In harmony with the theory early advocated by Jefferson respecting the recognition of new governments,<sup>2</sup> it has long been the accepted American doctrine that the right to accord recognition depends solely on the circumstance whether a new State has in fact come into being, and that the test of the existence of that fact is whether the conflict with the parent State has been substantially won.<sup>3</sup> Statements of principle have not always drawn a sharp line of distinction between the time when the cause of the parent State was desperate or hopeless, and that when the contest was at an end.<sup>4</sup> The point to

§ 39.<sup>1</sup> Mr. Adams, Secy. of State, to Mr. Anduaga, Spanish Minister, April 6, 1822, Am. State Pap. For. Rel., IV, 846, Moore, Dig., I, 87.

"While Spain maintained a doubtful contest with arms to recover her dominion, it was regarded as a civil war. When that contest became so manifestly desperate that Spanish viceroys, governors, and captain-generals themselves concluded treaties with the insurgents, virtually acknowledging their independence, the United States frankly and unreservedly recognized the fact, without making their acknowledgment the price of any favor to themselves, and although at the hazard of incurring the displeasure of Spain." (Mr. Adams, Secy. of State, to Mr. Anderson, Minister to Colombia, May 27, 1823, MS. Inst. to U. S. Ministers, IX, 274, 282, 283, Moore, Dig., I, 89.)

§ 40.<sup>1</sup> "The law of nations does not undertake to fix the precise time at which recognition shall or may be extended to a new State. This is a question to be determined by each State upon its own just sense of international rights and obligations; and it has rarely happened, where a new State has been formed and recognized within the limits of an existing State that the parent State has not complained that the recognition was premature." (Mr. Hay, Secy. of State, to General Reyes, Colombian Envoy, Jan. 5, 1904, For. Rel. 1903, 294, Moore, Dig., III, 90.)

<sup>2</sup> See Recognition of New Governments, The Position of the United States, *infra*, § 44.

<sup>3</sup> "In every question, relating to the Independence of a Nation, two principles are involved, one of *right* and the other of *fact*. The former exclusively depending upon the determination of the Nation itself, and the latter resulting from the successful execution of that determination. . . . Under these circumstances, the Government of the United States, far from consulting the dictates of a policy questionable in its morality, has yielded to an obligation of duty of the highest order, by recognizing as Independent States, Nations, which, after deliberately asserting their right to that character, had maintained and established it, against all the resistance which had been or could be brought to oppose it. This Recognition is neither intended to invalidate any right of Spain, nor to affect the employment of any means which she may yet be disposed or enabled to use, with the view of reuniting those Provinces to the rest of her Dominions. It is the mere acknowledgment of existing facts, with the view to the regular establishment with the Nations newly formed, of those relations, political and commercial, which it is the moral obligation of Civilized and Christian Nations to entertain reciprocally with one another." (Mr. Adams, Secy. of State, to Don Joaquin de Anduaga, Spanish Minister at Washington, April 6, 1822, Brit. and For. State Pap., IX, 754, 755.)

<sup>4</sup> "But there is a stage in such contests when the parties struggling for independence have, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when independence is established as a matter of fact so as to leave the chances of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived." (Mr. Adams, Secy. of State, to the President, Aug. 24, 1818, Monroe MSS., Dept. of State, Moore, Dig., I, 78.)

See, also, Report of Mr. Clay, from Senate Committee on Foreign Relations, June 18, 1836, Senate Ex. Doc. 406, 24 Cong., 1 Sess., Moore, Dig., I, 96; President Jackson, message concerning Texas, Dec. 21, 1836, Richardson's Messages, III, 265, Moore, Dig., I, 98; Mr. For-

be observed is, however, that the propriety of recognition, according to American theory, depends upon a fact, namely, the success of the revolutionary force, and that regardless of the illegitimacy thereof in the eyes of the parent State.<sup>5</sup> Thus recognition based upon careful regard for such a fact is deemed to be consistent with the maintenance of friendly relations between the recognizing State and the parent State, and as not reasonably provocative of war.

The according of recognition to a country still in the throes of warfare against the parent State partakes of a different character. Such action constitutes participation in the conflict. It makes the cause of independence a common one between the aspirant for it and the outside State. Participation must be regarded as intervention, and therefore essentially antagonistic to that State.

Thus the propriety of recognition as such depends in each case upon its unlikeness to participation in the conflict. When the struggle is over and independence won, recognition bears no resemblance to such conduct. On principle, the test should always be whether the contest is practically at an end. As there may be great difficulty in ascertaining with precision when such a moment has arrived, the wisdom of allowing an interval to elapse between the termination of the struggle and the according of recognition is apparent. The deliberation of States in this regard is, however, due to a sense of expediency rather than to one of duty. As soon as a revolting colony has in fact gained its independence and attained the qualifications for statehood, the according of recognition is not at any time thereafter to be deemed premature.<sup>6</sup>

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syth, Secy. of State, to Mr. Castillo, March 17, 1837, MS. Notes to Mexican Legation, VI, 71, Moore, Dig., I, 102; President Grant, Annual Message, Dec. 7, 1875, For. Rel. 1875, I, vii-viii, Moore, Dig., I, 107; President McKinley, special message, April 11, 1898, For. Rel. 1898, 750, Moore, Dig., I, 108.

<sup>5</sup> If the position taken by Secretary Seward, with respect to the much dreaded recognition by Great Britain and France of the Confederacy, appears to be at variance with the previous attitude of the Department of State, it must be recalled that the conflict was raging at the time when he expressed himself, and that no *de facto* control exercised at any time by the Confederate forces over any territory remained unchallenged or proved to be capable of maintenance. The Civil War was not terminated until it was brought to a close by force of the Union arms. Therefore, it is believed that at any stage thereof the United States might fairly have regarded recognition of the Confederacy as a State as an act of intervention. See, in this connection, Mr. Seward, Secy. of State, circular to all Ministers of the United States, March 9, 1861, Dip. Cor. 1861, 32, Moore, Dig., I, 104; Mr. Seward, Secy. of State, to Mr. Adams, American Minister at London, April 10, 1861, Dip. Cor. 1861, 71, 79, Moore, Dig., I, 105.

<sup>6</sup> The people of Panama, by a bloodless revolution, November 3 and 4, 1903, declared themselves independent of Colombia. For. Rel. 1903, 230-240. On November 2 and 5, 1903, the commanders of American naval vessels near the Isthmus were ordered to maintain free and uninterrupted transit across the same, to prevent the landing of any armed force with hostile intent whether Colombian or insurgent at any point, to prevent the landing of a Colombian force reported to be approaching the Isthmus, if such landing would precipitate a conflict, to make every effort to prevent, in the interest of peace, Colombian troops at Colon from proceeding to Panama, and to prevent the recurrence of a (reported) bombardment of Panama by a Colombian gunboat. On November 6, the United States recognized the independence of Panama. Mr. Hay, Secy. of State, to Mr. Ehrman, Vice-Consul-General, Nov. 6, 1903, *id.*, 233; Same to Mr. Beaupré, American Minister, same date, *id.*, 240. On November 13, Señor Bunau-Varilla, Minister of Panama, presented his letters of credence to the President of the United States. *Id.*, 245. A treaty between the United States and Panama was signed at Washington, on November 18. Malloy's Treaties, II, 1349. The part taken by the United States was one of intervention. Its conduct was so described and acknowledged by President Roosevelt. For. Rel. 1903, 272-273. The case is, therefore, without

The recognition by the United States of Poland in January, 1919, is fairly illustrative of the principle involved.<sup>7</sup> Poland then possessed in fact the attributes of sovereignty, exercising supremacy within certain territorial areas, although the extent of the limits thereof was a matter of controversy. No duty on the part of the United States with respect to Germany or Austria-Hungary forbade recognition, while the freedom of the new Republic from actual domination by Russia removed from the act of recognition a character to be regarded as hostile to that country.<sup>8</sup> It remained, however, for the Peace Conference at Paris to adjust the boundaries of the new State, and to prescribe requisite cessions to it, as well as to establish its relations with Danzig.<sup>9</sup> It should be observed that on November 1, 1918, "the Polish Army was recognized by the United States as autonomous and co-belligerent under the supreme political authority of the Polish National Committee."<sup>10</sup>

The recognition by the United States in September, 1918, of the Czechoslovak National Council as a *de facto* belligerent government, and the announcement simultaneously of a readiness to enter into formal relations with it, is to

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value as a precedent with regard to the time when the recognition of the statehood of a country attaining independence by revolution may be justly accorded.

See President Roosevelt, remarks on occasion of presentation of letters of credence by the Minister from Panama, Nov. 13, 1903, For. Rel. 1903, 246; President Roosevelt, Annual Message, Dec. 7, 1903, *id.*, vii, xxxvi; President Roosevelt, special message, Jan. 4, 1904, *id.*, 260, 272-273, 276-277; General Reyes, Colombian Envoy, to Mr. Hay, Secy. of State, Dec. 23, 1903, *id.*, 284, 288-290; Same to Same, Jan. 6, 1904, *id.*, 306; Same to Same, Jan. 11, 1904, *id.*, 311; Mr. Hay, Secy. of State, to General Reyes, Colombian Envoy, Jan. 5, 1904, *id.*, 294. The messages of President Roosevelt, and the Hay-Reyes correspondence are contained in Moore, Dig., III, 46-113.

*Cf.* Diplomatic History of the Panama Canal, submitted by President Wilson to the Senate April 23, 1914 (embracing documents compiled by Department of State), Senate Doc. No. 474, 63 Cong., 2 Sess.

See, also, Shelby M. Cullom, "The Panama Situation," *The Independent*, LV, 2787; Theodore S. Woolsey, "The Recognition of Panama and Its Results," *Green Bag*, XVI, 6; G. G. Phillimore in *Law Magazine and Review*, XXIX, 212; G. W. Scott, "Was the Recognition of Panama a Breach of International Morality," *The Outlook*, LXXV, 947; W. C. Dennis, "The Panama Situation in the Light of International Law," *Am. Law Reg.*, LII, 265.

<sup>7</sup> Official Bulletin, III, No. 525, Jan. 30, 1919, containing communication of Mr. Lansing, Secy. of State, to Mr. Paderewski, Polish Premier. See, also, Dept. of State, statement for the Press, No. 1, April 24, 1920, concerning the recognition the previous day by the United States of the *de facto* Government of the Armenian Republic.

"The Secretary of State on January 22, 1919, when he was a member of the American Commission to Negotiate Peace at Paris, sent to the Prime Minister of Poland, by direction of the President of the United States, a telegram expressing willingness to enter into official relations with the Prime Minister. An American Minister to Poland was appointed on April 16, 1919, and Poland accredited a Minister to the United States, who was recognized as appointed Minister of Poland near this Government as of date of November 1, 1919." (Communication of Dept. of State to Mr. W. O. Hart, April 7, 1924.) See also For. Rel. 1919, Vol. II, 741-745.

<sup>8</sup> The preamble of the treaty between the Principal Allied and Associated Powers and Poland, of June 28, 1919, adverted to the fact that by a proclamation of March 30, 1917, the Government of Russia assented to the reestablishment of an independent Polish State.

Concerning the effort of the Emperors of Germany and Austria-Hungary in 1916, to create a Polish State, and the attitude of the Allied Powers in relation thereto, see Mr. Sharp, American Ambassador to France, to Mr. Lansing, Secy. of State, Dec. 5, 1916, For. Rel. 1916, Supp., 796-798, Hackworth, Dig., I, § 29.

<sup>9</sup> Part III, Section VIII of treaty of peace with Germany, of June 28, 1919, U. S. Treaty Vol. III, 3374.

See, also, treaty concluded by the Principal Allied and Associated Powers with Poland, June 28, 1919, British Treaty Series No. 8, 1919 [Cmd. 223].

<sup>10</sup> Hackworth, Dig., I, 386.

be regarded as a form of belligerent activity, incidental to the prosecution of the war then existing against Germany and Austria-Hungary, rather than as illustrative of the exercise of the right of recognition as such.<sup>11</sup> An American Minister to the Czecho-Slovak Republic was appointed on April 23, 1919. It in turn sent a Chargé d'Affaires *ad interim* to Washington who was received at the Department of State on December 8, 1919.

The Department of State on April 7, 1924,<sup>12</sup> found occasion to declare that its records disclosed the following information relative to the recognition by the Government of the United States of the following States:

The Kingdom of the Serbs, Croats and Slovenes (Yugoslavia): The Government of the United States recognized the Government of the Kingdom of the Serbs, Croats and Slovenes on February 7, 1919. Announcement was made of this recognition by the Secretary of State of the United States at Paris on that date, while he was a member of the American Commission to Negotiate Peace; and subsequently in a note of February 10, 1919, addressed to the Minister of the Kingdom of the Serbs, Croats and Slovenes at this capital, the Acting Secretary of State of the United States recognized the Legation of Serbia as the Legation of the Kingdom of the Serbs, Croats and Slovenes.<sup>13</sup>

Finland: The Secretary of State of the United States at Paris on May 7, 1919, when he was a member of the American Commission to Negotiate Peace, instructed the American Consul at Helsingfors by telegraph to inform the Finnish Government of the recognition by the United States of "the *de facto* Government of an independent Finland." The Congress of the United States having, by an act approved March 6, 1920, authorized the establishment of a Legation of the United States in the Republic of Finland, the Department of State, on May 12, 1920, instructed a Secretary in the Diplomatic Service to proceed to Helsingfors in the capacity of Chargé d'Affaires *pro tempore* pending the appointment of a Minister. An American Minister to Finland was appointed on October 8, 1921. The Finnish Government had previously accredited a Minister to the United States. He was received by the President on August 22, 1918.<sup>14</sup>

<sup>11</sup> Concerning the recognition of Czechoslovakia by the United States, see announcement of Mr. Lansing, Secy. of State, For. Rel. 1918, Supp. I, 824; also documents in Hackworth, Dig., I, § 39.

See Mr. Lansing, Secy. of State, to Mr. Ekengren, Swedish Minister at Washington, concerning the unwillingness of the United States to accept the mere autonomy of the Czecho-Slovaks and the Jugo-Slavs as a basis for peace with Austria-Hungary, Oct. 18, 1918, *Official Bulletin*, Oct. 19, 1918, Vol. II, No. 441. In relation to the effect of recognition by the United States, see *Garvin v. Diamond Coal & Coke Co.*, 278 Pa. 469.

See text of Declaration of Independence of the Czecho-Slovak Nation adopted by its provisional government at Paris, Oct. 18, For. Rel. 1918, Supp. I, 848-851; also *Waldes v. Basch*, 179 N. Y. Supp. 713. Also Art. 81 of the Treaty of Versailles of June 28, 1919, by which Germany, "in conformity with the action already taken by the Allied and Associated Powers" recognized the complete independence of the Czecho-Slovak State which included the autonomous territory of the Ruthenians to the south of the Carpathians, U. S. Treaty Vol. III, 3372.

<sup>12</sup> Communication to Mr. W. C. Hart, April 7, 1924.

<sup>13</sup> See also documents in Hackworth, Dig., I, 220.

<sup>14</sup> See documents in Hackworth, Dig., I, 209.

Declared President Wilson, May 20, 1918, in a communication to the Secretary of State: "Do you not think that the proper reply to this [a request from Finland for recognition]

Esthonia, Latvia and Lithuania: The Government of the United States recognized the Governments of Esthonia, Latvia and Lithuania on July 28, 1922. Accompanying the announcement made to the press on that date was the following statement: The Governments of Esthonia, Latvia and Lithuania have been recognized either *de jure* or *de facto* by the principal Governments of Europe and have entered into treaty relations with their neighbors. In extending to them recognition on its part, the Government of the United States takes cognizance of the actual existence of these Governments during a considerable period of time and of the successful maintenance within their borders of political and economic stability.<sup>15</sup>

Albania: The Government of the United States recognized the Government of Albania on July 28, 1922. Accompanying the announcement made to the press on that date was the following statement: The Government of Albania has been recognized by the principal Governments of Europe, including its immediate neighbors, and in extending recognition on its part, the Government of the United States takes cognizance of the successful maintenance of a national Albanian Government.<sup>16</sup>

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§ 41. **Recognition, by Whom Determinable.** The recognition of a foreign State is a matter peculiarly within the province of the political as distinct from the judicial department of the government. The position taken by the former is rigidly followed by the latter. As Sir William Grant expressed it in 1809:

It always belongs to the government of the country to determine in what relation any other country stands towards it; that is a point upon which courts of justice cannot decide.<sup>1</sup>

Such is the position of the courts of the United States.<sup>2</sup>

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is that we shall be willing to recognize the Republic of Finland only when she shows that she is not controlled by Germany, as she now seems to be?" (For. Rel. 1918, Russia, II, 788.) See, also, documents in For. Rel. 1919, II, 210-227, especially communication of Secy. Lansing to the Finnish Minister of Foreign Affairs, May 7, 1919, *id.*, 215. See, in this connection, M. W. Graham, *The Diplomatic Recognition of the Border States*, Part I: Finland, Publications, University of California at Los Angeles in Social Sciences, Vol. III, No. 2, Berkeley, California, 1935.

In relation to the matter of Iceland see documents in Hackworth, Dig., I, 213.

<sup>15</sup> See documents in Hackworth, Dig., I, 199.

<sup>16</sup> See documents in Hackworth, Dig., I, 196.

Concerning the recognition by the United States of the Kingdom of Hejaz and Nejd and its dependencies in 1931 (which assumed the name of the Kingdom of Saudi Arabia after the following year), see Hackworth, Dig., I, 217.

§ 41. <sup>1</sup> The Pelican, Edw. Admr., Append. D.

<sup>2</sup> "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — 'the political' — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." (Clarke, J., in the opinion of the Court in *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302.) See also *Guaranty Trust Co. of New York v. United States*, 304 U. S. 126, 137.

See, also, *Emperor of Austria v. Day*, 3 De G. F. and J., 217, 221, 233; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. Div. 489, 497; *Republic of Peru v. Dreyfus*, 38 Ch. Div. 348; *Taylor v. Barclay*, 2 Sim. 213; *Rose v. Himely*, 4 Cranch, 241, 272; *Kennett v. Chambers*, 14 How. 38; *Luther v. Borden*, 7 How. 1; *Foster v. Neilson*, 2 Pet. 253, 307; *Gelston v. Hoyt*, 3 Wheat. 246, 324; *United States v. Palmer*, 3 Wheat. 610, 634; *The Nueva Anna*, 6 Wheat. 193; *The Three Friends*, 166 U. S. 1; *Fifield v. Insurance Co.*, 47 Penn. St. 166, 172.

As a matter of domestic practice, in the case of the United States, recognition has been accorded by the President in some cases following coöperation with the Congress, and in others independently thereof.<sup>3</sup> The power of the President "to recognize any country" has been said to be "absolute."<sup>4</sup> It has been recently stated that "in every instance in which recognition has been accorded by the United States since 1906, the act has been that of the President, taken solely on his own responsibility."<sup>5</sup>

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§ 42. **Acts Falling Short of Recognition of a New State.** The holding of intercourse with agents of a revolutionary body does not necessarily signify that it is accorded recognition as a State. Whether a particular act possesses such a character depends partly upon whether, as has been seen, it is in defiance of, or at variance with, the pretensions of any third State claiming a right of domination. Certain forms of intercourse are clearly of such a kind.<sup>1</sup> Others may be equivocal in point of character. They may, for example, justify although not compel the inference that they are in derogation of the rights of a parent State. In such case their exact significance must depend upon the intention of the actor. Still other acts are in no sense equivocal, and are not to be regarded as involving recognition. Thus the holding of unofficial communication with a country struggling for independence and claiming to have won it, does not imply acknowledgment of the existence of a new State. Nor does the sending unofficially to such a country of agents in order to gain information therein or for purposes requiring no formal diplomatic intercourse, possess greater significance.<sup>2</sup> Dealings with revolutionary authorities in actual control of territory

<sup>3</sup> Declares Prof. Moore: "In the preceding review of the recognition, respectively, of new States, new governments, and belligerency, there has been made in each case a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and coöperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility. The question of the power to recognize has, however, been specifically discussed on various occasions." Dig., I, 243-244. See documents, *id.*, I, 244-246, and in particular Mr. Seward, Secy. of State, to Mr. Dayton, American Minister at Paris, April 7, 1864, MS. Inst. France, XVII, 42, Moore, Dig., I, 246. See, also, instructions given by Mr. Clayton, Secy. of State, to Mr. Mann, special and confidential agent to Hungary, June 18, 1849, Sen. Ex. Doc. 43, 31 Cong., 1 Sess., Moore, Dig., I, 218.

See memorandum from Secretary Knox, of Feb. 4, 1913, set forth in For. Rel. 1913, 88, Hackworth, Dig., I, 162.

<sup>4</sup> Mr. Kellogg, Secy. of State, to Senator Swanson, Dec. 14, 1927, Hackworth, Dig., I, 161.

<sup>5</sup> Hackworth, Dig., I, 162, where Mr. Hackworth adds: "Congress has exhibited little inclination to contest the prerogative of the Executive to accord or withhold recognition at his discretion, although attempts have been made on a number of occasions through resolutions to determine the action to be taken with respect to certain governments."

§ 42.<sup>1</sup> Thus Mr. Seward declared in a communication to Mr. Adams, American Minister at London, May 21, 1861: "It is, of course, direct recognition to publish an acknowledgement of the sovereignty and independence of a new power. It is direct recognition to receive its ambassadors, ministers, agents, or commissioners, officially." Dip. Cor. 1861, 73, Moore, Dig., I, 206.

<sup>2</sup> See statement in Moore, Dig., I, 206.

within which foreign persons and property are located, are oftentimes had, and that without any design to accord recognition of statehood.<sup>3</sup>

The United States has frequently found it expedient to hold unofficial intercourse with communities engaged in revolution through the medium of its own agents sent thereto,<sup>4</sup> and of others received therefrom without any intention of according recognition through such action, and without in fact having done so.<sup>5</sup>

In 1849, Mr. A. Dudley Mann was sent to Europe as "special and confidential agent of the United States to Hungary," under instructions authorizing him, according to his discretion and prudence, to enter into official diplomatic relations with the Government of Hungary in case it should appear to him that it was able to maintain the independence which it had declared.<sup>6</sup> This procedure is believed to have been unfortunate, because there was entrusted to an agent abroad the determination of the question whether a contingency had arisen which legally justified recognition. Ultimate decision in such a matter should, for the sake of the safety of the State likely to accord recognition, be left with the highest executive authority thereof and so remain undelegated to any inferior officer.<sup>7</sup>

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### Recognition of New Governments

#### (1)

§ 43. **In General.** After a State has come into being, its obligations in relation to the outside world are not affected in consequence of internal changes which may be undergone. "It follows from the fact of continuity of State life that all

<sup>3</sup> The fact that a foreign State may, for the sake of protecting its own citizens or their property, by some means enter into communication with the *de facto* government in complete control, at least of a certain portion of territory whose population is in rebellion against the parent State, does not necessarily imply the according of recognition. See Earl Russell, to Mr. Adams, Nov. 26, 1861, Dip. Cor. 1862, 8-9, Moore, Dig., I, 209.

<sup>4</sup> Mr. Monroe, Secy. of State, to Mr. J. Poinsett, agent to Buenos Ayres, June 28, 1810, H. Rep. 72, 20 Cong., 2 Sess., Moore, Dig., I, 214; Mr. Adams, Secy. of State, to Messrs. Samuel Smith and James Lloyd, U. S. Senate, Feb. 24, 1824, 20 MS. Dom. Let. 300, Moore, Dig., I, 216; Mr. Buchanan, Secy. of State, to Gen. Alvear, Aug. 14, 1846, MS. Notes, Argentine Legation, VI, 19, Moore, Dig., I, 217.

<sup>5</sup> Concerning the unofficial reception by the United States Government in 1900, of a delegation representing the South African Republics, see documents in Moore, Dig., I, 212-214.

<sup>6</sup> Compare attitude of Mr. Seward, Secy. of State, concerning unofficial intercourse between emissaries of the Confederate States of America and Great Britain during the Civil War, and expressed in Moore, Dig., I, 208-210, *citing* Dip. Cor. 1861, 72, 87, 88; *id.*, 1862, 8-9; *id.*, 1865, III, 378.

<sup>7</sup> "Mr. Mann proceeded to Vienna, but when he arrived there the revolution was practically ended, and he did not visit Hungary." Moore, Dig., I, 219, *citing* *Pol. Sc. Quar.*, X, 264.

<sup>8</sup> Mr. Clayton, Secy. of State, to Mr. Mann, special and confidential agent to Hungary, June 18, 1849, Senate Ex. Doc. 43, 31 Cong., 1 Sess., Moore, Dig., I, 218; protest of Chevalier Hülsemann, Austrian Chargé d'Affaires, Sept. 30, 1850, Senate Ex. Doc. 9, 31 Cong., 2 Sess., Moore, Dig., I, 221; Mr. Webster, Secy. of State, to Chevalier Hülsemann, Dec. 21, 1850, Senate Ex. Doc. 43, 31 Cong., 1 Sess., Moore, Dig., I, 223. *Cf.* also President Taylor, special message, March 28, 1850, Senate Ex. Doc. 43, 31 Cong., 1 Sess., Moore, Dig., I, 220. It should be noted in this connection that while the instructions to Mr. Mann stated that under certain contingencies the President would cheerfully recommend to Congress the recognition of Hungary, the special and confidential agent was empowered to commit acts which in themselves would have amounted to recognition by the State of which he was the representative.

rights and title to property belonging to a State continue to vest in it regardless of changes in its government."<sup>1</sup>

The transformation of a monarchy into a republic, or the overthrow of a government by an opposing political party are in one sense matters of domestic concern. Said Mr. Webster, Secretary of State, to Mr. Rives, Minister to France, January 12, 1852:

From President Washington's time down to the present day it has been a principle, always acknowledged by the United States, that every nation possesses a right to govern itself according to its own will, to change its institutions at discretion, and to transact its business through whatever agents it may think proper to employ. This cardinal point in our policy has been strongly illustrated by recognizing the many forms of political power which have been successively adopted by France in the series of revolutions with which that country has been visited.<sup>2</sup>

Inasmuch, however, as the government of a State is the instrument through which it has official contact with the outside world and undertakes to respond to its international obligations, a change of government and the methods by which it is wrought are matters of concern to foreign countries. They are concerned primarily with a question of fact — whether the régime seeking recognition is in actual control of the reins of government. No difficulty presents itself when a change is wrought through normal processes and the result is accepted as a mere incident in the life or growth of the State concerned.<sup>3</sup> The situation may be obscure, however, when a contest for governmental control is waged by force of arms or by other processes not contemplated by the local law; the completeness of the success of a contestant may be fairly open to doubt for a protracted period, and even after its adherents assume to exercise the functions of government. In such case foreign States may, and oftentimes do, withhold recognition until they are themselves assured where the victory really lies.<sup>4</sup> The sufficiency of such assurance depends obviously upon the circumstances of the particular case; and it may follow close upon the heels of a *coup d'état*.<sup>5</sup> The

§ 43. <sup>1</sup> Hackworth, Dig., I, 387. Among the cases there cited, see *Lehigh Valley R. Co. v. State of Russia*, 21 F. (2d) 396, 400, 401; also opinion of Mr. Cummings, Attorney General, 37 Ops. Att'y. Gen. 505, 513-514. See Mr. Hughes, Secy. of State, to the Attorney General, May 15, 1923, For. Rel. 1923, Vol. II, 571.

<sup>2</sup> Senate Ex. Doc. 19, 32 Cong., 1 Sess., 19, Moore, Dig., I, 126. See also, Mr. Jefferson, Secy. of State, to Mr. Morris, American Minister at Paris, Nov. 7, 1792, *Jefferson's Works*, ed. by H. A. Washington, III, 488, 489, Moore, Dig., I, 120; Mr. Buchanan, Secy. of State, to Mr. Rush, American Minister, March 31, 1848, Senate Ex. Doc. 53 Cong., 1 Sess., 3, Moore, Dig., I, 124.

<sup>3</sup> Declared Secy. Stimson in the course of an address on February 6, 1931: "The recognition of a new government within a State arises in practice only when a government has been changed or established by revolution or *coup d'état*. No question of recognition normally arises, for example, when a king dies and his heir succeeds to the throne, or where as the result of an election in a republic a new chief constitutionally assumes office." ("The United States and the Other American Republics," Publications of Dept. of State, Latin American Series, No. 4, 1931.)

<sup>4</sup> See Mr. Hughes, Secy. of State, to Mr. Samuel Gompers, President of American Federation of Labor, July 19, 1923, For. Rel. 1923, II, 760.

<sup>5</sup> Declared Secy. Hull in the course of a communication to Representative Tinkham, May 16, 1936: "The time element as such does not enter into considerations affecting recognition of a new government, except that . . . it is the rule of the United States 'to defer recog-



matter is unrelated to the mode whereby the success of a régime is achieved, except in so far as recourse to a particular method may breed doubt as to the security or permanence of the control that has been won.

A disposition may manifest itself, however, to do more than seek facts and abide by what they disclose. Foreign States may be inclined, for example, to establish tests of their own devising to indicate whether a new régime produced by revolution is likely to be long or short-lived. They may hold to a philosophy that inspires reluctance to acknowledge the durability of a government which gains control through harsh and ruthless methods applied in the face of popular opposition, and which seemingly reflects the achievement of a minority. They may proclaim, through treaty or otherwise, a determination to withhold recognition from aspirants who flout their own constitution and scorn the ballot.<sup>6</sup> Again, there may be unwillingness to recognize an entity deemed to lack the disposition or capacity to respond to the international obligations of its country. As international law imposes no obligation upon a State to accord recognition to a new government functioning within any other at any particular time, the bare withholding of it is a matter of policy. Nevertheless, a rigid recourse to a policy of non-recognition of new governments within particular States or groups of States, save on compliance with specified conditions, may serve at times to

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dition of another executive in its place until it shall appear that it is in possession of the machinery of the State, administering the government with the assent of the people thereof and without substantial resistance to its authority, and that it is in a position to fulfill all the international obligations and responsibilities incumbent upon a sovereign State under treaties and international law.' You will appreciate that the length of time necessary for a new government to satisfy our Government upon these points will vary to a great extent in each case. . . ." (Hackworth, Dig., I, 174.)

<sup>6</sup> That States should endeavor to look beyond the bare fact of control by a new régime functioning in a foreign country is regarded in some quarters with disapproval. Special objection is made to the attempt to ascertain and pass judgment upon the question whether local institutions have been duly respected and constitutional injunctions heeded by a contestant for governmental control, and to causing the according of recognition to depend upon the decision of an outside State thereon. It is contended that to demand of such a contestant rigid respect for local institutions, is to ignore the fact that in some countries the arbitrary exercise of power by existing and previously recognized governments, renders it impossible by constitutional processes, as by the ballot, to effect changes desired by a majority of the people; and it is asserted that the use of force applied in lawless fashion is thus oftentimes, if not commonly, the only method by which such a country may freely exercise its power to obtain a government of its choice. Therefore, it is maintained, that the conditioning of recognition upon a showing indicative of absence of disregard for the local law, constitutes a taking of sides in a foreign domestic contest, is a practical interference with freedom of choice, and amounts to pernicious supervision of the affairs of a foreign country.

It is contended on the other hand, that in certain groups of States where for the past century changes of government have most frequently been wrought by force, the results have not reflected the desire of a people to possess a government responsive to its choice, but quite as often the sheer power of particular leaders bent on personal aggrandizement to gain the ascendancy at the expense of the public interest; that the recurrence of such achievements has served to diminish the capacity of countries afflicted with them to respond to the normal obligations of independent statehood, and to render precarious the continuance or permanence of such statehood; that the contention that upon defiance of local institutions rests the sole hope of effecting desired changes of governmental agencies is an admission of weakness not to be uttered in behalf of entities making claim to the benefits of the law which the international society has established for its membership; and that in a group of States where such situations have been off-recurrent there is an increasing disposition manifested by appropriate conventions, to agree to withhold recognition from a régime whose achievement is the product of a *coup d'état* or insurrection.

produce a decisive effect upon the mode of governmental changes therein, even though there may be in a technical sense no participation in the contest.

Outside States do not stop at this point. They oftentimes not only take sides in the contest, but also participate actively therein. There are thus closely entwined with the matter of the recognition of new governments, — which in its essence is the mere formal acknowledgment that a régime purporting to be the government of a State is such — considerations that are foreign to it; and these relate to acts the propriety of which must be sought in another quarter. Thus an outside State may endeavor to assist an existing government to retain control despite the effort of insurgents to dislodge it. Assistance may assume a variety of forms, such as the placing of an embargo on arms destined for the insurgents, or the direct sale of arms to their opponents; or there may be an endeavor to cause a particular contestant, whether in or out of the saddle, to abandon the contest.<sup>7</sup>

## (2)

§ 44. **The Position of the United States.** Before the beginning of the nineteenth century Jefferson declared it to be in accord with American principles "to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared."<sup>1</sup>

He perceived both the continuity of state life in spite of governmental changes, and also the reasonableness of entering into formal relations with whatever party ultimately gained the ascendancy. It was the fact of control rather than any other circumstance which appeared to be regarded by him as the decisive test. He expressed himself to the effect that "the will of the nation" was "the only thing essential to be regarded," whether a "king, convention, assembly, committee, president, or anything else" were chosen as the organ through which intercourse with foreign nations was to be had.<sup>2</sup> Jefferson did not, however, seem to be concerned with what should be deemed to be requisite proof of "the will of the nation" when a monarchy succeeded a republic.

During the first half of the nineteenth century and until the Civil War, the theory of Jefferson seems to have been simply applied. Thus when a monarchical government overthrew a republican, the result was accepted without regard to the domestic legitimacy of the transaction, and recognition duly accorded without serious reluctance.<sup>3</sup> Irrespective of the nature or method of the change, the

<sup>7</sup> See in this connection, J. B. Moore, "The New Isolation," *Am. J.*, XXVII, 607.

§ 44.<sup>1</sup> See communication to Mr. Morris, Nov. 7, 1792, Jefferson's Works, ed. by H. A. Washington, III, 488, 489, Moore, Dig., I, 120.

<sup>2</sup> Communication to Mr. Morris, March 12, 1793, Jefferson's Works, ed. by Ford, VI, 199, Moore, Dig., I, 120.

<sup>3</sup> Thus concerning the recognition by the United States of the pretender Dom Miguel as King of Portugal in 1829, Mr. Van Buren, Secy. of State, declared: "But, even apart from the foregoing considerations, the course which had ever before been pursued by the United States of always recognizing the government existing *de facto*, and which had but recently led to the acknowledgment of that of Brazil, left them no choice in the instance under consideration." (Communication to Mr. Brown, Chargé d'Affaires to Brazil, Oct. 20, 1830, MS. Inst. to American States, XIV, 101, Moore, Dig., I, 137.)

United States was not disposed to concern itself with more than the fact that a particular party was in actual control.<sup>4</sup> Nevertheless, during this period reference was at times made to the bearing of the public will upon the success or achievement of such party. President Jackson in 1830 referred to it as "the paramount authority" that had borne Louis Philippe to the throne.<sup>5</sup> In 1856, President Pierce, declaring that the United States did not "go behind the fact of a foreign government, exercising actual power, to investigate the question of legitimacy," said that "all these matters we leave to the people and public authorities of the particular country to determine; and their determination, whether it be by positive action or by ascertained acquiescence, is to us sufficient warrant of the legitimacy of the new government."<sup>6</sup> Popular approval of a particular régime appears, however, to have been regarded as reasonable deduction from the fact of success, rather than as a condition of which the existence remained to be established by special tests of American devising.

Possibly as a consequence of the nature of his objections to the British recognition of the Confederate States as belligerents in 1861,<sup>7</sup> Secretary Seward, and his successors for some years following, laid stress on another consideration. They announced in substance that a revolutionary government in a republican State, defiant of an existing constitution, and also gaining control by sheer force of arms, ought not to be recognized by the United States until it was assured that the change was adopted by the people rather than imposed upon them against their will.<sup>8</sup> Thus the will of the nation was deemed to be inseparable from or identical with that of the people. This idea found expression in American

<sup>4</sup> "In its intercourse with foreign nations the Government of the United States has, from its origin, always recognized *de facto* governments. We recognize the right of all nations to create and re-form their political institutions according to their own will and pleasure. We do not go behind the existing Government to involve ourselves in the question of legitimacy. It is sufficient for us to know that a government exists capable of maintaining itself; and then its recognition on our part inevitably follows. This principle of action, resulting from our sacred regard for the independence of nations, has occasioned some strange anomalies in our history. The Pope, the Emperor of Russia, and President Jackson were the only authorities on earth which ever recognized Dom Miguel as King of Portugal." (Mr. Buchanan, Secy. of State, to Mr. Rush, March 31, 1848, Senate Ex. Doc. 53, 30 Cong., 1 Sess., 3, Moore, Dig., I, 124.)

<sup>5</sup> President Jackson, annual message, Dec. 6, 1830, Richardson's Messages, II, 501; Moore, Dig., I, 123.

<sup>6</sup> President Pierce, special message, May 15, 1856, House Ex. Doc. 103, 34 Cong., 1 Sess., 5-6, Moore, Dig., I, 142; also Mr. Cass, Secy. of State, to Mr. McLane, Minister to Mexico, March 7, 1859, MS. Inst. Mexico, XVII, 213, Moore, Dig., I, 147.

<sup>7</sup> Recognition of Belligerency, *infra*, §§ 47-48.

<sup>8</sup> Thus Mr. Seward declared in an instruction to Mr. Hovey, American Minister to Peru, March 8, 1868: "The policy of the United States is settled upon the principle that revolutions in republican States ought not to be accepted until the people have adopted them by organic law, with the solemnities which would seem sufficient to guarantee their stability and permanency. This is the result of reflection upon national trials of our own." (Dip. Cor. 1866, II, 630.)

See, also, same to same, May 7, 1868, where it was said: "What we do require, and all that we do require, is when a change of administration has been made, not by peaceful constitutional processes, but by force, that then the new administration shall be sanctioned by the formal acquiescence and acceptance of the people." (Dip. Cor. 1868, II, 863.)

Also Mr. Seward, Secy. of State, to Mr. Blair, Dec. 1, 1868, Dip. Cor. 1868, II, 337, Moore, Dig., I, 144; Mr. Seward, Secy. of State, to Mr. Culver, March 9, 1863, MS. Inst. Venezuela, I, 266, Moore, Dig., I, 149; Mr. Seward, Secy. of State, to Mr. Hall, Minister to Bolivia, Sept. 28, 1865, MS. Inst. Bolivia, I, 80, Moore, Dig., I, 154; same to same, April 21, 1866, Dip. Cor. 1866, II, 330.

state papers for several decades, although the forms of utterance lacked uniformity.<sup>9</sup> In the meantime American instructions gradually began to emphasize the significance of another consideration — the ability of any new government to make response to the international obligations of its State.<sup>10</sup> In 1899, Secretary Hay evinced a readiness to authorize the recognition of a new government in Bolivia “when it shall appear to be established in control of the machinery of administration and in a position to fulfill its international obligations.”<sup>11</sup> Thereafter reference to this requirement was frequently made or emphasized, and has not ceased to be recurrent.<sup>12</sup> Notwithstanding the occasional absence of

<sup>9</sup> See for example, President Grant, second Annual Message, Dec. 5, 1870, Moore, Dig., I, 127; Mr. Fish, Secy. of State, to Mr. Sickles, Dec. 16, 1870, For. Rel. 1871, 742, Moore, Dig., I, 133; Mr. Evarts, Secy. of State, to Mr. Baker, June 14, 1879, MS. Inst. Venezuela, III, 67, Moore, Dig., I, 151; Mr. Foster, Secy. of State, to Mr. Scruggs, telegram, Oct. 12, 1892, For. Rel. 1892, 635, Moore, Dig., I, 153; Mr. F. W. Seward, Acting Secy. of State, to Mr. Foster, May 16, 1877, For. Rel. 1877, 403, 404, Moore, Dig., I, 148; Mr. Blaine, Secy. of State, to Mr. Christianity, American Minister at Lima, May 9, 1881, For. Rel. 1881, 909, Moore, Dig., I, 157; Mr. Frelinghuysen, Secy. of State, to Mr. Phelps, American Minister to Peru, July 26, 1883, For. Rel. 1883, 709, Moore, Dig., I, 157; President Arthur, third Annual Message, Dec. 4, 1883, For. Rel. 1883, vi-vii, Moore, Dig., I, 158; Mr. Bayard, Secy. of State, to Mr. Buck, Dec. 16, 1885, MS. Inst. Peru, XVII, 192, Moore, Dig., I, 159; Mr. Blaine, Secy. of State, to Mr. Adams, Nov. 30, 1889, For. Rel. 1889, 66, Moore, Dig., I, 160; President Harrison, Annual Message, Dec. 1, 1890, For. Rel. 1890, iv, Moore, Dig., I, 162; Mr. Olney, Secy. of State, to Mr. Tillman, Minister to Ecuador, Nov. 6, 1895, For. Rel. 1895, I, 248, 249, Moore, Dig., I, 156.

Compare Mr. Hunter, Acting Secy. of State, to Mr. Baker, Oct. 3, 1879, MS. Inst. Venezuela, III, 79, Moore, Dig., I, 150, note.

<sup>10</sup> Mr. Evarts, Secy. of State, to Mr. Baker, June 14, 1879, MS. Inst., Venezuela, III, 67, Moore, Dig., I, 151.

<sup>11</sup> Communication to Lord Pauncefoot, British Ambassador at Washington, Nov. 16, 1899, For. Rel. 1899, 344, Moore, Dig., I, 155; Mr. Hay, Secy. of State, to Mr. Loomis, American Minister to Venezuela, telegram, Nov. 8, 1899, For. Rel. 1899, 809, Moore, Dig., I, 153; Mr. Adee, Second Assist. Secy. of State, to Mr. Maxwell, American Consul-General at San Domingo City, Oct. 19, 1899, 169 MS. Inst. to Consuls, 506, Moore, Dig., I, 163, note; Mr. Loomis, Acting Secy. of State, to Mr. Combs, Minister to Honduras, telegram, April 24, 1903, For. Rel. 1903, 579.

<sup>12</sup> Declared Mr. Hill, Acting Secy. of State, in an instruction to Mr. Hart, American Minister at Bogotá, Sept. 8, 1900: “The policy of the United States, announced and practised upon occasion for more than a century, has been and is to refrain from acting upon conflicting claims to the *de jure* control of the executive power of a foreign State; but to base the recognition of a foreign government solely on its *de facto* ability to hold the reins of administrative power. When, by reason of revolution or other internal change not wrought by regular constitutional methods, a conflict of authority exists in another country whereby the titular government to which our representatives are accredited is reduced from power and authority, the rule of the United States is to defer recognition of another executive in its place until it shall appear that it is in possession of the machinery of the State, administering government with the assent of the people thereof and without substantial resistance to its authority, and that it is in a position to fulfill all the international obligations and responsibilities incumbent upon a sovereign State under treaties and international law.” For. Rel. 1900, 410, Moore, Dig., I, 138.

See also, For. Rel. 1899, 793-812, concerning the revolution in Venezuela in 1899, and the recognition of the Government of Gen. Castro.

Declared Mr. Hughes, Secy. of State, to the American Chargé d’Affaires in Mexico, June 8, 1921: “In short, when it appears that there is a government in Mexico willing to bind itself to the discharge of primary international obligations, concurrently with that act its recognition will take place. This Government desires immediate and cordial relations of mutual helpfulness and simply wishes that the basis of international intercourse should be properly maintained.” (For. Rel. 1921, Vol. 2, 406, 407.)

“Attention is invited especially to the following instances of recognition set forth in the following sections of this chapter: Persia, 1909, § 50; Haiti, 1911, § 47; Peru, 1914, 1919, § 47; China, 1915, § 51; Chile, 1924, § 47; Argentina, Bolivia, and Peru, 1930, § 47; Spain, 1931, § 48; Bolivia, 1936, § 47; Ecuador, 1937, § 47. In nearly all these instances the ability

statements concerning the matter of popular approval or of the public will, the diplomatic instructions of the time leave no doubt that that consideration was rarely lost sight of. Moreover, in the years that followed there appeared to be a tendency to revert to a position or to statements of position somewhat resembling those of Secretary Seward and his immediate successors. Without failing to seek assurance of the capacity of a new régime to perform incidental obligations, stress was laid upon respect for constitutional requirements or upon the matter of the acquiescence of the people.<sup>18</sup>

Declared Mr. Hackworth, the Solicitor for the Department of State in 1931:

Occasionally we have closely approached the requirements specified by Seward in 1866. On October 5, 1910, the monarchy of Portugal was overthrown by a *coup d'état*. We recognized the ensuing provisional government when it had been officially proclaimed by the Constituent Assembly. We awaited the due election of a president in Paraguay in 1912 before granting recognition to the new government. Following the abdication of the Manchu rulers of China on February 12, 1912, and the organization of a provisional republican government, we stated in an instruction to the American Minister to China, dated September 20, 1912, that it would be more in accord with established precedents to defer recognition "until a permanent constitution shall have been definitely adopted by a representative national assembly, a president duly elected in accordance with the provisions of such constitution, and the present Provisional Government replaced by a permanent one with constitutional authority."

With the possible exception, however, of these last-mentioned instances, which may be explained by the special circumstances of the particular cases, the policy of recognition prior to the beginning of the administration of President Wilson uniformly followed the fundamental principles laid down by Jefferson in his instruction to Mr. Morris in 1792. The lack of uniform phraseology did not constitute a break in the substantially uniform policy, since these various formulae are, after all, but different methods of expressing the Jeffersonian criteria — the will of the nation substantially declared. Jefferson's statements carried the implication that a government, such as he described, would be in possession of the machinery of government, would possess stability, and would be able and willing to meet its international obligations. Therefore, stipulations to that effect contained in more recent

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and willingness of the new government to discharge its international obligations has been stressed as a prerequisite to recognition. In those instances in which this has not been stated explicitly, it has probably been considered implicit in the requirement that the government be stable and in control of the machinery of government." (Hackworth, *Dig.*, I, 176.)

<sup>18</sup> Mr. Adee, Acting Secy. of State, to the Provisional Minister for Foreign Affairs of Honduras, Aug. 23, 1907, *For. Rel.* 1907, II, 605; Mr. Knox, Secy. of State, to Mr. Furniss, American Minister to Haiti, telegram, Aug. 18, 1911, *For. Rel.* 1911, 290; same, to the American Minister to the Dominican Republic, telegram, Jan. 23, 1912, *For. Rel.* 1912, 341, in which it was said: "It is the practice of the Government of the United States to refuse to recognize any Government resulting from a revolution unless it appears to represent the will of the people and to be able and willing to respond to its international obligations."

Also, Mr. Knox, Secy. of State, to the American Chargé d'Affaires at Lisbon, June 6, 1911, *For. Rel.* 1911, 690; same to same, June 7, 1911, *id.*, 691.

See President Taft, annual message, Dec. 3, 1912, *For. Rel.* 1912, xxi-xxii, concerning relations with the Provisional Government of China.

instructions to our diplomatic officers may be regarded as specifically stating conditions which otherwise would have been implied in the principles enunciated by Jefferson.<sup>14</sup>

It should be observed that the United States has at times not been reluctant to lay down terms to be satisfied by aspirants for governmental control as a condition precedent to recognition. Thus, in 1912, the insurgents in the Dominican Republic were formally notified that they would not be recognized "if the government is overturned by force";<sup>15</sup> and in later years there has been an occasional effort to stiffen the price of recognition when the according of it could be utilized as a means of gaining respect for equitable demands, such as appropriate arrangements for the adjustment of claims. This was manifest in connection with the recognition of the government of General Obregón in Mexico in 1923.<sup>16</sup> Again, special assurances were sought from the Solorzano government in Nicaragua in 1924,<sup>17</sup> and from the People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics in 1933.<sup>18</sup> It should be borne in mind, however, that the provisions of a treaty,<sup>19</sup> or the special geographical relationship of the particular country concerned to the United States, or the interventional policy of the latter as applied or manifested through the withholding of recognition, may be regarded as responsible for the attitude as-

<sup>14</sup> "The Policy of the United States in Recognizing New Governments during the past Twenty-five Years," *Proceedings*, Am. Soc. Int. Law, 1931, 120, 123-124.

"Ever since the American Revolution entrance upon diplomatic intercourse with foreign States has been *de facto*, dependent upon the existence of three conditions of fact: the control of the administrative machinery of the State; the general acquiescence of its people; and the ability and willingness of their government to discharge international and conventional obligations. The form of government has not been a conditional factor in such recognition; in other words, the *de jure* element of legitimacy of title has been left aside." (Mr. Adee, Second Assist. Secy. of State, Memorandum for the Secy. of State, March 28, 1913, For. Rel. 1913, 100.)

<sup>15</sup> See the American Minister to the Dominican Republic and the Special Commissioners, to Mr. Knox, Secy. of State, Nov. 20, 1912, For. Rel. 1912, 373, 375-376; Mr. Knox, Secy. of State, to the American Minister to the Dominican Republic, Nov. 25, 1912, *id.*, 376. See also documents in Hackworth, *Dig.*, I, § 47.

Also documents in For. Rel. 1910, 762-769, concerning the relations between the United States and the Provisional Government of Señor Estrada in Nicaragua, in 1910.

<sup>16</sup> Declared Secy. Hughes in an address before the Council on Foreign Relations, at New York, on Jan. 23, 1924: "We had the friendliest feelings for the people of Mexico and were sensible of their desire for social and political betterment, but revolutionary tendencies and despotic conditions made it impossible to find a sound basis for intercourse. At last, under General Obregon's administration there was a restoration of stability; commerce and industry began to regain confidence; there was a hopeful endeavor to put the finances of the country on a better footing; provision was made for the payment of the foreign debt. When it appeared that there was a disposition to discharge the obligations which are incident to membership in the family of nations, this government was glad to recognize the existing government of Mexico and to resume diplomatic relations."

"Two conventions were at once concluded — a special convention relating to claims arising from revolutionary disturbances, and a general convention dealing generally with the claims of the respective States and their nationals. Diplomatic relations were resumed and these conventions were concluded last September." (Charles E. Hughes, *The Pathway of Peace and other Addresses*, New York, 1925, 89, 98-99.) See also President Harding to General Obregón, July 21, 1921, For. Rel. 1921, Vol. II, 420.

<sup>17</sup> See Mr. Hughes, Secy. of State, to Mr. Thurston, Chargé in Nicaragua, Dec. 10, 1924, For. Rel. 1924, Vol. II, 503; Mr. Thurston, to the Secy. of State, Dec. 13, 1924, *id.*, 505.

<sup>18</sup> See Recognition of the Russian Government in 1933, *infra*, § 45B.

<sup>19</sup> See Convention with the Dominican Republic of Feb. 8, 1907, Malloy's Treaties, I, 418.

sumed in special cases, and that that attitude may not be illustrative of the position which the United States may be expected generally to assume under normal circumstances.

On March 12, 1913, President Wilson made public a declaration of policy with regard to Latin America in the course of which he declared:

We hold, as I am sure all thoughtful leaders of republican government everywhere hold, that just government rests always upon the consent of the governed, and that there can be no freedom without order based upon law and upon the public conscience and approval. We shall look to make these principles the basis of mutual intercourse, respect, and helpfulness between our sister republics and ourselves. We shall lend our influence of every kind to the realization of these principles in fact and practice, knowing that disorder, personal intrigues, and defiance of constitutional rights weaken and discredit government and injure none so much as the people who are unfortunate enough to have their common life and their common affairs so tainted and disturbed. We can have no sympathy with those who seek to seize the power of government to advance their own personal interests or ambition. We are the friends of peace, but we know that there can be no lasting or stable peace in such circumstances. As friends, therefore, we shall prefer those who act in the interest of peace and honor, who protect private rights, and respect the restraints of constitutional provision. Mutual respect seems to us the indispensable foundation of friendship between States, as between individuals.<sup>20</sup>

It will be observed that the President did not in terms refer to the matter of the recognition of new governments. His statement revealed, however, his sense of the significance to be attached to the constitutionality of acts of foreign aspirants in Latin America who might seek recognition by the United States; and there was intimated a strong reluctance on his part to accord recognition to a régime that appeared to him to gain the ascendancy in defiance of the local fundamental law.

The bare withholding of recognition by President Wilson from the régime of General Huerta in Mexico in 1913 and 1914, was merely incidental to the larger policy that was followed. The former, regarding the latter as a usurper of power without vestige of legal right and contemptuous of the institutions of his country, did not regard his government as an entity to be tolerated until such time as it might fairly be deemed to have won the acquiescence of a submissive people. President Wilson saw fit rather to announce and act upon an affirmative policy designed to cause General Huerta to relinquish his grasp of

<sup>20</sup> For. Rel. 1913, 7. As critical of the President's declaration see J. B. Moore, "The New Isolation," *Am. J.*, XXVII, 607, 609.

"The special policy pursued by the United States during a part of the period since 1906 with reference to the recognition of governments coming into power in disregard of *constitutional* procedure, has assumed a political importance which has tended to obscure the pattern of uniformity obtaining in the practice of recognition in other instances. Aside from this prerequisite of 'constitutionalism' adopted in the recognition of Central American governments and inaugurated by President Woodrow Wilson with reference particularly to certain other of the American republics, the prerequisites during this period have conformed substantially to the so-called *de facto* policy of recognition instituted by Jefferson." (Mr. Hull, Secy. of State. to Representative Tinkham, May 16, 1936, Hackworth, Dig., I, 174.)

the reins of government. This effort was effective and produced the end desired. It must be regarded as constituting intervention.<sup>21</sup>

The declaration of policy enunciated by President Wilson in 1913 found frequent expression in diplomatic communications addressed to certain Latin-

<sup>21</sup> Francisco I. Madero had been elected to the Presidency of Mexico in October, 1911, and entered upon the duties of his office the following month. For. Rel. 1911, 519-521. In February, 1913, he was captured and his resignation secured through the revolt of the army at Mexico City under the leadership of Felix Diaz. General Huerta thereupon assumed the provisional presidency. On Feb. 22, 1913, Madero, while in the custody of the authorities, was killed. During the months of March, April and May, 1913, the Huerta government was recognized by a number of European powers. In August, 1913, having declined to recognize Huerta, President Wilson sent to Mexico City as his special representative, Mr. John Lind, formerly Governor of Minnesota. He was instructed to endeavor to obtain a settlement of distressing conditions in Mexico, and to offer the good offices of the United States in order to effect it. In the judgment of President Wilson a satisfactory settlement seemed to be conditioned on "(a) An immediate cessation of fighting throughout Mexico, a definite armistice solemnly entered into and scrupulously observed;

"(b) Security given for an early and free election in which all will agree to take part;

"(c) The consent of Gen. Huerta to bind himself not to be a candidate for election as President of the Republic at this election; and

"(d) The agreement of all parties to abide by the results of the election and coöperate in the most loyal way in organizing and supporting the new administration."

The Lind mission proved abortive, and the terms proposed were formally declined by Huerta. On Aug. 27, 1913, President Wilson brought the matter to the attention of Congress, declaring that the United States could not be the partisan of either party to the contest distracting Mexico, or constitute itself the virtual umpire. He announced that "neither side to the struggle" taking place in Mexico should receive any assistance from the United States, and simultaneously prohibited the exportation of arms to any portion of Mexico or to any parties therein. See Address of the President to Congress, on Mexican Affairs, Aug. 27, 1913, *Am. J.*, VII, Supp., 279; Reply of Secy. of Foreign Affairs of Mexico to proposals conveyed through Mr. Lind, Aug. 16, 1913, *id.*, 284.

In October, 1913, Huerta, who had announced a general election to be held later during that month, caused the arrest of numerous deputies attending the session of the National Congress, dissolved that body, and assumed the rôle of a dictator. See text of Huerta's decree of Oct. 10, 1913, in *New York Sun*, Oct. 17, 1913. The election was duly held, and the results were declared to show that Huerta was the choice of the electors.

On Nov. 7, 1913, Secretary Bryan announced by telegram to certain American diplomatic officers the fact (for communication to the governments to which they were accredited) that the President deemed it to be "his immediate duty to require Huerta's retirement from the Mexican Government, and that the Government of the United States must now proceed to employ such means as may be necessary to secure this result." For. Rel. 1913, 856.

On Nov. 24, 1913, Secy. Bryan declared in a communication to Chargé d'Affaires O'Shaughnessy: "It is the purpose of the United States therefore to discredit and defeat such usurpations whenever they occur. The present policy of the Government of the United States is to isolate General Huerta entirely; to cut him off from foreign sympathy and aid and from domestic credit, whether moral or material, and to force him out. It hopes and believes that isolation will accomplish this end and shall await the results without irritation or impatience. If General Huerta does not retire by force of circumstances it will become the duty of the United States to use less peaceful means to put him out. It will give other Governments notice in advance of each affirmative or aggressive step it has in contemplation should it unhappily become necessary to move actively against the usurper; but no such step seems immediately necessary." (For. Rel. 1914, 443.)

In his Annual Message of Dec. 2, 1913, President Wilson declared that there could be no certain prospect of peace in America until Huerta had surrendered "his usurped authority in Mexico; until it is understood on all hands, indeed, that such pretended governments will not be countenanced or dealt with by the Government of the United States." He added that Mexico had no government, that the attempt to maintain one at the City of Mexico had broken down, and that a mere military despotism had been set up which had hardly more than the semblance of national authority. This, he stated, had originated in the usurpation of Huerta who, he declared, had, after a brief attempt to play the part of constitutional President, "at last cast aside even the pretense of legal right and declared himself dictator." It was said that in consequence, there existed in Mexico a condition of affairs which rendered it doubtful whether even the most elementary and fundamental rights "either of her own people or of the citizens of other countries resident within her territory" could long be successfully safeguarded. He declared that Huerta had failed in his purposes, that he had forfeited the respect and moral support of those who were at one time willing to see him succeed, and that little



American republics in the course of the years that immediately followed.<sup>22</sup>

The Wilson administration, in declining to recognize the Tinoco régime in Costa Rica in 1917, took occasion to announce that "the Government of the United States desires to set forth in an emphatic and distinct manner its present position in the actual situation in Costa Rica which is that it will not give recognition or support to any Government which may be established unless it is clearly proven that it is elected by legal and constitutional means."<sup>23</sup> Moreover, the Department of State later announced to three Central American States that it would not regard the recognition of General Tinoco by any one of them as evidence of friendly feeling toward the United States.<sup>24</sup> General Tinoco was obliged to give up.<sup>25</sup>

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by little he had become completely isolated. He predicted that his collapse was not far away. (For. Rel. 1913, x-xi.)

On Feb. 3, 1914, President Wilson withdrew the embargo on the exportation of arms and ammunition to Mexico, thus technically placing the opposing factions of Huerta and Carranza upon an equality, although giving thereby actual advantage to the latter by reason of the superior opportunities which it possessed to effect importations. Later, however, the embargo was reestablished. The Tampico flag incident in April, 1914, and the resulting occupation of Vera Cruz by American forces doubtless served to increase the reluctance of President Wilson to accord recognition to the Huerta government. See Retorsion, *infra*, § 588. It should be observed, however, that in consequence of the mediation of Argentina, Brazil and Chile, negotiations at Niagara Falls, Ontario, resulted in practical agreement between the United States and Huerta as to the mode of reestablishing constitutional government in Mexico which should be recognized by the United States, and should cause the restoration of diplomatic relations which had been severed. *Am. J.*, VIII, 579-585. The unwillingness, however, of General Carranza to participate in these negotiations served to render them abortive. The constitutionalist authorities preferred force to negotiation in their opposition to Huerta. Following his election in July, 1914, Huerta resigned from the presidency in the course of a few days, and left the country. On Aug. 15, the constitutionalist army entered Mexico City, and a few days later, General Carranza himself there assumed the reins of government. The following month witnessed the withdrawal of the American troops from Vera Cruz. *Am. J.*, VIII, 860-864.

After July, 1914, the revolutionary party became divided into factions, and General Carranza found himself opposed by some of his former lieutenants. The pacification of the country was thus greatly delayed. On June 2, 1915, President Wilson urged in vain the leaders of the several factions to act together for the "relief and redemption of their prostrate country." Senate Doc. 324, 64 Cong., 1 Sess., 14. On Aug. 15, 1915, Secretary Lansing, together with diplomatic representatives at Washington of Brazil, Chile, Argentina, Bolivia, Uruguay and Guatemala, made a vain appeal to the leaders of the revolutionary factions, suggesting the convening of a conference for the peaceful settlement of their differences, and offering to act as intermediaries. *Id.*, 10 and 15. General Carranza gained control of about 75 per cent of Mexican territory; and the *de facto* government of which he was the Chief Executive was recognized by the United States on Oct. 19, 1915, in view of assurances given by it to hold popular elections upon the restoration of domestic peace and to protect the lives and property of foreigners. This *de facto* government was not a constitutional government, but rather one of a military character which was expected by the United States to be within a reasonable time "merged in or succeeded by a government organized under the Constitution and law of Mexico." See Mr. Lansing, Secy. of State, to the President, Feb. 12, 1916, *id.*, 9-11. Concerning the failure of the Carranza government in 1916 to pacify the country and to overcome the operations of Villa, see Mr. Lansing, Secy. of State, June 20, 1916, to the Secy. of Foreign Relations of the *de facto* Mexican Government, *Am. J.*, X, *Supplement*, 211.

<sup>22</sup> See, for example, Mr. Lansing, Secy. of State, to Mr. Gonzales, Minister to Cuba, Feb. 13, 1917, for issuance by the latter, For. Rel. 1917, 356. See also numerous other documents quoted or cited in Hackworth, *Dig.*, I, § 33.

<sup>23</sup> Mr. Lansing, Secy. of State, to Minister Leavell, telegram, Feb. 9, 1917, For. Rel. 1917, 306; same to same, telegram, April 23, 1918, *id.*, 1918, 257.

<sup>24</sup> Mr. Lansing, Secy. of State, to Minister Leavell, telegram, Sept. 21, 1917, *id.*, 1917, 343. See also documents in Hackworth, *Dig.*, I, § 47.

<sup>25</sup> See Dept. of State, statement for the press, No. 2, Aug. 2, 1920, concerning the downfall of the Tinoco Government.

In January, 1921, Secretary Colby announced that in view of the fact that the election of Dr. Bautista Saavedra to the Presidency of Bolivia had been conducted in conformity with the provisions of the Bolivian Constitution as amended by the Constitutional Convention elected in November, 1920, the Government of the United States had "determined to extend recognition to the existing Government of Bolivia, not as the *de facto* Government, but as the Constitutional Government of that Republic."<sup>26</sup> It has recently been observed that the policy of not recognizing revolutionary governments also received application during President Wilson's administration with respect to Central America, but that it was based partially upon the Central American treaty of 1907; that "it was not applied with respect to the recognition of any non-American government, nor was it applied with respect to the recognition of new governments in American republics other than those referred to above;"<sup>27</sup> that the policy was invoked in a few instances subsequent to the termination of President Wilson's administration in 1921;<sup>28</sup> and that the administration of President Hoover "definitely abandoned the test of 'constitutionality' as a prerequisite to the recognition of new governments, except in Central America."<sup>29</sup>

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§ 45. **The Same. Russia 1920-1925.** In response to an intimation that the Government of Italy would welcome a statement of the views of that of the United States on the situation presented by the Russian advance into Polish territory in the summer of 1920, Mr. Colby, Secretary of State, found occasion to make clear the grounds which, in his judgment, forbade American recognition of the Soviet régime functioning in Russia.<sup>1</sup> These were, briefly, that the existing rulers of that State were not in power by the will or consent of any considerable portion of the Russian people, but represented a small minority thereof, and that they retained control by means of savage oppression. Secondly, it was pointed out that the existing *régime* was "based upon the negation of every

<sup>26</sup> Communication to the American Ambassador in Argentina, Jan. 31, 1921, For. Rel. 1921, I, 282, where it was added: "This Government will delay the formal act of recognition for a few days until assured that the stability of the present Bolivian Government will not be menaced by any outbreak of disorders."

Concerning the recognition by the United States of the government of Mr. Sidonio Paes as President of the Republic of Portugal, in 1918, see documents in Hackworth, Dig., I, 293.

<sup>27</sup> Attention was here called to the recognition of governments coming to power in Peru in 1914 and 1919, Hackworth, Dig., I, 185.

<sup>28</sup> Attention was called to the recognition of the Saavedra government in Bolivia in 1921, Hackworth, Dig., I, 185, and the delay of three years in the recognition of the government which overthrew the existing government in Ecuador in July, 1925, *id.*

<sup>29</sup> Statement in Hackworth, Dig., I, 185. See also documents *id.*, concerning the bearing of the Central American Treaty (to which the United States was not a party) concluded Dec. 20, 1907, Malloy's Treaties, II, 2397, upon the recognition policy of the United States as applied to the Central American republics.

§ 45. <sup>1</sup> See communication to Baron Avezzano, Italian Ambassador at Washington, Dept. of State, statement for the Press, Aug. 10, 1920.

Also views of Mr. Lansing, Secy. of State, expressed before Senate Committee on Foreign Relations, in 1919, Senate Doc. 66 Cong., 2 Sess., No. 172, p. 3.

The abdication of the Emperor of Russia, Nicholas II, for himself and his son was officially promulgated on March 17, 1917. (For. Rel. 1918, Russia, Vol. I, 3.) On March 20, 1917, the American Government authorized the Ambassador in Russia to inform the Provi-

principle of honor and good faith, and every usage and convention underlying the whole structure of international law; the negation, in short, of every principle upon which it is possible to base harmonious and trustful relations, whether of nations or individuals."<sup>2</sup> It was declared that in the opinion of the Government, there could not be any common ground upon which it could stand with a power whose conceptions of international relations were so entirely alien to its own, and so utterly repugnant to its moral sense; and that there could be no mutual confidence or trust or even respect, if pledges were to be given and agreements made with a cynical repudiation of their obligations already in the mind of one of the parties. "We cannot recognize," he said, "hold official relations with, or give friendly reception to, the agents of a Government which is determined and bound to conspire against our institutions; whose diplomats will be the agitators of dangerous revolt; whose spokesmen say that they sign agreements with no intention of keeping them."<sup>3</sup> Shortly thereafter the French Government announced hearty acquiescence in the principles so enunciated.<sup>4</sup>

Secretary Hughes made clear his reasons for withholding recognition from the Soviet régime, in a communication to Mr. Samuel Gompers, President of the American Federation of Labor, of July 19, 1923.<sup>5</sup> "We are not concerned," he said, "with the question of the legitimacy of a government as judged by

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sional Government which had been set up that "the Government of the United States recognizes the new Government of Russia, and that you, as Ambassador of the United States, will be pleased to continue intercourse with Russia through the medium of the new Government." (*Id.*, 12.) On March 22, 1917, formal recognition took place. (*Id.*, 12.) "The Provisional Government was overthrown by the Bolshevik *coup d'état* of November 7, 1917." (Hackworth, *Dig.*, I, 299. See also *For. Rel.* 1918, Russia, Vol. I, 224-241.)

"We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government through its duly recognized representatives from March 16, 1917 to November 16, 1933, when the Soviet Government was recognized. There was at all times during that period a recognized diplomatic representative of the Russian State to whom notice concerning its interests within the United States could be communicated, and to whom our courts were open for the purpose of prosecuting suits in behalf of the Russian State." (Stone, J., in the opinion of the Court in *Guaranty Trust Co. v. United States*, 304 U. S. 126, 138-139.)

<sup>2</sup> In this connection he said: "The responsible leaders of the *régime* have frequently and openly boasted that they are willing to sign agreements and undertakings with foreign powers, while not having the slightest intention of observing such undertakings or carrying out such agreements. This attitude of disregard of obligations voluntarily entered into, they base upon the theory that no compact or agreement made with a non-Bolshevist government can have any moral force for them. They have not only avowed this as a doctrine, but have exemplified it in practice. . . .

"Moreover, it is within the knowledge of the Government of the United States that the Bolshevik government is itself subject to the control of a political faction, with extensive ramifications through the Third Internationale, and that this body, which is heavily subsidized by the Bolshevik government from the public revenues of Russia, has for its openly avowed aim the promotion of Bolshevik revolutions throughout the world. . . .

"Inevitably, therefore, the diplomatic service of the Bolshevik government would become a channel for intrigues and the propaganda of revolt against the institutions and laws of the countries with which it was at peace, which would be an abuse of friendship to which enlightened governments cannot subject themselves."

<sup>3</sup> For evidence in support of these charges, see statement of Mr. Colby, Dept. of State, statement for the Press, No. 4, Aug. 18, 1920.

<sup>4</sup> See communication from the French Embassy, Aug. 14, 1918, of which an English translation of the French text was given in Dept. of State, statement for the Press, No. 3, Aug. 18, 1920, together with statement of Secretary Colby concerning it.

<sup>5</sup> *For. Rel.* 1923, Vol. II, 760.

See also Hackworth, *Dig.*, I, §§ 33 and 48, and documents there cited.

European standards. We recognize the right of revolution and we do not attempt to determine the internal concerns of other States.”<sup>6</sup> After adverting to the views of Jefferson, expressed in 1793,<sup>6</sup> he added:

It must be borne in mind, however, that while this Government has laid stress upon the value of expressed popular approval in determining whether a new government should be recognized, it has never insisted that the will of the people of a foreign State may not be manifested by long continued acquiescence in a régime actually functioning as a government. When there is a question as to the will of the nation it has generally been regarded as a wise precaution to give sufficient time to enable a new régime to prove its stability and the apparent acquiescence of the people in the exercise of the authority it has assumed. The application of these familiar principles, in dealing with foreign States, is not in derogation of the democratic ideals cherished by our people, and constitutes no justification of tyranny in any form, but proceeds upon a consideration of the importance of international intercourse and upon the established American principle of non-intervention in the internal concerns of other peoples.

But while a foreign régime may have securely established itself through the exercise of control and the submission of the people to, or their acquiescence in, its exercise of authority, there still remain other questions to be considered. Recognition is an invitation to intercourse. It is accompanied on the part of the new government by the clearly implied or express promise to fulfill the obligations of intercourse. These obligations include, among other things, the protection of the persons and property of the citizens of one country lawfully pursuing their business in the territory of the other and abstention from hostile propaganda by one country in the territory of the other. In the case of the existing régime in Russia, there has not only been the tyrannical procedure to which you refer, and which has caused the question of the submission or acquiescence of the Russian people to remain an open one, but also a repudiation of the obligations inherent in international intercourse and a defiance of the principles upon which alone it can be conducted.

The persons of our citizens in Russia are for the moment free from harm. No assurance exists, however, against a repetition of the arbitrary detentions which some of them have suffered in the past. The situation with respect to property is even more palpable. The obligations of Russia to the taxpayers of the United States remain repudiated. The many American citizens who have suffered directly or indirectly by the confiscation of American property in Russia remain without the prospect of indemnification. We have had recent evidence, moreover, that the policy of confiscation is by no means at an end. The effective jurisdiction of Moscow was recently extended to Vladivostok and soon thereafter Moscow directed the carrying out in that city of confiscatory measures such as we saw in Western Russia during 1917 and 1918.

What is most serious is that there is conclusive evidence that those in control at Moscow have not given up their original purpose of destroying existing governments wherever they can do so throughout the world. Their

<sup>6</sup> Communication to Mr. Morris, March 12, 1793, Moore, Dig., I, 120.

efforts in this direction have recently been lessened in intensity only by the reduction of the cash resources at their disposal. You are well aware from the experiences of the American Federation of Labor of this aspect of the situation which must be kept constantly in view.<sup>7</sup>

While this spirit of destruction at home and abroad remains unaltered the question of recognition by our Government of the authorities at Moscow cannot be determined by mere economic considerations or by the establishment in some degree of a more prosperous condition, which of course we should be glad to note, or simply by a consideration of the probable stability of the régime in question. There cannot be intercourse among nations any more than among individuals except upon a general assumption of good faith. We would welcome convincing evidence of a desire of the Russian authorities to observe the fundamental conditions of international intercourse and the abandonment by them of the persistent attempts to subvert the institutions of democracy as maintained in this country and in others. It may confidently be added that respect by the Moscow régime for the liberties of other peoples will most likely be accompanied by appropriate respect for the essential rights and liberties of the Russian people themselves. The sentiment of our people is not deemed to be favorable to the acceptance into political fellowship of this régime so long as it denies the essential basis of intercourse and cherishes, as an ultimate and definite aim, the destruction of the free institutions which we have laboriously built up, containing as they do the necessary assurances of the freedom of labor upon which our prosperity must depend.

While the confiscatory policy of the Soviet régime, and its repudiation of Russian fiscal obligations were regarded by the Secretary of State as evidences of bad faith,<sup>8</sup> it was the organized effort in which he had reason to believe it was engaged to subvert and injure American institutions that made him adamant in his opposition. With diplomatic representatives of a Government committed to such a program he was unwilling to enter into formal relations.<sup>9</sup>

<sup>7</sup> In this connection he added: "I had occasion to refer to it last March in addressing the Women's Committee for the Recognition of Russia. It is worth while to repeat the quotations which I then gave from utterances of the leaders of the Bolshevik Government on the subject of world revolution, as the authenticity of these has not been denied by their authors. Last November Zinoviev said, 'The eternal in the Russian revolution is the fact that it is the beginning of the world revolution.' Lenin, before the last Congress of the Third Internationale, last fall, said that 'The revolutionists of all countries must learn the organization, the planning, the method and the substance of revolutionary work.' 'Then, I am convinced,' he said, 'the outlook of the world revolution will not be good but excellent.' And Trotsky, addressing the Fifth Congress of the Russian Communist Youths at Moscow last October, — not two years ago but last October, — said this: 'That means, comrades, that revolution is coming in Europe as well as in America, systematically, step by step, stubbornly and with gnashing of teeth in both camps. It will be long protracted, cruel and sanguinary.' The only suggestion that I have seen in answer to this portrayal of a fixed policy is that these statements express the views of the individuals in control of the Moscow régime rather than of the régime itself. We are unable, however, to find any reason for separating the régime, and its purpose from those who animate it, and control it, and direct it so as to further their aims."

See also statement by Mr. Hughes, Secy. of State, Dec. 18, 1923, for delivery by the American Consul at Reval to the Soviet representative at that place for communication to Mr. Tchitcherin, People's Commissar for Foreign Affairs, For. Rel. 1923, Vol. II, 788.

<sup>8</sup> See his statement on the foreign relations of the United States, of July 1, 1924, issued by the Republican National Committee.

<sup>9</sup> *Id.*, p. 45, where Secretary Hughes declared: "The essential fact is the existence of an

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§ 45A. **The Central American Treaty of 1923.** At the Conference of the representatives of Central American States that convened at Washington 1922–1923, there was concluded on February 7, 1923, a General Treaty of Peace and Amity. According to Article II:

The Governments of the Contracting Parties will not recognize any other Government which may come into power in any of the five Republics through a *coup d'état* or a revolution against a recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country. And even in such a case they obligate themselves not to acknowledge the recognition if any of the persons elected as President, Vice-President or Chief of State designate should fall under any of the following heads:

(1) If he should be the leader or one of the leaders of a *coup d'état* or revolution, or through blood relationship or marriage, be an ascendent or descendent or brother of such leader or leaders.

(2) If he should have been a Secretary of State or should have held some high military command during the accomplishment of the *coup d'état*, the revolution, or while the election was being carried on, or if he should have held this office or command within the six months preceding the *coup d'état*, revolution, or the election.

Furthermore, in no case shall recognition be accorded to a government which arises from election to power of a citizen expressly and unquestionably disqualified by the Constitution of his country as eligible to election as President, Vice-President or Chief of State designate.<sup>1</sup>

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organization in the United States created by, and completely subservient to, a foreign organization striving to overthrow the existing social and political order of this country. The subversive and pernicious activities of the American Communist Party and the Workers' Party and their subordinate or allied organs in the United States are activities resulting from and flowing out of the program elaborated for them by the Moscow group."

See also *Recognition of Russia*, Hearings before a subcommittee of the Committee on Foreign Relations, U. S. Senate, 68 Cong., 1 Sess., pursuant to Senate Res. 50, declaring that the Senate of the United States favors the recognition of the present Soviet Government in Russia, January 21, 22 and 23, 1924.

Declared Mr. Elihu Root at a dinner given in honor of Mr. Hughes, former Secretary of State, at New York, Nov. 10, 1925: "He [Mr. Hughes] knew that recognition means that each government accepts the implied assurance of the other government that it will maintain true friendship, true respect, true observance of the obligations of good neighborhood. And he knew also that the fundamental doctrine of the men who govern Russia now is that it is their mission in the world to overturn and destroy the government of the United States, of England, of France, of all the civilized nations of the western world. He knew that in the first place the act of recognition would be a formal and a solemn lie, a false pretense of accepting the obligations of the Bolshevik rulers of Russia to observe friendship to the government and the people of the United States. He knew that they did not intend friendship, but they intended enmity and destruction to the government of the United States and the institutions of the American people, and he knew in the second place that to recognize the Russian Government would be to open the doors to them to carry out their purpose of destructive enmity, and would be a stupid and idiotic yielding to mere momentary expediency in order to make future disaster certain." Also *American Secretaries of State and Their Diplomacy*, X, Chap. IX, 280–288.

§ 45A.<sup>1</sup> Conference on Central American Affairs (Washington, December 4, 1922–February 7, 1923), Washington, Government Printing Office, 1923, 287, 288.

By Art. V, the parties obligated themselves to maintain in their respective constitutions the principle of non-re-election to the office of President and Vice-President of the Republic.

The United States was not a signatory to the convention; but was said to be in hearty accord with the provisions quoted above.<sup>2</sup> According to Secretary Kellogg, it had "adopted the principles of that treaty as its policy in the future recognition of Central American Governments" inasmuch as it felt that by so doing it could best show friendly disposition towards, and its desire to be helpful to the Republics of Central America.<sup>3</sup> On several occasions the Department of State indicated categorically that the policy of the Government of the United States in the recognition of Central American Governments would be consonant with the provisions of the treaty.<sup>4</sup>

In view, however, of the denunciation by El Salvador of the Treaty of Peace and Amity of 1923, and the recognition of the régime functioning therein by the Republics of Nicaragua, Honduras, Guatemala, and Costa Rica (which itself had also denounced the Treaty of 1923), the American Chargé d'Affaires *ad interim* was instructed on January 26, 1934, under authorization of the President, to extend recognition on behalf of the United States to the Martinez Government of El Salvador.<sup>5</sup> Beginning with this incident, the policy of the Government of the United States with respect to the recognition of Central American Governments underwent a change. Certain later acts on the part of two Central American Republics which it was difficult to reconcile with the provisions of the treaty also encouraged the United States to abandon it as a guide.<sup>6</sup> Appropriate confidential instructions to its several Legations in Central America in April, 1936, made clear its decision.

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For the text of the invitation extended by the Government of the United States to the Governments of the five Central American Republics to attend the Conference, see *id.*, 4. The respective Governments of those Republics invited the Government of the United States to designate delegates to the Conference, and pursuant to that invitation the President of the United States appointed Secretary Hughes and the Honorable Sumner Welles, American Commissioner to the Dominican Republic, as delegates, *id.*, 12. Secretary Hughes was elected Chairman of the Conference, *id.*, 20.

See in this connection, The United States and Nicaragua: A Survey of the Relations from 1909 to 1932, Dept. of State, Latin American Series, No. 6, 1932, 43-46.

<sup>2</sup> Mr. Hughes, Secy. of State, to the Minister in Honduras, June 30, 1923, For. Rel. 1923, Vol. II, 432. Also Charles E. Hughes, Our Relations to the Nations of the Western Hemisphere, Princeton, 1928, 48-50.

<sup>3</sup> Communication to Dr. Castrillo, Nicaraguan Minister at Washington, contained in Press statement of Jan. 25, 1926; statement by Mr. Kellogg, Secy. of State, announcing the formal recognition of the régime of President Diaz, Dept. of State Press Releases, Nov. 17, 1926.

Concerning the application by the United States of the principles of the 1923 convention to a situation arising in Guatemala in December, 1930, see Henry L. Stimson, "The United States and the other American Republics," address, Feb. 6, 1931, Publications, Dept. of State, Latin American Series, No. 4, 1931, p. 10.

See also documents in Hackworth, Dig., I, § 33.

<sup>4</sup> See statement of Mr. Stimson, Secy. of State, Sept. 17, 1930, Dept. of State Press Releases, Sept. 20, 1930, 192-193, quoting in part from statement by Mr. Hughes, Secy. of State, in an instruction to the American Minister to Honduras, June 30, 1923.

<sup>5</sup> Dept. of State Press Releases, Jan. 27, 1934, 51. See L. H. Woolsey, "The Recognition of the Government of El Salvador," *Am. J.*, XXVIII, 325. See also Hackworth, Dig., I, § 47, and documents there cited.

<sup>6</sup> Among those acts may be noted the alteration by Guatemala and Honduras of their respective constitutions in order to extend the terms of office of certain presidents beyond the terms provided by those constitutions.

See also documents in Hackworth, Dig., I, 190-192.

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§ 45B. **Recognition of the Russian Government in 1933.** Recognition by the United States of the Government of Russia was formally acknowledged in a note of November 16, 1933, from President Roosevelt to Mr. Litvinoff, People's Commissar for Foreign Affairs, with whom conferences had been held. Therein was announced a decision "to establish normal diplomatic relations with the Government of the Union of Soviet Socialist Republics and to exchange Ambassadors."<sup>1</sup> Simultaneously, certain assurances were given on both sides. These embraced, on the part of the Russian Government, a significant declaration as to a fixed policy:

1. To respect scrupulously the indisputable right of the United States to order its own life within its own jurisdiction in its own way and to refrain from interfering in any manner in the internal affairs of the United States, its territories or possessions.

2. To refrain, and to restrain all persons in government service and all organizations of the government or under its direct or indirect control, including organizations in receipt of any financial assistance from it, from any act overt or covert liable in any way whatsoever to injure the tranquillity, prosperity, order, or security of the whole or any part of the United States, its territories or possessions, and, in particular, from any act tending to incite or encourage armed intervention, or any agitation or propaganda having as an aim the violation of the territorial integrity of the United States, its territories or possessions, or the bringing about by force of a change in the political or social order of the whole or any part of the United States, its territories or possessions.

3. Not to permit the formation or residence on its territory of any organization or group — and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group — which makes claim to be the government of, or makes attempt upon the territorial integrity of, the United States, its territories or possessions; not to form, subsidize, support or permit on its territory military organizations or groups having the aim of armed struggle against the United States, its territories or possessions and to prevent any recruiting on behalf of such organizations and groups.

4. Not to permit the formation or residence on its territory of any organization or group — and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group — which has as an aim the overthrow or the preparation for the overthrow of, or bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions."<sup>2</sup>

§ 45B.<sup>1</sup> See also response of Mr. Litvinoff of same date.

For texts of the communications between the President and Mr. Litvinoff see Dept. of State, Eastern European Series, No. 1, Washington, 1933.

<sup>2</sup> Declared President Roosevelt, by way of response, on Nov. 16, 1933: "It will be the fixed policy of the Executive of the United States within the limits of the powers conferred



In response to a note from President Roosevelt relative to expectations in regard to freedom of worship together with the incidents thereof, to be enjoyed by American nationals on Russian soil, broad assurances were given, by Mr. Litvinoff, and readiness expressed to include in a consular convention appropriate provisions no less favorable in this regard than those yielded by Russia for the benefit of nationals of the nation most favored in this respect.<sup>3</sup>

That the Soviet Government was prepared to grant to nationals of the United States rights with reference to legal protection not less favorable than those enjoyed within its territories by nationals of the nation most favored in this respect was also acknowledged by Mr. Litvinoff, who announced a willingness, immediately upon the establishment of relations between the two countries to negotiate a consular convention covering such matters.<sup>4</sup>

In response to a question from the President in regard to prosecutions in Russia for economic espionage, Mr. Litvinoff gave desired explanations, pointing to the erroneous impressions in regard to the matter that had been widely circulated. He announced also, under date of November 13, 1933, that his government agreed that:

preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations of the amounts admitted to be due or that may be found due it, as the successor of prior governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignments."<sup>5</sup>

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by the Constitution and the laws of the United States to adhere reciprocally to the engagements above expressed."

It will be recalled that Secretary Hull, in August, 1935, protested against conduct by the Soviet Government which in his judgment constituted a violation of this pledge. See Dept. of State Press Releases, Aug. 31, 1935, 147-149. See "Concerning a Russian Pledge," *Am. J.*, XXIX, 656.

<sup>3</sup> In this connection, Mr. Litvinoff in a note to the President of Nov. 16, 1933, adverted at length to the provisions of various pertinent decrees of his country, and also to Art. IX of the Treaty between Germany and the Union of Soviet Socialist Republics of Oct. 12, 1925.

<sup>4</sup> Communication on Protection to Nationals, of Nov. 16, 1933. In the course of President Roosevelt's reply of like date he saw fit to declare "that American diplomatic and consular officers in the Soviet Union will be zealous in guarding the rights of American nationals, particularly the right to a fair and public speedy trial and the right to be represented by counsel of their choice. We shall expect that the nearest American diplomatic or consular officer shall be notified immediately of any arrest or detention of an American national, and that he shall promptly be afforded the opportunity to communicate and converse with such national."

<sup>5</sup> See also response of President Roosevelt of Nov. 16, 1933. See in this connection, *United States v. Belmont*, 301 U. S. 324.

See *The Matter of Retroactivity*, *infra*, § 45F.

Finally, Mr. Litvinoff declared that his Government agreed to waive any and all claims of whatsoever character arising out of activities of military forces of the United States in Siberia, or assistance to military forces in Siberia, subsequent to January 1, 1918, and that such claims would be regarded as finally settled and disposed of by such agreement.<sup>6</sup>

The recognition, in November, 1933, of the existing government of Russia stands out as an instance where the United States demanded and secured from a European power unique assurance that it would hold itself in leash as a respecter of international law, and so respond to certain requirements in that regard that previous administrations of the American government had resolutely stood for. Notwithstanding the magnitude of American claims then existing against Russia, and the aspect of public claims of Russia against the United States, the according of recognition did not await the perfecting of an agreement in relation to the matter. Thus, at the moment when normal relations were re-established between the two countries, issues of large moment awaited solution.

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§ 45C. **Certain Other Instances.** The recognition of the Government of General Obregón in Mexico in 1923, was attributable to a confidence in the ability and disposition of that régime to fulfil the international obligations of that State in relation to the United States,<sup>1</sup> and was accompanied by the conclusion of two claims Conventions, one providing for the arbitration of claims arising from revolutionary disturbances in Mexico, and the other for the arbitration of claims generally to the respective States and their nationals.<sup>2</sup> Shortly thereafter, when a revolution under General de la Huerta was pressing hard the existing Government of General Obregón, the latter sought various forms of military aid from the Government of the United States.<sup>3</sup> The latter placed an embargo on the shipment of arms to the insurgents,<sup>4</sup> and also sold a limited quantity of arms and munitions to the Obregón Government which regained

<sup>6</sup> Communication to President Roosevelt of Nov. 16, 1933.

In a joint statement of the same date the President and Mr. Litvinoff announced that there had taken place an exchange of views with regard to methods of settling all outstanding questions of indebtedness and claims that permitted them to hope for a speedy and satisfactory solution of those questions, which both Governments desired to have out of the way as soon as possible.

§45C. <sup>1</sup> See Mr. Hughes, Secy. of State, in address cited of Jan. 23, 1924.

Also biographical sketch of Charles E. Hughes, by this author, in *American Secretaries of State and Their Diplomacy*, X, 303-309.

<sup>2</sup> See U. S. Treaty Vol. IV, 4441, and 4445; also in this connection, Charles W. Hackett, *The Mexican Revolution and the United States, 1910-1926*, World Peace Foundation Pamphlets, IX, No. 5 (1926).

See also documents in Hackworth, Dig., I, 263.

See also Instances of Intervention, Haiti, 1915, *infra*, § 82A; Nicaragua, 1926-1927, *infra*, § 82D.

<sup>3</sup> The Obregón Government twice sought permission for the passage of detachments of the Mexican Army from a point in Arizona to a point in Texas where they would re-enter Mexican territory. With the acquiescence of the Governors of those States the permission was granted.

<sup>4</sup> The embargo was under date of Jan. 7, 1924.

complete control and retained its position.<sup>5</sup> The United States had recourse to similar action during a Mexican revolution in 1929.<sup>6</sup>

In the course of a communication addressed to the American Ambassador in Chile, on October 9, 1924, Secretary Hughes declared that in determining upon the recognition of a new government in a foreign State the Government of the United States must, of course, first be guided "not only by the assurance that international obligations will be carried out by the new government, but also by satisfactory evidence that it is in a position to maintain stability and retain its power through the acquiescence of the people." He added that, keeping all of these factors in view it was the desire of the Department of State for the time being to maintain a position of reserve, while omitting no opportunity to indicate friendship for the Chilean people and courtesy towards the new régime.<sup>7</sup>

In extending recognition, which had been withheld for some three years, to the Government of Dr. Ayora in Ecuador in August, 1928, the Department of State declared that as his régime represented the majority of the Ecuadorean people and was both capable and desirous of maintaining an orderly internal administration of the country and of scrupulously observing all international obligations, the Government of the United States was pleased to extend to it full recognition as the Government *de jure* of Ecuador.<sup>8</sup>

<sup>5</sup> Declared Secretary Hughes in the course of an address on "Recent Questions and Negotiations," before the Council on Foreign Relations, Jan. 23, 1924:

"The contestants, seeking to overthrow the established government, have taken possession of certain portions of the Mexican territory and either are claiming tribute from peaceful and legitimate American commerce or are attempting to obstruct and destroy it.

"In these circumstances the established Mexican Government asked the Government of the United States to sell to it a limited quantity of arms and munitions. The request was one which could not be ignored; it had to be granted or denied. This Government had the arms and munitions close at hand; it did not need them and could sell them if it wished. If the request had been denied, we should have turned a cold shoulder to the Government with which we had recently established friendly relations and, whatever explanations we might make, we would in fact have given powerful encouragement to those who were attempting to seize the reins of government by force. The refusal to aid the established government would have thrown our moral influence on the side of those who were challenging the peace and order of Mexico, and we should have incurred a grave responsibility for the consequent disturbances. In granting the request, there was no question of intervention, no invasion of the sovereignty of Mexico, as we were acting at its instance and were exercising our undoubted right to sell arms to the existing government. Nor was there any departure from the principle involved in President Harding's policy as to the sale of arms." (Charles E. Hughes, *Addresses, The Pathway of Peace*, New York 1925, 89, 99-100, also published in *Foreign Affairs, Special Supp.*, II, No. 2.)

<sup>6</sup> See address of Mr. Stimson, Secy. of State, on "The United States and the Other American Republics," before the Council on Foreign Relations, New York, Feb. 6, 1931, *Publications, Dept. of State, Latin American Series*, No. 4, 12-13, *Foreign Affairs, Special Supp.*, IX, No. 3.

<sup>7</sup> Mr. Hughes, Secy. of State, to Ambassador Collier, no. 51, Oct. 9, 1924, Hackworth, *Dig.*, I, 230.

Concerning the recognition of the Greek Government by the United States in 1924, see *For. Rel.* 1924, Vol. II, 262-273. See also A. W. Dulles, "The Recognition of New States and Governments: Greece," *Am. Soc. Int. Law, Proceedings*, 1924, 98. See also documents in Hackworth, *Dig.*, I, 268.

<sup>8</sup> Department of State Press Releases, Aug. 15, 1928. In this connection it was added that the Government of the United States had observed with much satisfaction the progress which the Republic of Ecuador had made during the three years and more which had elapsed since the *coup d'état* of July 9, 1925, and the tranquillity that had prevailed during that period. See also Hackworth, *Dig.*, I, 243-247.

In according recognition on September 18, 1930, to the provisional Governments of Argentina, Peru and Bolivia, Secretary Stimson announced that the evidence satisfied him that those provisional governments were "*de facto* in control of their respective countries," and that there was "no active resistance to their rule." Each of them, he added, had also made it clear that it was "its intention to fulfill its respective international obligations and to hold in due course elections to regularize its status."<sup>9</sup> Secretary Stimson in passing upon the treatment to be accorded the Government of Panama, under the régime of Doctor Alfaro, in 1931, found occasion to declare that "the ordinary standards of international law for the recognition of new Governments would appear to be met with."<sup>10</sup> One may be permitted to doubt whether that law prescribes standards by which the propriety of the recognition of new governments is to be tested, save for the injunction that such action should not be the handmaiden of unlawful intervention and utilized as a means of wrongful interference with the freedom of an independent State.

Attention may be called also to the recognition by the Government of the

<sup>9</sup> Statement for the Press, Sept. 17, 1930.

Secretary Stimson added that the action in thus recognizing the three governments represented no new policy or change of policy by the United States toward the nations of South America or the rest of the world. He said further: "I have deemed it wise to act promptly in this matter in order that in the present economic situation our delay may not embarrass the people of these friendly countries in re-establishing their normal intercourse with the rest of the World." This document is also to be found in Hackworth, Dig., I, § 47.

In an address delivered before the Council on Foreign Relations, New York, Feb. 6, 1931, Secretary Stimson said: "As soon as it was reported to us, through our diplomatic representatives, that the new Governments in Bolivia, Peru, Argentina, Brazil and Panama were in control of the administrative machinery of the State, with the apparent general acquiescence of their people, and that they were willing and apparently able to discharge their international and conventional obligations, they were recognized by our Government." ("The United States and the other American Republics," Publications, Dept. of State, Latin American Series, No. 4, p. 8.)

It should be observed that on October 22, 1930, President Hoover placed an embargo on the shipment of arms to the Brazilian insurgents, that on about October 24, 1930, they seemingly gained control of the reins of government, and that on November 8, 1930, the Department of State announced that the American Ambassador had been instructed to "continue therewith the same friendly relations as with its predecessors." See Dept. of State Press Releases, Oct. 25, 1930, 264-268, and *id.*, Nov. 8, 1930, 322-323. See also documents in Hackworth, Dig., I, § 47.

See in this connection, address of Secretary Stimson, Feb. 6, 1931, in which he invoked Art. I, of the Havana treaty of Feb. 20, 1928, concerning the Rights and Duties of States in the event of Civil Strife (U. S. Treaty Vol. IV, 4725), accepted by both the United States and Brazil, whereby the contracting parties bound themselves "to forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied."

*Cf.* John Bassett Moore, "Candor and Common Sense," address before The Association of the Bar of the City of New York, Dec. 4, 1930, 14-21.

Also, Agnes S. Waddell, "The Revolution in Brazil," Foreign Policy Association, Information Service, March 4, 1931, VI, No. 26.

<sup>10</sup> He added: "The Department is inclined to consider Alfaro's coming into office as a constitutional devolution. . . . The Department's only preoccupation on this score in the past has been the question of stability and your present statement that the new Government apparently has the support of the great majority of the residents of the capital and has been well received throughout the Republic, and that opposition from the deposed authorities is improbable in the immediate future, leads the Department to feel that you should attend the inauguration of Doctor Alfaro and carry on normal diplomatic relations thereafter with his Government. You are authorized to do so." (Mr. Stimson, Secy. of State, to Mr. Davis, Jan. 15, 1931, Hackworth, Dig., I, 269.)

United States of Governments in Bolivia, in 1936 and 1937,<sup>11</sup> in Ecuador, in 1935 and 1937,<sup>12</sup> in Paraguay, in 1936 and 1937,<sup>13</sup> in Spain, in 1931,<sup>14</sup> and Liberia in 1935.<sup>15</sup> These cases, revealing the fairly recent views of the Department of State, exemplify theories that have long prevailed.

It may be observed that on April 1, 1939, at a time when it has been said that "all semblance of Loyalist Government had disappeared, all major cities had capitulated and the end of the strife had been formally proclaimed,"<sup>16</sup> President Roosevelt proclaimed that the civil strife in Spain had ceased to exist,<sup>17</sup> and Secretary Hull simultaneously informed the Foreign Minister of the so-called Nationalist Government at Burgos, of the readiness of the American Government "to establish diplomatic relations with that Government of Spain."<sup>18</sup>

On March 27, 1941, Mr. Lane, the American Minister to Yugoslavia, reported to the Department of State that a successful military *coup d'état* had taken place early on that day, and that King Peter II had assumed power as the head of a new Government. On March 28, 1941, President Roosevelt, by congratulating the King on his assumption of control, necessarily recognized the Government of the new régime with whose purposes utmost sympathy was expressed.<sup>19</sup>

<sup>11</sup> See Mr. Hull, Secy. of State, to Mr. Muccio, May 30, 1936, Hackworth, Dig., I, 227; same to same, July 22, 1937, Hackworth, Dig., I, 228.

See documents in Hackworth, Dig., I, § 47, concerning recognition of the new government in Chile in 1932, especially, Mr. Stimson, Secy. of State, to Ambassador Culbertson, Oct. 12, 1932, I, 233.

<sup>12</sup> See Mr. Hull, Secy. of State, to Mr. Gonzales, Oct. 8, 1935, Hackworth, Dig., I, 246; Mr. Welles, Acting Secy. of State, to Mr. Gonzales, Nov. 2, 1937, Hackworth, Dig., I, 247.

<sup>13</sup> See documents in Hackworth, Dig., I, 270.

<sup>14</sup> See documents in Hackworth, Dig., I, 295; also communication from Mr. Stimson, Secy. of State, to the Ambassador in Spain, April 19, 1931, in which it was said: "It is the Department's opinion that this Government should not become involved in a race to recognize the new Government, but on the other hand, it does not desire to be conspicuous in withholding recognition after action has been taken by the other great powers. It is considered however, that the Spanish situation is primarily one of European concern and the Department is of the opinion therefore that the motives of the other powers or their action in the matter of recognition may not necessarily apply to any action that may be taken by us. The Department would like to have a full expression of your opinion." (*Id.*, 296.)

<sup>15</sup> See documents in Hackworth, Dig., I, 305.

The Government of the United States in extending recognition to the Government of Persia under Reza Shah Pahlevi in December, 1925, stated that such extension was with the understanding that the new régime would scrupulously observe the international agreements between the United States and Persia. See Mr. Kellogg, Secy. of State, to Mr. Amory, Chargé d'Affaires in Persia, Nov. 5, 1925; same to same, Dec. 16, 1925, Hackworth, Dig., I, 310.

<sup>16</sup> Padelford, Spanish Civil Strife, 188.

<sup>17</sup> Dept. of State Press Releases, April 1, 1939, 246.

<sup>18</sup> *Id.*, 245. See also Mr. Hull, Secy. of State, to General Jordana, Minister of Foreign Affairs, April 3, 1939, Hackworth, Dig., I, 297.

Concerning the recognition by the Government of the United States of various governments in China, see Hackworth, Dig., I, § 51, and documents there cited.

<sup>19</sup> Dept. of State Bulletin, March 29, 1941, 349, 350.

"Mr. Lane had been instructed to state more or less the following to the new Government of Yugoslavia: That the information which has been received has been widely welcomed in the United States as a matter for self-congratulation to every liberty-loving man and woman; and that in accordance with the terms of the Lease-Lend Act the President is, of course, enabled in the interest of the national defense of the United States to render effective material assistance to nations which are seeking to preserve their independence and integrity against aggression." (*Id.*, 349.)

## (7)

§ 45D. **Some Conclusions.** From the days of Jefferson interest has been expressed by the United States in the will of the people of the foreign State concerned, that will being regarded as a factor worthy of close consideration. Differing tests have, however, been applied as to the sufficiency of evidence of popular approval; and not infrequently there has been a disposition to infer the existence of it from the bare achievement of a new régime. On the other hand, the mode of gaining control of the reins of government and the character of the contest antecedent to it, have at times raised doubt as to the fact of approval, for the manifestation of which long-continued acquiescence by the people concerned has been watched for, if not sought. The interest of the United States in the matter has, however, been dependent in large degree upon the relative proximity of its own territory to that of the foreign State undergoing a change of government, or upon the special concern of the former in the development of the latter. That concern has, moreover, occasionally bred an interest that served to subordinate the matter of popular approval to the will of the United States. Under special circumstances and in relation to particular countries the United States has decreed that governmental changes heed the requirements of local constitutions, and has accordingly, been disposed to withhold recognition from a régime attaining success through a revolution or a *coup d'état*.

There has always been the assumption that a new régime worthy of recognition would respond to the international obligations of its country. Within the past fifty years the capacity or disposition to do so has been increasingly mentioned as a prerequisite. Moreover, when the conduct and professions of a new régime have raised serious doubt as to its possession of such capacity or disposition, there has been marked reluctance to accord recognition.

Concerning the extent to which the tendency of the United States during the present century to prescribe conditions on which it may be expected to accord recognition differs from the simpler course pursued in earlier days of the Republic, opinions may well vary. It may be contended that not infrequently later pronouncements have manifested a development of, rather than a departure from, the thought responsible for practices long obtaining.<sup>1</sup>

American concern with foreign governmental changes has not always been confined to the observation of events abroad, or to the waiting for the ripening of conditions deemed requisite for the according of recognition. It has at times in the past revealed an intense interest in the outcome of particular contests which has even assumed the form of direct participation therein. This taking of sides has manifested itself in the announcement to aspirants for control that they would not be recognized if they overthrew an existing government by force and rode to victory by revolution, even when no other method offered a means of achievement; in placing an embargo on shipments of arms to insurgents when their opponents, the existing government, were not prevented from acquiring

§ 45D. <sup>1</sup> See Taylor Cole, *The Recognition Policy of the United States since 1901*, New Orleans, 1928.

needed supplies; and in direct sales of arms by the United States itself to an existing foreign government which were withheld from its adversaries.<sup>2</sup> By each of these processes the United States was able to exercise a decisive influence, and to save itself from being confronted with a situation where it might be face to face with an unwelcome régime entrenched in power, and demanding a recognition which it might prove embarrassing ultimately to withhold. The United States is not understood to have felt that the exertion of such an influence by any of these methods was in the particular case contemptuous of the requirements of international law.<sup>3</sup>

If a State proceeds to act on the theory that it may without impropriety lend direct military aid to the existing government of another despite the magnitude of the achievement of insurgents that remain unrecognized, and as a consequence of the bare withholding of recognition, there is seen a claim of right to restrict the freedom of a foreign State as such to establish a government of its own choice. Such a claim, if persisted in by the United States, would signify that it regarded the principle enunciated by Webster "that every nation possesses a right to govern itself according to its own will,"<sup>4</sup> to be subject to the limitation that that will harmonized in the mode through which it expressed itself with the will of a strong and possibly friendly neighbor professing special interest in its welfare. It should be observed, however, that the United States appears at the present time to be indisposed to employ its recognition policy as a means of intervention in civil strifes within foreign territory.<sup>5</sup> It does not seek by the withholding of acknowledgment of the achievements of insurgents to invoke a fiction that would identify a technically existing government, however decrepit, with the foreign State concerned, so as to succor that government in its extremity. In a word, the policy of the United States in relation to the recognition of new governments appears to be no longer associated with, or made the handmaiden of intervention.<sup>6</sup>

## (8)

§ 45E. **The Mode of Recognizing New Governments.** On March 28, 1913, Mr. Adee, Second Assistant Secretary of State, made the following statement:

In the practice of the United States, there are several formulae of recognition.

The first and most usual is, the notification, by the American representative at the foreign capital, that he is instructed to enter into relations with

<sup>2</sup> See in this connection, J. B. Moore, "Candor and Common Sense," address before the Bar Association of the City of New York, Dec. 4, 1930, 18-20.

<sup>3</sup> See, for example, Henry L. Stimson, "The United States and the Other American Republics," address before the Council on Foreign Relations, New York, Feb. 6, 1931, *Foreign Affairs, Special Supplement*, IX, No. 3 (April, 1931); Charles Evans Hughes, *Our Relations to the Nations of the Western Hemisphere*, Princeton, 1928, 51-54.

<sup>4</sup> Communication to Mr. Rives, Minister to France, Jan. 12, 1852, Senate Ex. Doc. 19, 32 Cong., 1 Sess., 19, Moore, *Dig.*, I, 126.

<sup>5</sup> This is true despite the fact that the United States is a party to the Convention on Maritime Neutrality concluded at the Sixth International Conference of American States, Feb. 20, 1928, U. S. Treaty Vol. IV, 4743.

<sup>6</sup> See Non-Intervention in the Western Hemisphere, *infra*, § 83B.

the new government. This is ordinarily supplemented by informing the foreign minister (if there be one) in Washington in a like sense.

The second, and the course very generally followed in other countries, is the acknowledgment, by the President, of a letter addressed to him by the head of the new foreign government announcing his assumption of authority. (It is in this way that King George V is reported to intend to recognize General Huerta as Constitutional *interim* President of the United Mexican States — that being the style and title used by General Huerta in his formal letter of announcement.)

The third, also usual in the intercourse of states, is the reception of an envoy by the President, in audience for the purpose of presenting his letters of credence.

The fourth is the reception, by the President, of the continuing diplomatic agent of the foreign state, for the purpose of making oral announcement of the change of government. In both these two latter cases, the complimentary addresses of the envoy and the President suffice to define and accentuate the scope of the recognition so effected.

A fifth method may be available, namely, the formal delivery by the American envoy at the foreign capital, to the head of the new government, of a message of recognition from the President, or of a congratulatory resolution of the American Congress if one have been passed.

The sixth method, which was adopted in the case of Portugal and Spain (and, I think, in the case of the French Republic, 1871) is to supplement the recognition of a provisional or interim government by a formal announcement of recognition, made by the American envoy, upon the adoption of a new form of government by the national assembly of the foreign state.<sup>1</sup>

When the recognition of a new government involves merely the resumption of relations with a particular régime formerly acknowledged to be the government of the foreign State concerned, from whose subsequent governmental régimes recognition has been withheld, no technical problem necessarily presents itself, and no special formality is requisite.<sup>2</sup> Thus, upon the return to Chile in 1925 of President Alessandri who had left that country under pressure exerted by a military junta whose régime had not been recognized by the Government of the United States during the period of his absence, upon the assumption by him of

§45E. <sup>1</sup> Memorandum for the Secy. of State, For. Rel. 1913, 100.

It must be obvious that in referring to the formulae set forth in his statement, Mr. Adee was not attempting to advert to some situations where the recognition of a new Government might be deemed to be the legal consequence of particular acts such as the issuance of exequators or the conclusion of treaties.

See also Mr. Hughes, Secy. of State, to President Coolidge, Jan. 25, 1924, with reference to the recognition of the Greek Government by that of the United States, For. Rel. 1924, II, 264.

<sup>2</sup> Declared the Solicitor for the Dept. of State in the course of an opinion March 18, 1925: "As to the mode of resumption of diplomatic relations, it may be observed that this Government has not recognized any régime as the Government of Chile since Alessandri's departure. As the individual who resumes office is identical with him who left it, there may be little formality required in dealing with him as the head of the Government of Chile. Perhaps the mode of recognition is unimportant. The time of according recognition is also partly a matter of policy. All the circumstances connected with the Alessandri case may combine to encourage the United States to believe that no delay should ensue." (Hackworth, Dig., I, 172.)



his executive duties formal relations were without formality resumed and maintained by that Government with his.<sup>3</sup>

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§ 45F. **The Matter of Retroactivity.** The power of a State to determine the time when recognition accorded the government of another shall be deemed to take effect is a circumstance that may account for the disposition to conclude that when no time is fixed, recognition is to be regarded as retroactive and operative as from the date when the newly recognized government really came to its own. The manifestation of this disposition in the decisions of American and also of British tribunals,<sup>1</sup> thus marks a judicial construction placed upon the conduct of the political department, rather than the enunciation of a rule of international law. Accordingly, evidence touching the design of that department must be regarded as always relevant and illuminating in establishing what the facts in that regard may be. The courts are not, however, prone to be analytical of their own decisions in the matter; and in view of the volume of judicial precedent, may be inclined to accept it as indicative of a rule of law.<sup>2</sup>

The foreign offices of States that profess to recognize new governments, although supposedly aware of the prevailing judicial view are, nevertheless, inclined to refrain from intimating that such a conclusion is at variance with their own. This restraint may become sufficiently habitual to impel the inference that States themselves conclude that the recognition of a new government should

<sup>3</sup> Concerning the resumption of diplomatic relations between the United States and Turkey in 1927, see Hackworth, Dig., I, § 32 and documents there cited.

§ 45F.<sup>1</sup> See *Underhill v. Hernandez*, 168 U. S. 250; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Banque de France v. Equitable Trust Co.*, 33 F. (2d) 202; *Inland Steel Co. v. Jelenovic*, 84 Ind. App. 373; *Oliver American Trading Co. v. Government of the United States of Mexico*, 5 F. (2d) 659; *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220; *Luis Terrazas v. George M. Holmes*, 115 Texas 32; *Day-Gormley Leather Co. v. National City Bank of New York*, 8 F. Supp. 503; *United States v. Bank of New York & Trust Co.*, 77 F. (2d) 866, 868, affirmed in 296 U. S. 463.

Also, *A. M. Luther v. James Sagor & Co.*, 37 T. L. R. 777.

Declares Edwin D. Dickinson: "Within limits as yet not clearly defined, it has been settled by English and American cases that political recognition is retroactive in effect." (*Am. J.*, XXV, 203, 236.)

*Cf. Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N. Y. 369.

<sup>2</sup> "It is also the result of the interpretation by this court of the principles of international law that when a government which originates in revolution or revolt is recognized by the political department of our government as the *de jure* government of the country in which it is established, such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence. *Williams v. Bruffy*, 96 U. S. 176, 186; *Underhill v. Hernandez*, 168 U. S. 250, 253. See s.c. 65 Fed. Rep. 577." (*Clarke, J.*, in *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302-303; quoted by *Pound, C. J.*, in *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220, 223.)

Quoting the foregoing statement (beginning with the words "when a government"), Judge Moore declared in October 1933:

"By no law, national or international, can such a statement be justified; nor could any statement more vividly exemplify certain erroneous impressions lately prevailing. The supposition that recognition of any kind 'validates all the actions and conduct' of the government recognized is as startling as it is novel. Recognition 'validates' nothing. On the contrary, it opens the way to the diplomatic controversy of the validity of any and all 'actions and conduct' that may be regarded as illegal." ("The New Isolation," *Am. J.*, XXVII, 607, 618.) See also *State of Yucatan v. Argumedo*, 157 N. Y. Supp. 219, 225.

*Cf. McNair's 4 ed. of Oppenheim*, § 75d, and especially footnote 1, I, 156.

be given retroactive effect, and that a rule of law so ordains when no evidence of an opposing design is forthcoming.<sup>3</sup>

While the exchanges of notes between President Roosevelt and Mr. Litvinoff, People's Commissar for Foreign Affairs, of November 13, and 16, 1933, in relation to the recognition by the United States of the existing Government of Russia did not make specific reference to the matter of retroactivity, the assurances of the latter in relation to the matter of claims appeared to be an acknowledgment that the fact of recognition should not for all purposes be deemed to have a retroactive effect, and in particular should not serve to inspire judicial effort to cause a reversal of previous conclusions based upon or influenced by the withholding of recognition by the United States.<sup>4</sup>

The Supreme Court of the United States in a decision handed down May 3, 1937, declared that the effect of the action of the President in recognizing the Soviet Government which was productive of the re-establishment of normal diplomatic relations followed by an exchange of ambassadors "was to validate, so far as this country is concerned, all acts of the Soviet Government here involved from the commencement of its existence."<sup>5</sup> The acts here concerned were those whereby the Soviet Government in 1918 dissolved and liquidated a Russian corporation and appropriated its assets including a sum of money deposited by the corporation with a New York bank, which asset that Government duly released and assigned to the United States in virtue of the agreement made with the President on November 16, 1933. In a decision handed down April 25, 1938, the same tribunal made the following statement through Mr. Justice Stone:

The Government argues that recognition of the Soviet Government, an action which for many purposes validated here that government's previous acts within its own territory, see *Underhill v. Hernandez*, 168 U. S. 250; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Ricaud v. American Metal Co.*, 246 U. S. 304; *United States v. Belmont*, 301 U. S. 324; *Dougherty v. Equitable Life Assurance Co.*, 266 N. Y. 71, 84, 85; *Luther v. Sagor & Co.*, 3 K. B. 532, operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its representatives, as though such recognition had never been accorded. This is tantamount to saying that the judgments in suits maintained here by the diplomatic representatives of the Provisional Government, valid when ren-

<sup>3</sup> As is noted elsewhere (*infra*, § 46A), the Government of the United States appeared to regard its recognition of the Government of Finland on January 12, 1920, as being operative as from May 7, 1919, when *de facto* recognition had been accorded the Government of that country.

<sup>4</sup> Thus Mr. Litvinoff declared in part: "The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest.

"(b) acts done or settlement made by or with the Government of the United States or public officials in the United States, or its nationals, relating to property, credits or obligations of any government of Russia or nationals thereof." (Dept. of State Publication, Eastern European Series No. 1, 1933, p. 13-14.)

<sup>5</sup> *United States v. Belmont*, 301 U. S. 324, 330. Cf. Opinion of Mr. Justice Stone, with whom concurred Justices Brandeis and Cardozo, *id.*, 333.

dered, became invalid upon recognition of the Soviet Government. The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* government which by virtue of the recognition, has become a government *de jure*. But it does not follow that recognition renders of no effect transactions here with a prior recognized government in conformity to the declared policy of our own government. The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on. So far as we are advised no court has sanctioned such a doctrine.<sup>6</sup>

The foregoing limitations of the applicability of validation as a consequence of the retroactivity of recognition are believed to be of utmost importance.

## h

§ 46. **Acts Falling Short of Recognition of New Governments.** Throughout the life of a State there must exist, in theory, a government exercising supremacy over its territory and competent to deal with foreign affairs. In the event of an internal conflict for the reins of government, there must always be, in legal contemplation, some authority or entity with which foreign States may hold informal intercourse. The latter are obliged to apprise themselves as to the particular contestant in actual control of various portions of the national domain at any given time. During the conflict such States frequently have occasion to demand that special protection be accorded the persons and property of their respective nationals. Thus the United States reasonably asserts the right to call upon any local authority assuming to exercise actual control over a territorial area, to protect the persons and property of American citizens therein, and to respect privileges accorded them by treaty, and that without prejudice to the determination of the ultimate question concerning recognition.<sup>1</sup>

<sup>6</sup> *Guaranty Trust Co. v. U. S.*, 304 U. S. 126, 140.

§ 46. <sup>1</sup> "Pending such *de facto* entrance into relations, the agents of the United States have the right to demand of any local authority assuming to exercise power and control, protection of American life and property from injury or damage and respect for all American rights secured by treaty and international law, and their so doing is to be held an act of necessity, without prejudice to the ulterior question of international relations as between one sovereign government and another, and equally without prejudice to our sovereign right to exact reparation from the responsible perpetrators of any wrong toward this Government, its citizens, and their interests." Mr. Hill, Acting Secy. of State, to Mr. Hart, American Minister at Bogota, Sept. 8, 1900, For. Rel. 1900, 410, Moore, Dig., I, 138.

See, also, Mr. Hay, Secy. of State, to Mr. Loomis, American Minister to Venezuela, telegram Oct. 23, 1899, For. Rel. 1899, 802, Moore, Dig., I, 153; Same, to Mr. Bridgman, Minister to Bolivia, March 14, 1899, MS. In't. Bolivia, II, 113, Moore, Dig., I, 155, note; Mr. Gresham, Secy. of State, to Mr. Baker, Minister to Nicaragua, Aug. 15, 1893, For. Rel. 1893, 212,

A State may find occasion to have intercourse for numerous purposes with the régime functioning as the government of another from which there is a disposition to delay or withhold recognition. As a means of preventing the implication that such intercourse amounts to recognition, care must be taken to avoid acts or statements from which such an inference may fairly be drawn.<sup>2</sup> President Roosevelt did not hesitate to include "President Michail Kalinin, All Union Central Executive Committee, Moscow, Russia," in a message of May 16, 1933, to the heads of those nations participating in the Disarmament Conference and the Monetary and Economic Conference.<sup>3</sup> This taking cognizance of the fact that the Soviet régime was the government of Russia was not deemed to constitute American recognition of that Government.

A State which has entered into diplomatic relations with another may be said to enjoy a certain privilege of diplomatic representation of which it is not necessarily deprived by reason of governmental changes experienced by that other. The former may, moreover, continue to maintain an intercourse through the medium of its foreign service officers within the territory of the latter, without necessarily recognizing the new régime functioning as the government thereof.<sup>4</sup> The United States has constantly done so, taking pains, however, to refrain from acts from the necessarily formal or official character of which the fact of recognition could reasonably be implied, such for example, as formal presentation of credentials by an American diplomatic officer.<sup>5</sup> In order to avoid the danger of

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Moore, Dig., I, 239; Mr. Hay, Secy. of State, to the Secy. of the Navy, Oct. 2, 1899, 240 MS. Dom. Let. 353, Moore, Dig., I, 240; Mr. Knox, Secy. of State, to the Nicaraguan Chargé d'Affaires at Washington, Dec. 1, 1909, For. Rel. 1909, 455, 456; Mr. Knox, Secy. of State, to Mr. Furniss, Minister to Haiti, telegram, Aug. 10, 1911, For. Rel. 1911, 288; Mr. Knox, Secy. of State, to Mr. Wilson, Ambassador to Mexico, Feb. 28, 1913, For. Rel. 1913, 747.

The message of President Wilson to the people of Russia through the Soviet Congress, and telegraphed in March, 1918, to the American Consul-General at Moscow for delivery, did not constitute recognition of the Soviet Government. Official Bulletin, II, No. 255, March 12, 1918. For the response of the Soviet Congress, March 14, 1918, see Official Bulletin, II, No. 262, March 20, 1918.

<sup>2</sup> "The conduct of informal relations with the officials or agents of a new State or government does not in itself imply recognition. In order that recognition may be implied from any act short of explicit recognition, the act must be of such unequivocal character as to leave no doubt of the intention of the State performing or participating in it to deal with the new State or government officially as such. It frequently happens that the establishment or the maintenance of informal relations is most desirable, if not imperative prior to the establishment of formal relations. Such necessary intercourse may be maintained in a number of ways with unrecognized States or governments." (Hackworth, Dig., I, 326.)

<sup>3</sup> Dept. of State, Treaty Information Bulletin No. 44, May 1933, 2-7.

<sup>4</sup> "In the case of new governments, however, a situation usually exists which does not arise in the case of new States. In the latter case special agents are, where there is occasion for them, employed, since the dispatch of a minister to a new State is one of the acts from which its recognition is necessarily implied; but, in the case of a new government, the question of recognition as a rule practically concerns only the powers that have already recognized the State and established regular diplomatic relations with it. There has thus arisen a certain right of diplomatic representation; and the sending of a new minister or the retention of an old one, while it implies continued recognition of the State, does not constitute a recognition of the new government, so long as there is no formal presentation of credentials and communications bear only an unofficial character." Moore, Dig., I, 235. Also *Hopkins v. United Mexican States*, Opinions of Commissioners, United States and Mexican Claims Commission, under Convention of Sept. 8, 1923, 42, 46.

<sup>5</sup> See Mr. Seward, Secy. of State, to Mr. Culver, March 9, 1863, MS. Inst. Venezuela, I, 266, Moore, Dig., I, 235; Mr. Gresham, Secy. of State, to Mr. Baker, Minister to Nicaragua, Aug. 15, 1893, For. Rel. 1893, 212, Moore, Dig., I, 239; Mr. Hay, Secy. of State, to the Secy. of the Navy, Oct. 2, 1899, 240 MS. Dom. Let. 353, Moore, Dig., I, 240. See also statement in Hackworth, Dig., I, § 53.

misunderstanding, the Department of State on one occasion, in 1924, made it "abundantly clear" through the diplomatic channel both at Washington and at the capital of the foreign State concerned, that the carrying on of relations with the régime functioning in the latter, and with its agents, was "not to be considered as a recognition of that régime as other than the *de facto* authorities."<sup>6</sup> As Secretary Knox observed in 1913, the exact forms of correspondence and modes of address, whether they be maintained as usual or otherwise, are not in themselves material so long as the precise attitude of the State and the theory upon which it is dealing with the unrecognized authorities of another are made quite clear to them.<sup>7</sup> The Department of State has at times instructed American diplomatic representatives with reference to their maintaining unofficial relationships with members of the diplomatic corps representative of governments not recognized by the United States, and stationed at capitals of States to which the former were accredited.<sup>8</sup> In 1919, the American Government did not hesitate to send consular officers to Turkey "in a purely consular capacity without exequatur subject to permission to act being granted by the *de facto* authorities in control and with the express understanding" that their "resumption of duties with regard to American commerce should have no political significance or be regarded as a recognition of the rightfulness of control of such local authorities."<sup>9</sup>

The overthrow of the government of a State by whatsoever means and howsoever successful, does not necessarily serve to prevent the existing agencies of that State accredited to foreign countries from continuing to exercise their diplomatic or other functions. The United States is understood to take the position that its own continued intercourse with such officials does not necessarily imply the recognition of the new régime for which they may purport to act.<sup>10</sup>

<sup>6</sup> The Department declared that as this position was fully understood by the authorities of the State concerned, it was deemed advisable for the American diplomatic representative "not to emphasize continually the fact of our non-recognition." Moreover it was said to be entirely appropriate for a certain American General to call informally on the governmental junta and other appropriate *de facto* authorities. It is deemed unnecessary to advert to the particular mission to which this instruction was addressed by telegraph on December 24, 1924.

<sup>7</sup> Communication to the Ambassador in Mexico, Feb. 28, 1913, For. Rel. 1913, 747.

<sup>8</sup> Declared Secretary Hughes, in the course of an instruction to the American Legation at Helsingfors, Aug. 28, 1824: "There should be no difficulty in informal and courteous relations, as between two gentlemen with respect to the representative at the capital to which you are accredited, of a régime not recognized by this Government. I had no difficulty when I attended the celebration of the Centenary of Brazilian Independence at Rio de Janeiro in 1922 in meeting and having cordial relations with the representative of Mexico, although this Government had not recognized the Mexican Government. Of course such personal and private relations largely depend on the character and bearing of others, but ordinary courtesies of a personal nature need never embarrass this Government in maintaining its attitude of non-recognition."

Concerning the experience of Secretary Hughes at Rio de Janeiro in 1922, see, American Secretaries of State and Their Diplomacy, X, 261-262.

See also Mr. Castle, Acting Secy. of State, to the Ambassador in France, Aug. 30, 1928, Hackworth, Dig., I, 344; Mr. Hull, Secy. of State, to the Ambassador in Turkey, Sept. 5, 1933, Hackworth, Dig., I, 344.

<sup>9</sup> Mr. Polk, Acting Secy. of State, to the Consul General at Nantes, March 5, 1919, For. Rel. 1919, Vol. II, 811. See also memorandum from the Office of the Solicitor for the Dept. of State, Nov. 4, 1924, Hackworth, Dig., I, 331.

See also documents in Hackworth, Dig., IV, § 377.

<sup>10</sup> Mr. Hay, Secy. of State, to Mr. Loomis, Minister to Venezuela, Nov. 18, 1899, For. Rel. 1899, 809, Moore, Dig., I, 236; statement of Mr. Wilson, Acting Secy. of State, Feb. 25, 1913, For. Rel. 1913, 32.

The American Government is disposed, however, to make clear its understanding that its intercourse with such diplomatic representatives is not to be construed as amounting to recognition.<sup>11</sup> It appears to take a like stand with respect to the continuity of functions exercised by foreign consular officers.<sup>12</sup> That Government can not accept fresh credentials emanating from a foreign unrecognized régime in support of the authority of a diplomatic or consular officer who is prepared to act in its behalf.<sup>13</sup> Accordingly, in October, 1924 it was declared to be the

Mr. Seward, Secy. of State, was persistent in his refusal to hold even unofficial intercourse with emissaries of governments not recognized by the United States. See Mr. Seward, Secy. of State, to Mr. Partridge, Minister to Salvador, Jan. 2, 1864, MS. Inst. American States, XVI, 399, Moore, Dig., I, 237; same to same, No. 34, Jan. 29, 1864, MS. Inst. American States, XVI, 415, Moore, Dig., I, 237. Nevertheless, Mr. Seward permitted Mr. Arroyo, described as "consul, acting as commercial agent, New York," appointed by the Government of Maximilian in Mexico, which was not recognized by the United States, to attest invoices and manifests of vessels bound to Mexican ports from New York. "Such a commercial agent," Mr. Seward said, "can perform no consular act relating to the affairs of his countrymen in the United States." Communication to Mr. Romero, Mexican Minister, Aug. 9, 1865, Dip. Cor., 1865, III, 486-488, Moore, Dig., I, 238. See, also, Mr. Adams, Secy. of State, to the President, Jan. 28, 1819, Am. State Pap. For. Rel. IV, 413, Moore, Dig., I, 132.

The attitude of the Navy Department on the question of salutes, pending an insurrection, is instructively set forth in Moore, Dig., I, 240, note, with respect to the action of Commodore O. F. Stanton, U.S.N., during a revolt in Brazil, October, 1893.

<sup>11</sup> It followed such a course in 1924, in making clear its position to the Chilean Ambassador at Washington, upon the overthrow or suspension of the Government of his country, from the opponents of which recognition was withheld.

<sup>12</sup> See, for example, Mr. Hughes, Secy. of State, to the Chargé d'Affaires in Guatemala, Jan. 28, 1922, For. Rel. 1922, Vol. II, 458.

It should be noted that a diplomatic officer may be quite unwilling to exercise his functions as such in behalf of a new government to whose methods and purposes he is opposed. See, for example, documents in Moore, Dig., I, 134-135, concerning the attitude of Mr. Barrozo, Portuguese Chargé d'Affaires at Washington, 1828, with respect to the government of Dom Miguel.

Upon the overthrow of the Pardo Government of Peru in July, 1919, through the occurrence of events which he deemed to be a violation of the constitution of that country, Dr. Tudela, the Peruvian Ambassador at Washington, handed over the archives of his embassy to the First Secretary thereof, and duly advised the Department of State. See Statement from Peruvian Embassy, *New York Times*, July 18, 1919.

"On July 5, 1917, Mr. Boris Bakhmeteff was recognized by our State Department as the accredited representative of the Russian Government—the provisional Russian Government—as successor to the Imperial Russian Government. He continued as such until July 30, 1922. At that date he retired, and the custody of the property of the Russian Government, for which Bakhmeteff was responsible, was recognized by the State Department to vest in Mr. Ughet, the financial attaché of the Russian embassy. The Soviet government, which later secured control of the Russian government, was never recognized by our State Department, and ever since the diplomatic status with our government was never altered by the termination of the ambassador's duties. Therefore the provisional Russian Government is the last that has been recognized, and after its ambassador retired its property was considered by the State Department to vest in its financial attaché. Prior to his retirement, and while the accredited ambassador, Mr. Bakhmeteff authorized the suits here considered, which were commenced July 23, 1918." (*Lehigh Valley Railroad Co. v. State of Russia*, 21 F. (2d) 396, 400.)

See Amos S. Hershey, "The Status of Mr. Bakhmeteff, The Russian Ambassador at Washington," *Am. J.*, XVI, 426.

See correspondence between Secretary Hughes and Mr. Bakhmeteff, Russian Ambassador at Washington, April 28 and 29, 1922, Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1, 21; also, communication from Mr. Phillips, Acting Secy. of State, to Mr. Ughet, Nov. 16, 1933, *id.*, 17.

It will be recalled that immediately upon the assumption of governmental control in Spain by the Republican régime that in 1931 supplanted the Monarchy in that country, the Spanish Ambassador at Washington resigned from his post.

<sup>13</sup> "This Government cannot, in any event, grant an exequatur to a Consul from a non-recognized Government." (Mr. Colby, Secy. of State, to the Commission at Riga, Sept. 11, 1920, For. Rel. 1920, Vol. III, 661, Hackworth, Dig., I, 170.)

opinion of the Department of State "that the formal and unconditional acceptance of an exequatur issued by the government in power in a State may be regarded as constituting recognition of such government as the government of the country." It was added, however, that the Government of the United States was willing "to make use of" the exequaturs issued by the unrecognized government of a particular country on condition that it be definitely understood that such action in no way implied or was to be considered as constituting recognition.<sup>14</sup>

A difficult situation presents itself if a State undertakes to enter into formal conventional arrangements with another whose foreign relations are conducted by a government from which it is desired to withhold recognition. It is a reasonable, if not a necessary, implication that a régime with which negotiations are had and which is deemed to be capable of binding its own country by a treaty signed in its behalf, is recognized as the government thereof by any other contracting party.<sup>15</sup> The United States has at times taken pains to avoid such an implication. Thus in 1923, in the course of negotiations at Mexico City with the representatives of the Government of General Obregón, then unrecognized by the United States, the American Commissioners were instructed to make it clear that the fact of negotiation with the associations incidental thereto, would not be regarded by the Government of the United States as constituting recognition of the Obregón régime in case the terms of an arrangement acceptable to both States were not agreed upon, and the conferences of the commissioners proved abortive.<sup>16</sup>

In respect to the matter of multipartite treaties, the United States does not appear to have followed a uniform course. In 1924, and thereafter, the United States conditioned its assent to the adhesion by Russia to the Treaty Regulating the Status of Spitzbergen and Conferring Sovereignty on Norway, of February 9, 1920, upon an understanding that such action should not be construed to signify American recognition of the régime or entity functioning in Russia as the government of that country.<sup>17</sup> The American plenipotentiaries in signing the Inter-

<sup>14</sup> Hackworth, *Dig.*, I, 170. See other documents *id.*, I, § 32, and IV, § 427.

<sup>15</sup> Thus on August 10, 1928, Secretary Kellogg informed the Legation at Peking that the Department of State considered that the signing of a treaty on July 25, 1928, with a representative of the Nationalist Government of China constituted technically recognition of that Government, Hackworth, *Dig.*, I, 318.

"By the hornbooks—the very primers of the kindergartens—of international law and diplomacy, recognition may be implied as well as express, and one of the stock examples of implied recognition is the entrance into conventional relations." (J. B. Moore, "Candor and Common Sense," address before the Bar Association of the City of New York, Dec. 4, 1930, p. 13.)

See Mr. Rogers, Assist. Secy. of State, to Messrs. Davis, Wagner, and Heater, July 9, 1932, Hackworth, *Dig.*, I, 312.

See also Republic of China v. Merchants' Fire Assur. Corp., 30 F. (2d) 278.

<sup>16</sup> See also in this connection, Mr. Hughes, Secy. of State, to the Chargé in Mexico, April 14, 1923, *For. Rel.* 1923, Vol. II, 532.

<sup>17</sup> British Treaty Series, No. 18 (1924), *Cmd.* 2092; U. S. Treaty Vol. IV, 4861. Article X made provision that "Until the recognition by the High Contracting Parties of a Russian Government shall permit Russia to adhere to the present Treaty, Russian nationals and companies shall enjoy the same rights as nationals of the High Contracting Parties." This language served to put the United States on its guard when it was proposed to permit the

national Sanitary Convention of June 21, 1926 (signed also by the representatives of the Union of Socialist Soviet Republics),<sup>18</sup> and subsequently the Senate, in advising and consenting to ratification by the United States,<sup>19</sup> made it clear that such action was "not to be construed to mean that the United States of America recognizes a régime or entity acting as government of a signatory or adhering Power when that régime is not recognized by the United States as the government of that Power."

The Universal Postal Convention of August 28, 1924, was, however, signed in behalf of the United States without such a declaration or disavowal of recognition, although it was also signed in behalf of the Union of Soviet Socialist Republics, to which special permission as to the taking of certain statistics was yielded by the final protocol annexed to the regulations.<sup>20</sup> Such was likewise the case with respect to the signature in behalf of the United States of the Universal Postal Convention of June 28, 1929.<sup>21</sup>

In the case of the Treaty for the Renunciation of War as an Instrument of National Policy, signed at Paris on August 27, 1928,<sup>22</sup> "the Soviet Government, upon the solicitation of one of our co-signers, had," to quote Judge Moore, "with our full knowledge and acquiescence, been permitted to adhere. By this act, we necessarily recognized the Soviet Government."<sup>23</sup> Neither that Government nor the American Government appeared, however, to regard recognition as taking

adhesion to the treaty by Russia through the instrumentality of a régime from which the United States sought to withhold recognition.

See documents in Hackworth, Dig., § 68.

<sup>18</sup> U. S. Treaty Vol. IV, 4962, 5014.

<sup>19</sup> Cong. Record, LXIX, 5380. It was added that "The participation of the United States of America in this international sanitary convention does not involve any contractual obligation on the part of the United States to a signatory or adhering Power represented by a régime or entity which the United States does not recognize as representing the government of that Power until it is represented by a government recognized by the United States."

<sup>20</sup> 44 Stat. 2221; also *id.* 2348. It should be observed that this multipartite convention belonged, in so far as the United States was concerned, to that group of arrangements broadly known as executive agreements rather than treaties. The consent of the United States was given by the Postmaster General under the approval of the President. See Executive Agreements in Pursuance of Acts of Congress, *infra*, § 506. To the fact that the matter of negotiation, signature and approval did not have the oversight or scrutiny of the Secretary of State, may be attributed the failure to pursue a course such as that followed in relation to the International Sanitary Convention of June 21, 1926, or the Spitzbergen Convention of Feb. 9, 1920.

Declares Prof. Manley O. Hudson: "For the purposes served by the treaty, but not for other purposes, the United States may be said to have recognized the Union of Socialist Soviet Republics by becoming a party to the convention." (*Am. J.*, XXIII, 126, 130.)

<sup>21</sup> 46 Stat. 2523

"Apparently through inadvertence such a reservation was not made at the time of the signing of the convention for the suppression of counterfeiting currency at Geneva on Apr. 20, 1929 (MS. Department of State, file 511. 4A6/424)." (Hackworth, Dig., I, § 53, footnote, p. 349.)

<sup>22</sup> U. S. Treaty Vol. IV, 5130.

<sup>23</sup> John Bassett Moore, "Candor and Common Sense," an address before the Bar Association of the City of New York, Dec. 4, 1930, p. 13; also same writer, in *Am. J.*, XXVII, 607, 618. Cf. Manley O. Hudson, "Recognition and Multipartite Treaties," *Am. J.*, XXIII, 126, 130.

"The Union of Soviet Socialist Republics was invited to adhere by the French Government through the French Ambassador at Moscow." (The General Pact for the Renunciation of War, Dept. of State Document, 1928, p. 54, note.) For the text of the Russian Declaration of Adherence, signed by M. Litvinoff, Sept. 6, 1928, see Dept. of State Press Releases, Oct. 4, 1928.



place until the exchange of notes between President Roosevelt and Mr. Litvinoff, Russian Minister of Foreign Affairs, on November 16, 1933.<sup>24</sup>

The following declarations, recorded in the Final Act of the International Load Line Conference, signed at London, on July 5, 1930, were made by the plenipotentiaries of the United States:

The Plenipotentiaries of the United States of America formally declare that the signing of the International Load Line Convention by them, on the part of the United States of America, on this date, is not to be construed to mean that the Government of the United States of America recognizes a régime or entity which signs or accedes to the Convention as the Government of a country when that régime or entity is not recognized by the Government of the United States of America as the Government of that country.

The Plenipotentiaries of the United States of America further declare that the participation of the United States of America in the International Load Line Convention signed on this date does not involve any contractual obligation on the part of the United States of America to a country, represented by a régime or entity which the Government of the United States of America does not recognize as the Government of that country, until such country has a Government recognized by the Government of the United States of America.<sup>25</sup>

There may be little reason to infer that bare participation in an international conference constitutes the recognition by each participating government of that of every other whose delegates are in attendance.<sup>26</sup> When, however, governments which do not recognize each other are aligned with others which they do recognize in accepting common obligations in behalf of their respective States, for which they appear to be acknowledged to be competent to act, a basis is offered for the contention that the recognition of each is to be implied, unless an appropriate disclaimer of such a consequence, or a disavowal of a design to accept burdens towards unrecognized signatory or adhering governments, be made known to all concerned.<sup>27</sup> It must be observed, however, that the government which might be

<sup>24</sup> See Recognition of the Russian Government in 1933, *supra*, § 45B.

See in this connection, Mr. Castle, Assist. Secy. of State, to President Coolidge, Aug. 18, 1928, Hackworth, Dig., I, 352. Also documents, *id.*

<sup>25</sup> International Load Line Convention and its Accompanying Final Protocol, U. S. Treaty Vol. IV, 5348.

Declared Mr. Stimson, Secy. of State, to the President, Feb. 11, 1931: "The purpose of this declaration, which is identical with the declaration made by the plenipotentiaries of the United States in the final act of the international conference for the safety of life at sea, signed at London May 31, 1929 (Executive B, 71st Cong., 2 Sess.), is to make clear the position of the United States that the signing of a multilateral convention by its plenipotentiaries with representatives of the régime now functioning in Russia, known as the Union of Soviet Socialist Republics, does not imply a recognition of that régime by the United States." (Senate Exec. Doc. No. 1, 71st Cong., 3 Sess., p. iv.)

See International Conference on Safety of Life at Sea, London, April 16–May 31, 1929, Report of the Delegation of the United States of America and Appended Documents, Publications of the Department of State, Conference Series, No. 1, 1929, p. 246.

<sup>26</sup> See Mr. Hughes, Secy. of State, to the Ambassador in Chile, No. 49, Oct. 8, 1924, Hackworth, Dig., I, 346.

See also discussion of the matter by Manley O. Hudson, in *Am. J.*, XVIII, 126, 129.

<sup>27</sup> See Mr. Kellogg, Secy. of State, to Mr. Burton, April 16, 1925, Hackworth, Dig., I, 348.

expected to be interested in, and hence alert to press such a contention, may not in fact do so.

Whether the acceptance of, or adherence to, a multipartite treaty produces the recognition, in legal contemplation, of the then unrecognized régime functioning as the government of another contracting party must depend upon the character of the relationship or undertakings that grow out of the arrangement. "If," as has been recently observed, "the treaty carries with it mutual and reciprocal obligations requiring the governments to have dealings with each other or to recognize official acts of each other, the signing of the treaty without reservation would carry with it an implication that the signatories are prepared to treat with each other on an equal footing. . . . Obviously, the signing with a non-recognized government of a multilateral treaty containing provisions in the nature of those recited, requiring as they do affirmative inter-governmental coöperation or dealings with an unrecognized government, would constitute recognition of the non-recognized government. On the other hand, where a treaty or convention is of such a character as would permit of its being carried into operation without such inter-governmental coöperation or exchange of communications, *i.e.*, where there do not exist reciprocal affirmative duties and obligations on the part of the signatories, the signing of such a treaty or convention with a non-recognized government would not constitute recognition."<sup>28</sup> In any case the insertion of a disclaimer of a design to accord recognition may be desirable in order to avoid a possible misconstruction of the position of the government of a contracting State that is far from desirous of yielding recognition.<sup>29</sup>

# (1)

§ 46A. So-called *De Facto* Recognition. A State may see fit formally to acknowledge that a régime functioning within the territory of another is merely in fact governing it, without going the whole length and acknowledging that that régime is to be deemed for all purposes the government thereof, of whose pretensions as such the soundness is no longer open to question.<sup>1</sup> Inasmuch as it is

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According to Art. II of a treaty signed at Paris, May 22, 1926, in behalf of Belgium, France, Great Britain and the Netherlands (but which failed to become effective), looking to the abrogation of the treaties of April 19, 1839, relating to the neutralization of Belgium, it was declared that "The Union of the Soviet Socialist Republics will also be invited by the Government of the French Republic to give its adhesion to the present Treaty, it being understood that the present provision or the eventual adhesion of the said Union shall not imply the recognition, in any form whatever, of the Government of this Union by the Powers which have not recognized it." (Translation from Annex to *Projet de loi portant approbation du Traité Collectif conclu à Paris, le 22 mai 1926, concernant l'abrogation des Traités de garantie de 1839, Chambre des Représentants, Séance du 2 Juin 1926.*)

<sup>28</sup> Opinion of the Legal Adviser of the Dept. of State, March 15, 1932, Hackworth, Dig., I, 351.

<sup>29</sup> See Mr. Castle, Acting Secy. of State, to Minister Wilson, July 26, 1931, Hackworth, Dig., I, 350.

§ 46A.<sup>1</sup> The recognition of a régime, as the government of a State, necessarily implies that that régime, regardless of the methods which it may have employed in attaining control, is deemed to be in a position where the sufficiency of its claims in law and in fact are not to be questioned by the foreign State that accords recognition. For that reason the description of such action as *de jure* recognition is believed to be tautological.

"*De facto* recognition by the executive is merely admission of the fact of the existence of

always possible to have informal intercourse for essential purposes with an unrecognized government, it is rarely necessary or expedient to make formal acknowledgment of the bare fact of its achievement, if for any reason there be reluctance to accord it full and complete recognition.<sup>2</sup> If, however, a foreign State is disposed to make such acknowledgment and yields what is oftentimes described as *de facto* recognition, it takes a step of which the consequences are not altogether clear. Such action may not in fact be followed by a renewal of diplomatic intercourse previously suspended, through freshly accredited officers. Nevertheless, it is not apparent why an opposite course may not be pursued under appropriate declarations disavowing a design of broadening the character of what has been accorded. Again, the courts of the recognizing State may experience difficulty in distinguishing the effects of *de facto* recognition from those where full and normal recognition has been yielded; and they may derive from the former what they regard as a sufficient foundation for the conclusion that the régime so recognized is entitled for purposes of adjudication to the privileges and immunities commonly enjoyed by a foreign government fully recognized as such.<sup>3</sup>

A State may find reason to accord recognition to a régime which purports to be, or calls itself merely the *de facto* or provisional government of its country. In such case the form or extent of recognition is likely to correspond with the character or style assumed by the entity thus formally dealt with.<sup>4</sup> It is believed

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the new government, and such admission is conclusive evidence of such existence in the courts of the recognizing government." (E. A. Harriman, "The Recognition of Soviet Russia," *Proceedings*, Am. Soc. Int. Law, 1924, 84, 88.)

See Herbert W. Briggs, "De Facto and de Jure Recognition: The Arantzazu Mendi," *Am. J.*, XXXIII, 689.

<sup>2</sup>"With reference to a communication received from an American consular officer at Veracruz, Mexico, in January 1924, referring to acts of the 'De facto Government' at that place, the Department of State, on January 11, instructed the officer to 'refer to de la Huerta faction not as de facto government but as de facto authorities.'" (Hackworth, *Dig.*, I, 128.)

<sup>3</sup>"For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign State of the one form of government or of the other, but for the present purpose, in my opinion, no distinction can be drawn. The Government of this country having, to use the language just quoted, recognized the Soviet Government as the government really in possession of the powers of sovereignty in Russia, the acts of that Government must be treated by the courts of this country with all the respect due to the acts of a duly recognized foreign sovereign State." (Bankes, L. J., in *Luther v. Sagor*, 37 T.L.R. 777, 779.)

Declared Dr. McNair, writing in 1922: "At present the British recognition of the Russian Soviet Government is *de facto* and it is submitted that, so long as that recognition lasts, the acts of the Soviet Government must be regarded in an English Court as the valid and unexaminable acts of a sovereign State as fully as if the recognition were *de jure*. The same reasoning would appear to apply to the case of recognition *de facto* of a new State." ("Judicial Recognition of States and Governments," *Brit. Y.B.*, 1921-1922, 57, 67.)

His Majesty's Government, in 1921, recognized the Soviet Government as the *de facto* Government of Russia. *Luther v. Sagor*, 37 T.L.R. 777. In a British Note under date of Feb. 1, 1924, for the Soviet Government, it was declared that the British Government "recognize the Union of Socialist Soviet Republics as the *de jure* rulers of those territories of the old Russian Empire which acknowledge their authority." Toynbee's Survey, 1924, 491.

See The Arantzazu Mendi, [1938] P. 233; [1939] P. 37; [1939] Appeal Cases 256.

<sup>4</sup>"On October 19, 1915, this Government recognized the *de facto* Government of Mexico, of which General Venustiano Carranza was the Chief Executive. The present Government of Mexico, in the person of its elected President, General Venustiano Carranza, received formal recognition from the Government of the United States in a communication dated August 31,

that generally neither clearness of thought nor improvement in the conduct of foreign relations is facilitated by according formal recognition to a foreign régime in terms that accentuate unwillingness to make full acknowledgment that it is deemed to be the government of its own State. Nevertheless, it should be borne in mind that States are not infrequently inclined to pursue such a course.

It may be observed that in recognizing the independence of Finland on May 7, 1919, Secretary Lansing declared that the Government of that country was recognized "as the *de facto* Government of Finland."<sup>5</sup> On January 12, 1920, Secretary Lansing informed the Finnish Minister at Washington that as "complete diplomatic relations" had been established, the Government of the United States desired to have a legation at Helsingfors at the earliest possible date.<sup>6</sup> In repeating this communication to the American Commissioner at Helsingfors, by telegraph, it was added: "This is considered to constitute full recognition of Finland as from May 7, 1919."<sup>7</sup>

## (2)

§ 46B. Aspects of Non-Recognition of a Régime Functioning as the Government of a Foreign State. The United States regards itself as free to withhold recognition from a régime professing to function, and even successfully functioning as the government of a foreign State.<sup>1</sup> Such a sense of freedom does not, however, imply that reciprocal obligations between State and State in relation to various phases of the protection of life and property are relaxed during the period while recognition is withheld. It signifies rather that throughout such period, as an incident of the withholding of recognition, there is acknowledged no duty formally to treat with such régime as though it were the government of the State for which it purports to act. Thus the former does not admit that the due performance of its international obligations towards the latter necessarily calls for the use by its unrecognized government of particular domestic agencies such

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1917, from the President addressed to 'His Excellency, Venustiano Carranza, President of the United Mexican States,' which communication was delivered to President Carranza by the American Ambassador at Mexico City on September 26, 1917." (Mr. Polk, Counselor of the Department of State, to Mr. Charles Blenman, of Tucson, Arizona, Oct. 19, 1917.) Also *Oetjen v. Central Leather Co.*, 246 U. S. 297.

<sup>5</sup> For. Rel. 1919, II, 215.

Obviously, the matter concerned the recognition of a new State as such, rather than the recognition of a new government.

<sup>6</sup> *Id.*, 226.

<sup>7</sup> *Id.*, 226, footnote. In the caption descriptive of the documents pertaining to Finland, *id.*, 210, reference is made to "Unqualified Recognition of the Government of Finland, January 12, 1920."

§ 46B. <sup>1</sup> "Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War." (Cardozo, J., in *Sokoloff v. National City Bank*, 239 N. Y. 158, 165.)

"Recognition is not compulsory. It is voluntary or optional. Each State judges for itself whether a new State or new government within an old State merits recognition. Except in consequence of particular conventions, no State is obliged to accord it." (John G. Hervey, "The Legal Effects of Recognition in International Law," Philadelphia, 1928, p. 11, and footnote No. 20.)

See Recognition of New Governments, In General, *supra*, § 43.

as those of the judicial department which normally are common instruments in the performance of international duties.<sup>2</sup> The State withholding recognition may in fact elect to perform its duties through executive or administrative action; and in so doing may indirectly thwart local adjudications. The incidents or consequences of this latitude are important; and yet they are not always perceived by the commentators or brought home to the minds of the principal actors.

When questions concerning the respect to be paid to the acts of a foreign unrecognized government reach the domestic courts, or when such a government itself seeks the adjudication of an issue therein, the solution of the problems that are involved, embracing those pertaining to the matter of jurisdiction, depends upon the judicial conception of the public policy of the State of the forum in consequence of the withholding of recognition, rather than upon any other circumstance.<sup>3</sup> In such a situation the American judicial mind seeks to ascertain whether from the fact of non-recognition there are tokens of such policy that furnish requisite guidance. If, therefore, attempt is made in a domestic tribunal to gain the benefit of any act of a foreign unrecognized government, the problem confronting the court lies within the field of conflict of laws rather than in that of international law. The fact of non-recognition thus looms up with an influence not unlike that of a local statute, and is pondered accordingly. It may or may not be deemed to imply a restraint upon judicial conclusions or actions. Its influence is doubtless strongest when public rather than private interests are sought to be locally protected or advanced or thwarted. The point to be emphasized is that the bare withholding of recognition is State conduct that, howsoever viewed in its applicability to the solution of a particular question, must be, and is, reckoned with by the domestic court. In the course of that reckoning the tribunal is not, by reason of the nature of its endeavor, likely to be, or necessarily concerned, lest the soundness of its conclusions be challenged in any foreign quarter.

Courts within the United States have in recent years revealed an increasing

<sup>2</sup> This fact points to the weakness of the contention that the withholding of local judicial remedies from an unrecognized government necessarily deprives the State for which it professes to be the spokesman of such protection of its property as the law of nations may demand.

See, in this connection, *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N. Y. 255, where the then unrecognized Soviet Government of Russia was not permitted to maintain an action.

"As regards standing in court, the American cases have taken the position that an unrecognized *de facto* government has no standing; in brief, that it may neither sue nor be sued in national courts." (E. D. Dickinson, in *Am. J.*, XXV, 214, 236.)

"It is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government. For this reason, access to the federal and state courts was denied to the Soviet Government before recognition." (Stone, J., in the opinion of the Court in *Guaranty Trust Co. v. United States*, 304 U. S. 126, 137.)

"Non-recognition does not in general abridge the rights of citizens of a State the government of which has not been recognized to sue in our courts." (Hackworth, Dig., I, 373, citing *Russian Volunteer Fleet v. United States*, 282 U. S. 481, 491-492.)

<sup>3</sup> "The decree of the Russian Soviet government nationalizing its insurance companies has no effect in the United States unless, it may be, to such extent as justice and public policy require that effect be given. We so held in *Sokoloff v. National City Bank* (239 N. Y. 158). Justice and public policy do not require that the defendant now before us shall be pronounced immune from suit." (Cardozo, J., in *James & Co. v. Second Russian Insurance Co.*, 239 N. Y. 248, 255.)

See also *Lehman, J.*, in *Russian Reinsurance Co. v. Stoddard*, 240 N. Y. 149, 158-159.

sense of freedom in deducing inferences of their own from the conduct of the political department of the Government in withholding recognition.<sup>4</sup> They have become less and less disposed to find therein evidence of a public policy that necessarily forbids judicial respect for the acts and achievements of an unrecognized foreign government. The progress of American judicial opinion in this regard, as well as the lack of it, has engrossed the attention of commentators.<sup>5</sup> It should be borne in mind, however, that the interesting and important inquiry touching the extent to which American tribunals draw particular inferences from the withholding of recognition, or the extent to which, in the making of them, they defer to the conclusions of the political department, is a domestic matter. The relevant decisions are not to be regarded as declaratory of requirements of international law.

Whether a foreign State carries on its official life through the instrumentality of a particular régime is a matter of fact capable of ascertainment as such. The existence of it may be established by various processes. A domestic tribunal may be satisfied as to the fact, and take cognizance of it, regardless of the attitude of the political department of its own government in withholding recognition.<sup>6</sup> That department may, however, itself take cognizance of the fact that a particular entity or régime from which it continues to withhold recognition is in fact in control of, and acting as the government of a foreign State.<sup>7</sup> Such a conclusion may be accepted as probative of the fact by a domestic tribunal.

<sup>4</sup> See generally, *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372, 375-376; *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N. Y. 255; *Sokoloff v. National City Bank*, 239 N. Y. 158, 165-166; *Fred S. James & Co. v. Second Russian Insurance Co.*, 239 N. Y. 248; *Russian Reinsurance Co. v. Stoddard*, 240 N. Y. 149; *James & Co. v. Russia Insurance Co.*, 247 N. Y. 262; *Petrogradsky Mejdunarodny K. Bank v. National City Bank*, 253 N. Y. 23; *In re People by Beha*, 255 N. Y. 428; *Salimoff v. Standard Oil Co.*, 262 N. Y. 220; *Lehigh Valley R. Co. v. State of Russia*, 21 F. (2d) 396; *Republic of China v. Merchants' Fire Assurance Corporation*, 30 F. (2d) 278; *Banque de France v. Equitable Trust Co.*, 33 F. (2d) 202, 206; *Russian Volunteer Fleet v. United States*, 68 Ct. Cl. 32 reversed by *Russian Volunteer Fleet v. United States*, 282 U. S. 481; *Dougherty v. Equitable Life Assurance Society*, 266 N. Y. 71; *Guaranty Trust Co. v. United States*, 304 U. S. 126.

<sup>5</sup> Among them, see Edwin D. Dickinson, "The Unrecognized Government in English and American Law," *Mich. Law Rev.*, XXII, 29 and 118; same writer, "Recent Recognition Cases," *Am. J.*, XIX, 263; "Recognition Cases 1925-1930," with bibliography, *Am. J.*, XXV, 214; "The Case of *Salimoff & Co.*," *id.*, XXVII, 743; N. D. Houghton, "The Validity of the Acts of Unrecognized De Facto Governments in the Courts of Non-Recognizing States," *Minn. Law Rev.*, XIII, 216; John G. Hervey, *The Legal Effects of Recognition in International Law*, Philadelphia, 1928; Edwin M. Borchard, "The Unrecognized Government in American Courts," *Am. J.*, XXVI, 261; J. B. Moore, "The New Isolation," *Am. J.*, XXVII, 607; David E. Hudson, "Recognition of Foreign Governments and Its Effect on Private Rights," *Missouri Law Rev.*, I, 1936, 312, 321-322.

<sup>6</sup> "Indeed we know as a matter of common knowledge that there is a government there which has been functioning in some fashion for five years or more, and that it is not the imperial government of the Czars. Facts are facts, in Russia the same as elsewhere." (Ford, J., in *Sokoloff v. National City Bank*, 199 N. Y. Supp. 355, 359.)

Also, *Lehman, J.*, in *Russian Reinsurance Co. v. Stoddard*, 240 N. Y. 158.

<sup>7</sup> See message of President Roosevelt, of May 16, 1933, addressed to "President Kalinin, All Union Central Executive Committee, Moscow, Russia," as one of the individuals referred to in an official publication of the Department of State as the "heads of the nations" participating in the Disarmament Conference and the Monetary and Economic Conference, Dept. of State, Treaty Information Bulletin, No. 44, May 31, 1933, 2-7.

In a statement from the Secretary of State quoted by Pound, C. J., in *Salimoff v. Standard Oil Co.*, 262 N. Y. 220, 223, it was said: "The Department of State is cognizant of the fact that the Soviet régime is exercising control and power in territory of the former Russian Empire and the Department of State has no disposition to ignore that fact."

## i

## Recognition of Belligerency

## (1)

§ 47. **In General.** In case an insurrection has attained proportions such that the mode and extent of operations by sea or land, by whomsoever committed, are deemed to be of grave concern to the interests of a foreign State, the latter may in fact accord to the insurgents the rights of belligerents.<sup>1</sup> This is true whether the rising in arms marks the attempt to overthrow an existing government by those seeking control of a State, or the struggle of the inhabitants of a portion of the territory of a State to defy the supremacy of the sovereign and win independent statehood.

Recognition of belligerency emanates from the political department of the State which yields it,<sup>2</sup> and is commonly announced in a formal proclamation.<sup>3</sup> "It may be implied from any act indicating a clear intention to accord regular belligerent rights to the insurgents."<sup>4</sup> By such action, the foreign State undertakes to treat both parties to the conflict as belligerents, and also to assume itself in relation to them the position of a neutral with the burdens and rights incidental to such a status.<sup>5</sup>

Recognition thus presupposes the existence of what is equivalent to war between the parties in opposition, and serves to clothe each with such privileges with respect to the outside State as might be fairly claimed were the conflict being waged between two independent powers.<sup>6</sup> These consequences are such as to confer commonly a distinct benefit upon the insurgents obtaining recognition, increasing proportionally the burden of the government opposing them.<sup>7</sup> For

§ 47.<sup>1</sup> Fuller, C. J., in the opinion of the Court in the case of *The Three Friends*, 166 U. S. 1, 63; also *Dana's Wheaton*, *Dana's Note No. 15*, Moore, Dig., I, 165; Lawrence B. Evans, *Cases on Int. Law*, 38, note.

<sup>2</sup> The courts regard themselves as bound by the attitude of the political department in according recognition. *United States v. Palmer*, 3 Wheat. 610, 643; *The Divina Pastora*, 4 Wheat. 52, 63; *The Nueva Anna*, 6 Wheat. 193.

<sup>3</sup> Mr. Blaine, Secy. of State, to the Atty.-Gen., March 18, 1889, 172 MS. Dom. Let. 228, Moore, Dig., I, 201; Benedict, J., in *The Conserva*, 38 Fed. 431, 437, Moore, Dig., I, 201.

<sup>4</sup> Hackworth, Dig., I, 320.

<sup>5</sup> "The act of recognition usually takes the form of a solemn proclamation of neutrality which recites the *de facto* condition of belligerency as its motive. It announces a domestic law of neutrality in the declaring State. It assumes the international obligations of a neutral in the presence of a public state of war. It warns all citizens and others within the jurisdiction of the proclamaunt that they violate those rigorous obligations at their own peril and cannot expect to be shielded from the consequences. The right of visit and search on the seas and seizure of vessels and cargoes and contraband of war and good prize under admiralty law must under international law be admitted as a legitimate consequence of a proclamation of belligerency." President McKinley, Annual Message, Dec. 6, 1897, For. Rel. 1897, XVII.

See Convention on Duties and Rights of States in the Event of Civil Strife — concluded at the Sixth International Conference of American States at Havana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4725.

<sup>6</sup> See George Grafton Wilson, "Insurgency and International Maritime Law," *Am. J.*, I, 46, 53. Also Hackworth, Dig., I, § 52.

See opinion of the Solicitor for the Dept. of State, Oct. 13, 1930, Hackworth, Dig., I, 385.

<sup>7</sup> The benefit consists in placing the insurgents on an equal footing as belligerents with the existing Government, and in thus conferring upon the former what may be regarded as a status of political and moral value. There may, however, be cases where the benefit is not apparent. See Hershey, revised ed., 204.

that reason it is constantly maintained that a foreign State is not free thus to aid an insurgent cause, save under special conditions which relieve the former from a normal duty of restraint. Diplomatic discussions have, however, revealed a divergence of opinion as to what conditions so operate.<sup>8</sup> The United States has itself been cautious to avoid haste in according recognition,<sup>9</sup> and has been disposed to withhold such a concession whenever its own domestic policies were deemed to oppose such action.<sup>10</sup>

It may be doubted whether the precise conditions when recognition may reasonably be accorded by a foreign State are capable of nice statement. The bearing, however, of certain considerations, whether favorable or unfavorable to such action, ought not to remain obscure. It may be doubted also whether as yet there is generally acknowledged a legal duty to accord recognition to insurgents as belligerents at any particular time in the course of their struggle, however successful it may prove to be.<sup>11</sup> The Department of State feels that there is none.<sup>12</sup>

It has recently been observed that "any act involving relations with an insurgent or a revolutionary régime must fall short of recognition of belligerency unless it indicates a clear intention on the part of the recognizing State to treat the insurgents or revolutionists as belligerents, enjoying all the rights and subject to all the obligations normally attaching to the status of belligerency."<sup>13</sup> In the course of the civil war in Spain which resulted in the complete success of the Nationalist Government under General Franco in 1939, the United States did not find occasion to accord recognition to the insurgents as belligerents. That

<sup>8</sup> "Where a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights which the parent government does not concede, a recognition by a foreign State of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government." Dana's Wheaton, Dana's Note No. 15. See, also, President Grant, special message, June 13, 1870, Moore, Dig., I, 194; President Grant, Annual Message, Dec. 7, 1875, For. Rel. 1875, I, ix, Moore, Dig., I, 196.

<sup>9</sup> Mr. Cass, Secy. of State, to Mr. Osma, Peruvian Minister, May 22, 1858, Senate Ex. Doc. 69, 35 Cong., 1 Sess., 17, Moore, Dig., I, 182; Mr. Adams, American Minister at London, to Lord Russell, Sept. 16, 1865, Dip. Cor. 1865, I, 554, 557, in relation to the action of the United States with respect to the issue between Spain and its American colonies, Moore, Dig., I, 172; Mr. Gresham, Secy. of State, to Mr. Thompson, Minister to Brazil, Jan. 11, 1893, For. Rel. 1893, 99, Moore, Dig., I, 204.

<sup>10</sup> See, for example, President Grant, Annual Message, Dec. 7, 1875, For. Rel. 1875, X; President Cleveland, Annual Message, Dec. 7, 1896, For. Rel. 1896, XXXII; President McKinley, Annual Message, Dec. 6, 1897, For. Rel. 1897, XVIII. The foregoing messages, in relation to the point here considered, are contained in Moore, Dig., I, 196-200.

<sup>11</sup> See Arnold D. McNair, "The Law Relating to the Civil War in Spain," *Law Quar. Rev.*, LIII, 471, 478, 483; J. W. Garner, "Recognition of Belligerency," *Am. J.*, XXXII, 106, 112. Cf. Hans Wehberg, "Civil War and International Law" (translated from the German by J. L. Mowat), *The World Crisis*, London, 1938, 160, 177-178.

See also James W. Garner, "Questions of International Law in the Spanish Civil War," *Am. J.*, XXXI, 66; Norman J. Padelford, "International Law and the Spanish Civil War," *id.*, 226; Vernon A. O'Rourke, "Recognition of Belligerency and the Spanish War," *id.*, 398; James W. Garner, "Recognition of Belligerency," *id.*, XXXII, 106; H. A. Smith, "Some Problems of the Spanish Civil War," *Brit. Y.B.*, 1937, 17; P. C. Jessup, "The Spanish Rebellion and International Law," *Foreign Affairs*, XV, 260; L. Le Fur, *La Guerre d'Espagne et le Droit*, Paris, 1938.

<sup>12</sup> See statement in Hackworth, Dig., I, 319.

Cf. Opinion of the Solicitor for the Dept. of State, Nov. 18, 1909, Hackworth, Dig., I, 321.

<sup>13</sup> Hackworth, Dig., I, 356.



Government was, however, recognized by the United States as the Government of Spain on April 1, 1939, when the conflict was substantially at an end.<sup>14</sup>

Nevertheless, the latitude possessed by the outside State in withholding recognition from the insurgents as belligerents even up to the hour of their final success, and the disposition of such a State to regard the *de jure* government as identical with the State which it professes to represent even when that government has lost its grip and is on the verge of destruction, may lead to sorry consequences and grave abuse. This is true where the withholding of recognition from the insurgents as belligerents is utilized as a convenient means of enabling the outside State to take sides in the contest by permitting through legislative enactment the *de jure* government, however decrepit, to attain military sustenance from the national domain that is withheld from its opponents. Such an effort to thwart the factual achievements of the insurgents at such a time, may, in the particular case, be difficult to reconcile with obligations which the outside State as such owes to that other not to participate in domestic conflicts between contenders for the reins of government.<sup>15</sup>

(2)

**§ 48. Where Parent State Has Recognized Belligerency.** When in its work of repression a parent State treats the insurrection as though it were productive of a state of war, as, for example, by proclaiming a blockade of ports held by the insurgents, it appears thereby to forfeit the right to claim that any subsequent act of external recognition is premature or inequitable.<sup>1</sup> Thus Great Britain found a sufficient answer to the complaints of the United States concerning the Queen's proclamation of May 13, 1861, recognizing the Confederate States as insurgents, in the President's proclamation of a blockade during the previous month.<sup>2</sup>

<sup>14</sup> Dept. of State Press Releases, April 1, 1939, 245.

As Professor McNair has correctly indicated, the recognition by Germany and Italy in November, 1936, of the Franco Government as the Government of Spain, marked not only intervention in a conflict then raging, but also necessarily implied that the entity recognized as that Government was possessed of the right to exercise belligerent privileges. In that sense that action constituted a recognition of the insurgents as belligerents. (*Law Quar. Rev.* LIII, 471, 497.)

*Cf.* Padelford, Spanish Civil Strife, 8-9, 18.

"Although the United States has been called upon in numerous instances during the past 30 years to define its policy toward civil conflicts of varying degrees of intensity in other States, it has—with two possible exceptions—in no instance recognized a state of belligerency in such a civil conflict. These two possible exceptions, namely, the recognition in 1918 of Czechoslovakia and of Poland as co-belligerents in the World War were not, strictly speaking, acts of recognition of belligerency in civil strife but were measures taken by the United States and certain other powers in the prosecution of the war." (Hackworth, *Dig.*, I, 319.)

See also Hackworth, *Dig.*, I, 362, and documents there cited.

<sup>15</sup> See Recognition of New Governments, Some Conclusions, *supra*, § 45D.

§ 48. <sup>1</sup> "The parent State may recognize the belligerency of a revolting community by acts which imply the existence of war or by formal declaration. Either course may justify recognition by foreign States." G. G. Wilson, *Int. Law*, 1910, 43.

<sup>2</sup> Lord Russell, British Foreign Secy., to Mr. Adams, American Minister at London, May 4, 1865, *Dip. Cor.* 1865, I, 356; Same to Same, Aug. 30, 1865, *id.*, 536.

See Hall, Higgins' 8 ed., 43-45.

See, also, The Prize Cases, 2 Black, 635, 666-667, 669-670, Moore, *Dig.*, I, 190; Williams v. Bruffy, 96 U. S., 176, 189-190, Moore, *Dig.*, I, 191.

Similarly, the recognition by an existing government of the belligerency of insurgents seeking to overthrow it is believed to deprive the former of cause of complaint if like action be taken thereafter by the governments of foreign States.

## (3)

§ 49. **Where Parent State Has Not Recognized Belligerency.** Doubtless a foreign State need not show that at the time of according recognition there was a probability that eventual success would attend the insurgent movement.<sup>1</sup> It would appear, however, reasonable to demand on principle that the contest amount, at that time, to what may be fairly regarded as actual war, and as such, something more than "a mere contest of physical force, on however large a scale."<sup>2</sup> As has been well said:

It must be an armed struggle, carried on between two political bodies, each of which exercises *de facto* authority over persons within a determinate territory, and commands an army which is prepared to observe the ordinary laws of war. It requires, then, on the part of the insurgents an organization purporting to have the characteristics of a State, though not yet recognized as such. The armed insurgents must act under the direction of this organized civil authority. An organized army is not enough. And all this, of course, must take place within the territorial limits recognized by foreign States as part of the parent country.<sup>3</sup>

To accord recognition to insurgents who have not achieved such a degree of success, and who are not so organized, manifests the giving of aid to a cause

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"It has been held by this court in repeated instances that, though the late war was not between independent nations, yet, as it was between the people of different sections of the country, and the insurgents were so thoroughly organized and formidable as to necessitate their recognition as belligerents, the usual incidents of a war between independent nations ensued." *United States v. Pacific Railroad*, 120 U. S. 227, 233, Moore, Dig., I, 191.

"It is to be observed that the rights and obligations of a belligerent were conceded to it [the Confederacy] in its military character, very soon after the war began, from motives of humanity and expediency by the United States." Chief Justice Chase, in *Thorington v. Smith*, 8 Wall. 10-11, quoted by Harlan, J., in *Baldy v. Hunter*, 171 U. S., 388, 393-394; also Moore, Dig., I, 192.

It may be noted that on May 15, 1869, Mr. Fish, Secy. of State, in a communication to Mr. Motley, American Minister at London, declared that the President recognized the right of every power when a civil conflict had arisen within another State, and had attained a sufficient complexity, magnitude and completeness, to define its own relations and those of its citizens and subjects towards the parties to the conflict, so far as their rights and interests were necessarily affected by it. He added that "the necessity and the propriety of the original concession of belligerency by Great Britain at the time it was made have been contested and are not admitted. They certainly are questionable, but the President regards that concession as a part of the case only so far as it shows the beginning and the animus of that course of conduct which resulted so disastrously to the United States. It is important in that it fore-shadows subsequent events." Moore, Dig., I, 192.

See, also, *Case of the United States, Part II, Geneva Arbitration, Papers Relating to the Treaty of Washington*, I, 19-46. Cf. Geo. Bemis, *Hasty Recognition of Rebel Belligerency, and Our Right to Complain of It*, Boston, 1865.

§ 49. <sup>1</sup> Mr. Forsyth, Secy. of State, to Mr. Gorostiza, Mexican Minister, Sept. 20, 1836, Senate Ex. Doc. 1, 24 Cong., 2 Sess., 81, Moore, Dig., I, 176. Compare message of President Monroe, March 8, 1822, Am. State Pap. For. Rel., IV, 818, Moore, Dig., I, 174.

<sup>2</sup> Jos. H. Beale, Jr., "The Recognition of Cuban Belligerency," *Harv. Law Rev.*, IX, 406, 407.

<sup>3</sup> *Id.*, 407, where Walker, *Science of Int. Law*, 115, is referred to as the basis of the first sentence quoted.

or movement which, at the time, is incapable of assuming those responsibilities of a belligerent which such action shifts automatically from the parent State to the shoulders of its opponents.<sup>4</sup> Under such circumstances that State may not unreasonably complain that recognition is designed primarily to aid the insurrection rather than to satisfy the legitimate needs of a foreign power, and so constitutes action resembling in theory intervention in the domestic affairs of the complaining State.

It may be doubted whether recognition of belligerency can generally be safeguarded so as not to influence in some degree the duration or result of the conflict. It should not be admitted, therefore, that the absence of the probability of exerting such an influence is essential to the propriety of such action.

When an insurrection has attained a magnitude indicating a substantial degree of success under a well-organized régime such as to warrant the conclusion that a condition of armed conflict or a state of war exists in fact as between the opposing contestants as truly as if they were opposing States, the government of the parent State, by reason of its very inability to prevent the achievement of its adversary, is shorn of the right to complain that foreign States violate a legal obligation towards itself or its country when they recognize the insurgents as belligerents.<sup>5</sup> In each case it is believed to be the nature and extent of the insurrectionary achievement, rather than any other consideration, that afford the test of the propriety of recognition. The same principle is, moreover, deemed to be applicable when the insurrection marks an endeavor to overthrow an existing government within a State rather than to create a new State by process of revolution.<sup>6</sup>

## j

**§ 50. Acts Falling Short of Recognition of Belligerency. Insurgency.** In the case of an insurrection, a foreign State may, without recognizing the insurgents as belligerents, formally acknowledge that a condition of political revolt exists, and thus recognize the fact of insurgency.<sup>1</sup> The United States has

<sup>4</sup> "We must have some political organization responsible for what takes place in all the territory of the civilized world. By recognizing the belligerency of insurgents, we free the parent country from all responsibility for what takes place within the insurgent lines." Jos. H. Beale, Jr., in *Harv. Law Rev.*, IX, 407, note 3, citing Dana's Wheaton, Dana's Note No. 15.

<sup>5</sup> Under such circumstances it would be difficult to show that the practice of States has begotten a rule requiring the foreign State to establish, or be in a position to establish, that the according of recognition is a measure required for its own self-protection, or dictated by something akin to necessity. Cf. Hall, Higgins' 8 ed., § 5; also Dana's Wheaton, Dana's Note No. 15.

<sup>6</sup> *O'Neill v. Central Leather Co.*, 87 N. J. Law, 552, Hudson's Cases, 163.

§ 50. <sup>1</sup> "The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time and since this forfeiture is alleged to have been incurred." Chief Justice Fuller, in the opinion of the Court in *The Three Friends*, 166 U. S. 1, 63-64.

See, in this connection, George G. Wilson, *Insurgency*, Lectures, Naval War College, 1900; same author, *Int. Law*, 1910, § 18; same author, "Insurgency and International Maritime Law," *Am. J.*, I, 46; Moore, *Dig.*, I, 242-243.

Concerning the acts of unrecognized insurgents in relation to the establishment of blockades, cf. *Blockade, Acts of Unrecognized Insurgents*, *infra*, § 826.

not infrequently pursued such a course, thereby announcing its attitude to the courts and obliging them to respect it.<sup>2</sup> The pronouncements of President Cleveland in 1896, with respect to the Cuban insurrection, are illustrative.<sup>3</sup>

It may be observed that a Joint Resolution of the Congress, approved on January 8, 1937, announced "the existence of a state of civil war now obtaining in Spain,"<sup>4</sup> and so recognized the fact that a condition of insurgency prevailed in that country.<sup>5</sup>

Recognition of a condition of insurgency within a foreign country is an official reckoning with a state of facts. In one sense such action does not strengthen the legal position already attained by the insurgents; it does not necessarily manifest a design to aid them; it does not impose upon the outside State the technical burdens of a neutral or serve to increase the load of obligations already resting upon it in consequence of the contest.<sup>6</sup> That action does, however, appear to deprive such a State of freedom to question the existence of the fact of insurgency which in itself is productive of certain obligations towards the country disturbed by such a condition. Thus, the former cannot thereafter well regard the efforts of the insurgents to prevent military aid from reaching their enemy as necessarily unlawful conduct, or their belligerent activities at sea as private ventures for private ends savouring of piracy.<sup>7</sup> Moreover,

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Concerning the treatment of unrecognized insurgents as pirates, see Piracy, Acts of Unrecognized Insurgents, *infra*, § 233.

<sup>2</sup> "We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question is applicable." The Three Friends, 166 U. S. 1, 65-66.

<sup>3</sup> See, for example, President Cleveland, Annual Message, Dec. 2, 1895, For. Rel. 1895, I, XXXII, Moore, Dig., I, 198; President Cleveland, Annual Message, Dec. 7, 1896, For. Rel. 1896, XXIX, Moore, Dig., I, 198; also President McKinley, Annual Message, Dec. 6, 1897, For. Rel. 1897, XVI, Moore, Dig., I, 198. Also documents in Moore, Dig., I, 193-197, with respect to the attitude of the United States during the insurrection in Cuba, 1868-1878.

President Taft, Annual Message, Dec. 7, 1911, with respect to the existing armed conflict in Mexico, For. Rel. 1911, XI-XVI; President Taft, Annual Message, Dec. 3, 1912, For. Rel. 1912, XIV; President Wilson, address to the Congress concerning Mexico, Aug. 27, 1913.

<sup>4</sup> 50 Stat. 3. See Neutrality, The Question of Belligerency, *infra*, § 884.

<sup>5</sup> See also Act of May 1, 1937, 50 Stat. 121; also Proclamation by the President of that date, No. 2236.

See in this connection Padelford, Civil Strife in Spain, Chap. VI.

"Any act involving relations with an insurgent or a revolutionary régime must fall short of recognition of belligerency unless it indicates a clear intention on the part of the recognizing State to treat the insurgents or revolutionists as belligerents, enjoying all the rights and subject to all the obligations normally attaching to the status of belligerency.

"Acting under the authority of certain joint resolutions of Congress various Presidents of the United States have issued proclamations placing restrictions on the exportation of arms and munitions of war to countries in which revolutionary disturbances existed. In no case has such action been considered as constituting recognition of the insurgents as belligerents. Nor was the joint resolution of Congress, approved January 8, 1937 (50 Stat. 3), prohibiting the exportation of arms, ammunition, and implements of war to Spain regarded as constituting recognition by the United States of the belligerency of the insurgents under General Franco, although the resolution applied equally to the recognized Government of Spain and to the insurgents." (Hackworth, Dig., I, 356.)

<sup>6</sup> "In this connection I am constrained to call to your attention the obvious fact that since there is now no recognized state of belligerency in Mexico the rules and laws governing warfare and the conduct of neutrals are not involved." Mr. Wilson, Acting Secy. of State, to the Mexican Ambassador at Washington, March 8, 1912, For. Rel. 1912, 740, 741.

<sup>7</sup> See proclamation of President Van Buren Jan. 5, 1838, with respect to the existing in-

the State that recognizes the condition of insurgency is hardly in a position to deny that its own subsequent acts by way of military assistance to either contestant constitute intervention for the justification of which solid and convincing excuses must be given.

It goes without saying that a State may reasonably demand of unrecognized insurgents protection of the lives and property of nationals within an area subject to their control without by necessary implication according recognition. The Government of the United States has on occasion made such demands,<sup>8</sup> and has also not hesitated to lodge protest against forms of belligerent action to which such insurgents were having recourse.<sup>9</sup> Again, it has asserted that the maintenance of an American consulate in insurgent territory involved no question of recognition.<sup>10</sup>

### 3

§ 51. **The Right to Continue Existence.** The right of a State to continue its life as such may be said to depend in a strict sense upon the effect of its conduct upon the international society. The welfare of that society may not require the maintenance of a particular State; its very extinction may be deemed to be for the general good.<sup>1</sup> When the acts of a State have caused the family of nations to reach such a conclusion, the former is not in a position to claim that that society or its members remain obliged to permit it to prolong its life, save on such terms as they prescribe. Accordingly, a decision to put an end to its life, or to yield the continuance of it on strict terms of their own devising, violates no requirement of international law. Various considerations may serve to produce such a result. These may be assigned to the failure of a State either through incompetency or political aggressiveness, to respond generally to its primary obligations to the outside world. When the injury to the international society is attributable to incompetency, the delinquent State is likely to forfeit its position of independence and find itself compelled to accept the protection of a stronger neighbor, or to permit the creation of one or more new States out of portions of

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surrection in Canada, Brit. and For. State Pap., XXXVIII, 1074, quoted by Joseph H. Beale, Jr., in *Harv. Law Rev.*, IX, 410.

See also joint resolution of the Congress, approved March 14, 1912, providing that whenever the President should find that in any American country conditions of domestic violence existed which were promoted by the use of arms or munitions of war procured from the United States and should make proclamation thereof, it should be unlawful to export, except under such limitations and exceptions as the President should prescribe, any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress. For. Rel. 1912, 745.

<sup>8</sup> See, for example, documents in For. Rel. 1912, 781-825, Hackworth, Dig., I, 360, with respect to dealings with General Orozco who had established a revolutionary government in Mexico in 1912.

<sup>9</sup> See Mr. Knox, Secy. of State, to the American Consul at Chihuahua, May 30, 1912, For. Rel. 1912, 813.

See also Mr. Hull, Secy. of State, to the Consul at Seville, Aug. 30, 1936, Hackworth, Dig., I, 362.

<sup>10</sup> Mr. Hull, Secy. of State, to Mr. Bowers, Ambassador in Spain, Nov. 15, 1937, Hackworth, Dig., I, 363.

§ 51.<sup>1</sup> See, in this connection, Westlake, 2 ed., I, 321-324.

its territory within which it was incapable of administering justice.<sup>2</sup> Such are the natural consequences of chronic delinquency.

When the political designs of a State cause it not only to marshal its forces for purposes of external aggression, but also to employ them for such an end whenever favorable opportunity arises, it proves itself to be a menace to the general peace, and justifies a united demand that it be shorn of power and deprived of opportunity of abusing the normal privileges of statehood.

While the conduct of a State may be regarded as sufficiently detrimental to the welfare of the international society to justify the latter in decreeing extinction, that result may not in fact ensue. A State whose life has proven to be a real and continuing detriment to the common weal, is more likely to be subjected to the effort to deprive it of independence (if it were independent) and demote it in rank, or to cause it to give up the possession and use of instrumentalities enabling it to indulge in conduct regarded as hostile to the common life of nations.

Normally, after a State has come into being, it is deemed to enjoy the right to live and develop.<sup>3</sup> In order to preserve its existence it is accorded large freedom; and to defend itself from attack it may even disregard the independence of its adversary. The privileges of a State with respect to the outside world are not, however, to be ordinarily measured by what, under extraordinary circumstances, it may not unlawfully do in order to prevent its own destruction. Because a man may, in self-defense, be justified in killing another individual, he is not deemed to possess the right of homicide. Such an act is generally forbidden. Likewise, in the society of nations, the rights of the individual member are neither derived from nor manifested by conduct which is commonly prohibited and never excusable save on grounds of self-defense.<sup>4</sup>

The privileges and duties of a State which result from its right to live and develop as a member of the family of nations may be fairly observed in connection with problems pertaining, respectively, to political independence, property and control, and matters of jurisdiction.

#### 4

### RIGHTS OF INDEPENDENCE DURING EXISTENCE

#### a

§ 52. **In General.** An independent State is regarded as enjoying the right, as Hall expressed it:

<sup>2</sup> The incapacity of a State to exercise its supremacy over the outlying districts of its territory, especially if it is manifested in a failure to administer justice, tends to arouse special interest on the part of outside States in the endeavors of the inhabitants of such areas to revolt and establish an independent State therein.

<sup>3</sup> See "Declaration of the Rights and Duties of Nations," adopted by the American Institute of International Law, January 6, 1916, in J. B. Scott's American Institute of International Law: Its Declaration of the Rights and Duties of States, Washington, 1916, 88.

Also Higgins' 8 ed. of Hall, § 8, p. 51.

<sup>4</sup> Certain Non-Political Acts of Self-Defense, *infra*, § 65.

to live its life in its own way, so long as it keeps itself rigidly to itself, and refrains from interfering with the equal right of other States to live their life in the manner which commends itself to them, either by its own action, or by lending the shelter of its independence to persons organising armed attack upon the political or social order elsewhere established.<sup>1</sup>

The practice of States has not thus far reflected a common opinion that international necessity demands the further restriction of the individual State which observes the conditions thus prescribed. It must, however, be recognized, that the society of nations may at any time conclude that acts which the individual State was previously deemed to be free to commit without external interference, are so injurious to the world at large as to justify the imposition of fresh restrictions.<sup>2</sup> Changes of thought in that regard are constant and are likely to be recurrent. In the process of their development there may be apparent a trend of opinion anticipatory of that which is ultimately to pervade the family of nations. The prospective influence of it may be appraised long before official opinion has been in fact won over. For that reason, care must be taken to distinguish forms of State conduct which, although theoretically adverse to the general welfare, are not in practice regarded by statesmen as having attained sufficient international significance to warrant interference, from those which foreign offices habitually regard as sufficiently injurious to justify such action. The former must not be mistaken for the latter.

When a particular theory of government wins adherents in several countries, which are sufficiently numerous to arouse a common interest that acknowledges no territorial limits, a vast international force may perhaps unofficially yet none the less potently project itself against a State which is seemingly committed to an opposing doctrine. The latter is doubtless free to safeguard itself as it may see fit; and on grounds of self-defense enjoys great latitude in so doing. Nevertheless, it may be impotent to stem the influence of a rising tide of foreign-born opinion upon thought prevailing within its own domain, and it may find itself swept into a fateful surge of approval. That approval may betoken acknowledgment of the worth of the newly accepted theory and for that reason mark an acquiescence that in a strict sense is voluntary. Nevertheless, the fact must not be obscured that a State may be subjected to a condition of mental subserviency, by a compulsion directed against its thinking which may be an effective obstacle to dissent. The law of nations as such does not safeguard the quality of the thinking of any member of the international society, and it is only by the resolute determination to preserve its own intellectual integrity and perspicacity, that a State may escape the danger of being mentally stampeded and subtly deprived of a freedom that it may never regain.<sup>3</sup> Whenever peoples within groups of

§52. <sup>1</sup> Higgins' 8 ed., § 8, p. 51.

<sup>2</sup> See Aspects of International Coöperation, In General, *supra*, § 33A.

<sup>3</sup> Declared Mr. Hull, Secy. of State, Dec. 10, 1938, in an address before the Eighth International Conference of American States at Lima: "... we all know that armed force is not the only instrumentality by which nations can be conquered. Equally, the dissemination by nations of doctrines and the carrying on of other types of activity can be utilized for the purpose of undermining and destroying in other nations established institutions of government and basic social order. Such activities are based on the fallacious theories of class or

States acknowledge a deeper interest in and concern for the acceptance of a distinctive political philosophy than for the independence, whether mental or political, of the States to which they severally owe allegiance and within whose territories they respectively reside, there is a denial of the primary importance of that independence to the individual State. It is too early to prophesy whether such denials are to dominate the thought of civilization and to lessen the disposition and even the freedom itself of such a State to live its own life in its own way. Thus far they have not sufficed to do so.

The extent of the freedom from external control which, according to American opinion, the individual State is believed to possess, will be examined with reference to what are commonly described as domestic affairs, as distinct from those designated as foreign affairs. In the course of such an examination it needs to be borne in mind that the revolutionary origin of the United States together with the intolerance of external control characteristic of the race to which the people who overcame British domination in the eighteenth century belonged, bred a devotion to principles of independence which there has happily been no disposition on the part of the Republic to relinquish. This circumstance accounts for the caution with which American opinion still greets any proposal for the restriction by general convention of rights long acknowledged to be the usual and common incidents of political independence. It is only when the sacrifice demanded in behalf of the international society is deemed to enhance the safety of each member thereof by processes which, having regard for the requirements of justice, appear to be conducive to the preservation of the general peace, that substantial concessions on the part of the United States are to be anticipated.

## b

### In Domestic Affairs

#### (1)

§ 53. **Form of Government.** A State is acknowledged to possess, as has been observed, the right to adopt whatever form of government or constitution it may see fit, and incidentally the right to change either at will.<sup>1</sup> The exercise of free-

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racial superiority, or claims to national dominance, which are being revived again in some parts of the world.

"There is no place in the Western Hemisphere for a revival of such doctrines and theories, which our nations, in common with an overwhelming majority of civilized mankind, rejected long ago . . . there should not be a shadow of a doubt anywhere as to the determination of the American nations not to permit the invasion of this hemisphere from any quarter by activities contrary or inimical to this basis of relations among nations. Here again, with a full consciousness of our common interest and responsibility, each of our nations must decide for itself what measures it should take in order to meet these insidious dangers." (Dept. of State Press Releases, Dec. 10, 1938, 426-427.)

§ 53. <sup>1</sup> Mr. Webster, Secy. of State, to Mr. Rives, Minister to France, Jan. 12, 1852, Senate Ex. Doc. 19, 32 Cong., 1 Sess., 19, Moore, Dig., I, 126; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Feb. 21, 1877, MS. Inst., Haiti, II, 91, Moore, Dig., I, 250; Mr. Bayard, Secy. of State, to Mr. Buck, Minister to Peru, No. 97, Sept. 23, 1886, For. Rel. 1887, 921, Moore, Dig., I, 251; Mr. Seward, Secy. of State, to Mr. Burton, Oct. 25, 1862, MS. Inst. Colombia, XVI, 47, Moore, Dig., VI, 20.



dom of choice does not endanger the existence of the State as such. "Once a State has come into existence it continues until it is extinguished by absorption or dissolution. A government, the instrumentality through which a State functions, may change from time to time both as to form — as from a monarchy to a republic — and as to the head of the government without affecting the continuity or identity of the State as an international person."<sup>2</sup> The international society is not concerned unless the form of government adopted be of a kind notoriously opposed to the existing order of affairs in that society, and calculated, therefore, to render the State impotent to perform its common obligations as a member thereof.

The political philosophy to which a State is committed may inspire the attempt to defy and break down institutions based upon an opposing theory as they exist and are maintained within the domain of another. When the former State as such by public processes participates in such an attempt its action must be regarded as internationally illegal. The United States has on occasion found it expedient to seek and obtain assurances of foreign governmental abstention from interference with its own institutions, and to make complaint when such assurances were seemingly repudiated.<sup>3</sup>

(2)

§ 54. **Legislation.** A State enjoys the right generally to enact such laws as it may see fit. The exercise of the legislative function may, however, be productive of the violation of international obligations imposed either by the law of nations or by treaty. The circumstance that an aggrieved State may with reason demand the repeal of laws serving directly to cause the breach of an international duty merely indicates that there may be an abuse of legislative power. Because the legislative department of a government may prove to be the particular means by which a State violates its duty toward another, it is not to be inferred that that department is subject to special restraint. The law of nations is concerned with the State itself rather than with the instrumentality through which it operates, and so simply demands that no act of the former partake of an internationally illegal character. Thus it always behooves the legislature as well as the executive and the courts to take no steps which expose the State to the charge of unfaithfulness to an international obligation. When, therefore, the legislative department enacts a law which, in the judgment of another State, serves to subject arbitrarily to criminal prosecution the nationals of the latter within the territory of the former, and thus to mark an abuse of power, vigorous protest is to be anticipated.<sup>1</sup>

A State may by various methods restrict its own freedom with respect to

<sup>2</sup> Hackworth, Dig., I, 127, citing *Lehigh Valley R. Co. v. State of Russia*, 21 F. (2d) 396, 400, 401.

<sup>3</sup> See protest by the United States of violation by the Soviet Government of its pledge of Nov. 16, 1933, as set forth in communications in behalf of the former of Aug. 25, and Aug. 31, 1935, Dept. of State Press Releases, Aug. 31, 1935, 147 and 150. Also, in this connection, "Concerning a Russian Pledge," *Am. J.*, XXIX, 656.

§ 54.<sup>1</sup> See, for example, case of the arrest of J. W. Grace, an American citizen, resulting from a law of Honduras regarding destruction of property by fire, *For. Rel.* 1916, 392-397.

legislation. Thus it may agree to adopt the legislation of another State,<sup>2</sup> or to commit an act requiring legislation for its accomplishment.<sup>3</sup> In fact the whole body of treaties to which a State is a party betokens a check upon legislative freedom. The United States has oftentimes felt the burden of restrictions so established, and has experienced embarrassment through the tardiness of the legislatures of the various States of the Union to perceive the nature or scope of the restraint imposed by particular conventions upon every lawmaking body within the country. The check similarly placed upon Congress has also been acknowledged. The limitation said to be fixed by the Hay-Pauncefote Treaty of November 18, 1901, upon the right to exempt by law vessels engaged in the coastwise trade of the United States from payment of tolls through the Panama Canal, is illustrative.<sup>4</sup>

## (3)

§ 55. **Treatment of Nationals.** In according such treatment as it may see fit to its own nationals within places subject to its control, such as its own territory, a State is acknowledged to enjoy great latitude. The matter is normally deemed to be one of an essentially domestic character. Thus the local application of seemingly harsh measures at variance with standards commonly prevailing in the international society is not regarded as necessarily productive of internationally illegal conduct. Again, a State may go far in regulating as it sees fit the habits of life, education and thought, as well as the conditions of occupation, of its nationals without running counter to the law of nations.<sup>1</sup> The

<sup>2</sup> See, for example, Art. XXIX of Treaty of Berlin, July 13, 1878, concerning the adoption by Montenegro of the maritime law in force in Dalmatia, *Nouv. Rec. Gén. 2 Sér.*, III, 449.

<sup>3</sup> See, for example, Art. VI of the treaty between the United States and Russia of March 30, 1867, concerning the purchase of Alaska, and contemplating the payment of money to the grantor. Malloy's Treaties, II, 1523. Also Art. VI of convention concluded by the United States with Great Britain, Russia and Japan, for the preservation and protection of fur seals frequenting the waters of the North Pacific Ocean, July 7, 1911, Charles' Treaties, 60, 62. U. S. Treaty Vol. III, 2966.

<sup>4</sup> The Panama Canal Act of Aug. 24, 1912, provided in Section 5, that "no tolls shall be levied upon vessels engaged in the coastwise trade of the United States." 37 Stat., Part I, 560, 562. President Wilson was of opinion that this exemption was at variance with the spirit of the Hay-Pauncefote Treaty. See address to the Congress, March 5, 1914, *Cong. Rec.*, 63 Cong., 2 Sess., 4313. He, therefore, urged the repeal of the exemption. It was repealed by an Act of Congress of June 15, 1914. This Act contained a proviso to the effect that it should not be construed as a waiver or relinquishment of any right which the United States might have under the Hay-Pauncefote Treaty, or under its treaty with Panama, ratified Feb. 26, 1904 (concluded Nov. 18, 1903), or otherwise, "to discriminate in favor of its vessels by exempting the vessels of the United States or its citizens from the payment of tolls for passage through said canal, or as in any way waiving, impairing, or affecting any right of the United States under said treaties, or otherwise, with respect to the sovereignty over or the ownership, control, and management of said canal and the regulation of the conditions or charges of traffic through the same." 38 Stat., Part I, 385-386.

See, also, correspondence with Great Britain in 1912 and 1913, contained in Diplomatic History of the Panama Canal, Senate Doc. 474, 63 Cong., 2 Sess., 82-102; speech of Hon. Elihu Root in the Senate, Jan. 21, 1913, on the obligations of the United States as to Panama Canal tolls.

§ 55. <sup>1</sup> Declared President Buchanan, Jan. 4, 1859, with reference to the case of Edgar Mortara: "I have long been convinced that it is neither the right nor the duty of this government to exercise a moral censorship over the conduct of other independent governments and to rebuke them for acts which we may deem arbitrary and unjust towards their own citizens or subjects. Such a practice would tend to embroil us with all nations. We ourselves would not permit any foreign power thus to interfere with our domestic concerns and enter

conduct in that regard of Russia since the advent of the Soviet régime is illustrative. The United States is not understood to take a different stand.

The treatment by a State of its nationals according to methods that are contemptuous of the dictates of humanity may, upon becoming known, shock the sensibilities of foreign States; and, in such event, some of them may be expected to voice their regret or indignation.<sup>2</sup> Even in such situations it has been appreciated in the United States that the effort to dissuade a State from the continuation of conduct greatly to be deplored should normally be confined to appeals of an intercessory character, and not assume the form of intervention.<sup>3</sup>

The harsh treatment of a national may, however, be indissolubly associated with a violation of some obligation towards a foreign State. When it is, the matter ceases to be one of domestic concern. A simple illustration is seen in cases where a particular form of conduct constitutes a breach of a contractual undertaking registered in a treaty.<sup>4</sup> The agreement may be incorporated in a multi-partite arrangement expressive of the concern of numerous signatories for the protection of particular groups or classes of nationals, as against possible discriminations otherwise to be anticipated. The provisions in the treaties of peace concluding the World War, and in other supplementary conventions for the protection of minorities are illustrative.<sup>5</sup> They reveal definite restrictions upon the freedom of certain States whose conduct was sought to be held in leash.

Even where no treaty is concerned, the harsh or arbitrary treatment of a national may directly affect the well-defined interests of a foreign State. The question presents itself, therefore, whether, when such action produces such an effect, it violates also an obligation of international law towards that State, and is to be dealt with accordingly. Secretaries Blaine, Gresham and Hay did not hesitate to declare that rigorous measures applied against their Hebrew nationals by Russia and Roumania, forcing a numerous class of destitute persons to emigrate to the territory of the United States, affected adversely the interests of the latter, to a degree sufficient to warrant its protest.<sup>6</sup>

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protests against the legislation or the action of our government towards our own citizens. If such an attempt were made we should promptly advise such a government in return to confine themselves to their own affairs and not intermeddle with our concerns." (Communication to Mr. Hart, 49 MS. Dom. Let. 474, Moore, Dig., VI, 350.)

See, also, Mr. Fish, Secy. of State, to Mr. Brown, Minister to Turkey, No. 24, Dec. 5, 1871, For. Rel. 1872, 669, Moore, Dig., VI, 334, 335; Mr. Cass, Secy. of State, to Mr. Hart, Dec. 8, 1858, 49 MS. Dom. Let. 415, Moore, Dig., VI, 348, note.

<sup>2</sup> See Representations made by the Government of the United States in 1916, in behalf of Armenians and Syrians, For. Rel. 1916, 856-858; *id.*, 1915, Supp., 988.

See also For. Rel. 1918, Russia, I, 683-719.

See Intervention, Domestic Affairs, Harsh Treatment of Nationals, *infra*, § 72.

<sup>3</sup> See, for example, Mr. Frelinghuysen, Secy. of State, to Mr. Hoffman, American Chargé d'Affaires at St. Petersburg, No. 123, April 15, 1882, House Ex. Doc. 470, 51 Cong., 1 Sess., 65, Moore, Dig., VI, 353.

<sup>4</sup> According to Art. XIV of the treaty between the United States and China, of Oct. 8, 1903: "Any person, whether citizen of the United States or Chinese convert, who, according to these tenets, peaceably teaches and practices the principles of Christianity shall in no case be interfered with or molested therefor. No restrictions shall be placed on Chinese joining Christian churches." (Malloy's Treaties, I, 268.)

<sup>5</sup> See, *supra*, § 27.

<sup>6</sup> Thus Secretary Hay declared: "The right of remonstrance against the acts of the Roumanian government is clearly established in favor of this government. Whether consciously and of purpose or not, these helpless people, burdened and spurned by their native land, are

That the harsh treatment of a national produces injury abroad is not necessarily decisive of the character of the initial act. The existence of a complete causal connection is in itself insufficient to brand that act as internationally illegal. Nor is the circumstance that an aggrieved foreign State is to be expected to lodge protest necessarily indicative of the quality of the conduct that gives rise to complaint. If, however, a State exercises its power to deal harshly or arbitrarily with a national, as the direct means, and with the design of penalizing the national of a foreign State within the limits of its domain, or of otherwise causing injury to the latter, a different situation presents itself. It may be doubted whether the actor may rely upon the nature and extent of its privileges in relation to its nationals, as a convenient instrumentality for the prosecution of such an end. Thus, for example, the imposition of a fiscal or bodily penalty upon unoffending nationals as a means of penalizing a non-resident alien bound to them by close ties of blood and affection, might well be challenged by the State of the latter as an abuse of power.<sup>7</sup>

It is to be expected that the international society will ultimately evince an interest in the welfare of the private individual sufficient to cause the law of nations to restrict the freedom of a State in its treatment of its nationals.<sup>8</sup> That interest has already sufficed to produce arrangements designed to operate as deterrents of conduct to be regarded as at variance with the requirements of social justice.<sup>9</sup> They may be prophetic of what the future has in store.

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forced by the sovereign power of Roumania upon the charity of the United States. This government cannot be a tacit party to such an international wrong. It is constrained to protest against the treatment to which the Jews of Roumania are subjected, not alone because it has unimpeachable ground to remonstrate against the resultant injury to itself, but in the name of humanity." (Communication to Mr. Wilson. American Minister to Roumania, July 17, 1902, For. Rel. 1902, 910, Moore, Dig., VI, 364.)

See, also, Mr. Blaine, Secy. of State, to Mr. Smith, Minister to Russia, No. 78, Feb. 18, 1891, For. Rel. 1891, 737, Moore, Dig., VI, 354; Mr. Gresham, Secy. of State, to Mr. Webb, Chargé d'Affaires at St. Petersburg, No. 119, Aug. 28, 1893, For. Rel. 1894, 535, Moore, Dig., VI, 356, note; President Harrison, Annual Message, Dec. 9, 1891, For. Rel. 1891, xii, Moore, Dig., VI, 358; Mr. Hay, Secy. of State, to American diplomatic representatives at London, Paris, Berlin, St. Petersburg, Vienna, Rome and Constantinople, Aug. 11, 1902, For. Rel. 1902, 42, Moore, Dig. VI, 365.

"The cause of action herein arose where the act of confiscation occurred, and it must be governed by the law of Soviet Russia. According to the law of nations, it did no legal wrong when it confiscated the oil of its own nationals and sold it in Russia to the defendants." (Pound, C. J., in *M. Salimoff and Co. v. Standard Oil Co.*, 262 N. Y. 220, 227.)

<sup>7</sup> Declared the Department of State in an instruction to the Legation at Athens, July 11, 1923: "Department informed by several naturalized American citizens of Greek origin who served in the American Army during recent war that their parents are threatened by Greek officials with confiscation of property and banishment because of their failure to return to Greece for military service. Present matter informally but earnestly to Foreign Minister and express hope that instructions will be sent to appropriate officials to cease molesting these people. State that the interest exhibited by this Government in the matter does not involve a denial of the authority of the Greek Government over Greek nationals, but, when penalties are inflicted upon persons in Greece because of no offense committed by them, but solely to coerce their children in this country, who have in good faith left Greece, established themselves in the United States and obtained naturalization as American citizens, this Government cannot refrain from expressing concern." (Hackworth, Dig., III, 179.)

<sup>8</sup> See Relationships with the State of which the Individual is a National, *supra*, § 11C.

<sup>9</sup> The Treaty of Versailles of June 28, 1918, announced that the failure of any State to adopt humane conditions of labor was an obstacle in the way of other States which desired to improve conditions within their own territories, and by implication, a token of disregard of that social justice on which the maintenance of universal peace was acknowledged to

In the meantime, some States, aware of the extent of the latitude which they still enjoy, have in quite recent years sought to avail themselves of it regardless of the effect produced upon the minds of others which have found it difficult to justify interference. Contempt for the sensibilities of foreign peoples which are increasingly aroused by the harsh treatment of nationals is, however, bound to produce repercussions which may serve to render inexpedient recourse by a State to conduct which at the time it may be impossible to denounce as internationally illegal. Upon the character and intensity of foreign reactions depends the final result. They may suffice to weld together a common interest bent on discouraging a State from pursuing a course regarded as contemptuous of the essential needs of the individual. That interest may assert itself by recourse to a procedure which does not involve direct interference; it may manifest itself in acts of retorsion which assume a form that no customary or conventional rule of law necessarily opposes. By such process, it may become too expensive for a State to deal with its own nationals as though it were a purely domestic matter; and the very price to be paid for the supposed privilege of treating them harshly may cause the privilege to fall into disuse. The solution of the problem as it presents itself today will be facilitated by a realization of the inexorable consequences of persistent defiance of the sensibilities of foreign peoples who feel their kinship with suffering humanity in any quarter, and whose organization in entities known as States will not be permitted to render impotent the preventive power of a common sympathy.

## c

## Foreign Affairs

## (1)

§ 56. **In General.** An independent State doubtless still enjoys the right to determine, as Hall has expressed it, "what kind and amount of intercourse it will maintain with other countries, so long as it respects its social duties, and by what conditions such intercourse shall be governed."<sup>1</sup> It should be observed, however, that these social duties are closely entwined with legal duties. The latter embrace the obligation to maintain diplomatic intercourse with foreign States generally.<sup>2</sup> The practice of so doing is universal. This fact, together with the cir-

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depend. (Part XIII, and particularly the preamble thereof; also Art. XXIII of the Covenant of the League of Nations.) That treaty made provision, accordingly, for a permanent organization in coöperation with the League of Nations, with the design of securing and maintaining fair and humane conditions of labor for men, women and children within each State, and necessarily for the benefit of nationals and aliens alike. There was thus revealed a fresh endeavor to check through an international agency the power of the individual State, within certain bounds, to deal harshly with its own nationals inhabiting its own domain.

<sup>1</sup> § 56. <sup>1</sup> Higgins' 8 ed., of Hall, § 10, p. 55.

<sup>2</sup> Thus in 1852, the United States believed that it "had the right to insist that Japan enter into such treaty relations as would protect travellers and sailors from the United States visiting or cast ashore on that island from spoliation or maltreatment, and also to procure entrance of United States vessels into Japanese ports." Moore, Dig., V, 740, *citing* Mr. Conrad, Assist. Secy. of State, to Mr. Kennedy, Nov. 5, 1852, MS. Notes, Special Missions, III, 1. See, also, attitude of Mr. Cushing, Minister Plenipotentiary and Commissioner, to the Chinese authorities in 1844, asserting the right of legation in China. Moore, Dig., V, 417, 419;

cumstance that the isolation of a State would be wholly incompatible with its health and growth, serves to obscure the obligatory aspect of its conduct. Thus what takes place is more frequently described as indicative of a right of legation than as the performance of a duty towards the outside world; for the maintenance of diplomatic intercourse is looked upon as a privilege rather than a burden.<sup>3</sup>

While a particular State may sever diplomatic relations with another, such conduct always betokens the existence of an international controversy, and marks an essentially abnormal situation between the powers at variance.

As an incident of its official intercourse with the outside world an independent State enjoys in theory the broadest privilege of concluding various forms of agreements with others. In so doing it finds itself free to withhold approval of prospective arrangements of every kind. It may dissent at will from undertakings that receive the full support of large and influential groups of States. No legal obligation rests upon it to accept or adhere to a treaty not to its liking. As has been noted elsewhere, however, the value of this privilege of dissent is weakened by the external pressure oftentimes exerted to compel a State to accept formally a treaty to which it is opposed.<sup>4</sup> In seasons of peace as well as in those of war, such pressure is in fact frequently applied with success by the strong against the weak. The United States has not been reluctant to be an exerter of pressure.<sup>5</sup> Inasmuch as evidence of compulsion is not as yet regarded as affecting the validity of international agreements, the technical freedom of an independent State in relation to the matter of treaty-making is thus grimly curtailed. A practice that on the one hand, acknowledges the freedom of such a State not to agree to what for any reason it opposes, and simultaneously sustains the validity of treaties that it may be forced to accept regardless of its desires, tends to breed disrespect for the system of law that tolerates such a condition.

## (2) .

§ 57. **The Conclusion of Special Relationships.** An independent State may enter into special relationships with particular countries; and it may do so through the instrumentality of treaties. The quality or value of arrangements that register the endeavors of contracting parties to achieve ends forbidden by the law of nations, whether in the shape of special relationships or otherwise, is considered in another place.<sup>1</sup>

It may here be observed that the international society does not appear to have expressed disapproval of a variety of special relationships that have been

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also report on Expulsion by M. Rolin-Jacquemyns, to the Institute of International Law, 1888, *Annuaire*, X, 229, 231-232.

<sup>3</sup> Lauterpacht's 5 ed., of Oppenheim, I, § 360.

Cf. Lawrence Preuss, "Capacity for Legation and the Theoretical Basis of Diplomatic Immunities," *New York University Law Review*, X, 170, 171.

<sup>4</sup> See, The Equality and Similarity of Independent States, *supra*, § 11.

<sup>5</sup> The conclusion of the treaty with Haiti, of September 16, 1915, U. S. Treaty Vol. III, 2673, is believed to be an instance. See Haiti, *supra*, § 22.

§ 57. <sup>1</sup> See Agreements between States, Validity, Restrictions of International Law, *infra*, § 490.

wrought by its independent members. They have in the past been regarded as free to contract alliances, binding the parties to assist each other in the event of war, as well as to enter into commercial and political unions. In view of the practices of the time, international law did not forbid the United States to enter into an alliance with France in 1778,<sup>2</sup> or in later years to join with Great Britain in a project to neutralize a projected interoceanic canal,<sup>3</sup> or to assume the burdens of a protector over Cuba,<sup>4</sup> or to become the guarantor of the independence of Panama.<sup>5</sup>

<sup>2</sup> Malloy's Treaties, I, 449.

<sup>3</sup> See Clayton-Bulwer Treaty, of April 19, 1850, Malloy's Treaties, I, 650.

<sup>4</sup> Art. III of treaty with Cuba of May 22, 1903, Malloy's Treaties, I, 364.

<sup>5</sup> Art. I of treaty with Panama, Nov. 18, 1903, Malloy's Treaties, II, 1349.

The United States has entered into regional understandings on more than one occasion with respect to the preservation of the territorial integrity of China and the so-called "open-door policy" in relation to that country. Thus Mr. Hay, Secy. of State, in 1899 and 1900, was successful in concluding arrangements with Great Britain, France, Germany, Russia, Italy and Japan, by which those powers agreed to recognize the open-door policy with respect to foreign trade in Chinese territory over which they had claimed spheres of influence or the rights of lessces, For. Rel. 1899, 128-141, Moore, Dig., V, 534-546. These agreements also registered the recognition of the sovereign rights of China in the territory concerned. See in this connection memorandum of Mr. Hay, Secy. of State, Feb. 1, 1902, For. Rel. 1902, 275, 926, Moore, Dig., V, 546. By an exchange of notes Nov. 30, 1908, between Mr. Root, Secy. of State, and Baron Takahira, Japanese Ambassador at Washington, it was agreed in behalf of the United States and Japan, (1) to be the wish of the two governments to encourage the free and peaceful development of their commerce on the Pacific Ocean; (2) that the policy of both governments, uninfluenced by any aggressive tendencies, was directed to the maintenance of the existing *status quo* in the region mentioned, and to the defense of the principle of equal opportunity for commerce and industry in China; (3) to respect reciprocally the territorial possessions belonging to each other in that region; (4) to preserve the common interest of all powers in China by supporting by all pacific means at their disposal "the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire"; and (5) in the event of an occurrence threatening the *status quo* as thus described, or the principle of equal opportunity as so defined, to communicate with each other in order to arrive at an understanding as to what measures it might be considered useful to take. See Malloy's Treaties, I, 1045-1047. By an exchange of notes Nov. 2, 1917, between Mr. Lansing, Secy. of State, and Viscount Ishii, Japanese Ambassador on Special Mission, it was declared that the Government of the United States and Japan recognized that "territorial propinquity creates special relations between countries," and that consequently the United States recognized that Japan had special interests in China, particularly in the part to which her possessions were contiguous. It was announced that the territorial sovereignty of China remained, nevertheless, unimpaired, and it was denied that the governments of the contracting parties had any purpose to infringe in any way the independence or territorial integrity of that country. It was further declared that those governments would always adhere to the principle of the open-door or equal opportunity for commerce and industry in China, and it was announced also that they were opposed to the acquisition by any government of any special rights or privileges which would affect the independence or integrity of China, or which would deny to the nationals of any country full enjoyment of equal opportunity in commerce and industry in China, Official Bulletin, No. 152, Nov. 6, 1917, For. Rel. 1917, 264, also explanatory statement of Secretary Lansing, *id.*, Treaty Series No. 630. See, also, in this connection, Shutaro Tomimas, *The Open-Door Policy and The Territorial Integrity of China*, New York, 1919, 133-145. The Lansing-Ishii Agreement was terminated by an exchange of notes on April 14, 1923, U. S. Treaty Vol. III, 3825.

See also Treaty between the United States, the British Empire, France, and Japan, relating to their Insular Possessions and Insular Dominions in the Pacific Ocean, of December 13, 1921, U. S. Treaty Vol. III, 3094; also Treaty between the United States, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal, relating to the Principles and Policies to be followed in Matters Concerning China, of February 6, 1922, U. S. Treaty Vol. III, 3120.

The United States has entered into regional understandings of a non-political character, such as, for example, the treaty with Great Britain for the suppression of the African slave trade, within two hundred miles of the African coast, concluded April 7, 1862, Malloy's

It must be obvious, however, that a special relationship may be designed for an end that is regarded as essentially injurious to the welfare of the international society, as by welding together two or more States for the purpose of inflicting injury upon another that has done no wrong. It ought to be clear that a union effected with such a design in no way frees the members thereof from the burden of restrictions which the law of nations imposes upon each. Again, it must be clear that any relationship created with a view to injuring an unoffending third State, as by impairing or interfering with its political independence, may justly be regarded as at variance with the welfare of the international society, and as affording frail support for pretensions to be invoked before an international forum.

In practice the parties to a special relationship are not disposed to admit or avow a design possessed of such a sinister character, regardless of the effect that the achievement of their purposes may be expected to produce. Again, it has been difficult to focus attention upon the validity of special relationships that might be fairly open to criticism on the grounds above suggested. Moreover, the international society as such has not been alert to marshal its opposing interest, or to challenge what might well be regarded as detrimental thereto. The freedom of individual States to unite for their own purposes has been the distinctive feature of the picture.<sup>6</sup> Therefore, it may still be premature to declare that numerous forms of special relationships are to be regarded as contrary to international law. It is not improbable, however, that with the increasing tendency of the international society to perceive the real nature of whatever is hostile to its welfare, and also to combat whatever it deems to possess such a character, the law that governs its members may develop and impose fresh restrictions which are not as yet apparent. They may be expected to forbid commercial or economic relationships defiant of privileges commonly assigned to outside States, and contemptuous of their independent economic life.<sup>7</sup> In recent years there have been instances where States have undertaken, by treaty, to forego the

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Treaties, I, 674, and the convention for the preservation and protection of fur seals frequenting the waters of the North Pacific Ocean, concluded with Great Britain, Russia and Japan, July 7, 1911, U. S. Treaty Vol. III, 2966. See also Convention relating to the Liquor Traffic in Africa, and Protocol, signed at Saint Germain-en-Laye, September 10, 1919, U. S. Treaty Vol. III, 3746; Arrangement by Exchange of Notes between the United States, Canada, Cuba and Newfoundland, relative to the Assignment of High Frequencies to Radio Stations on the North American Continent, signed on February 26 and 28, 1929, U. S. Treaty Vol. IV, 4787.

<sup>6</sup> It may be observed that the Anglo-Japanese Alliance of July 13, 1911, was terminated in pursuance of Article IV of the Treaty concluded by the United States, the British Empire, France and Japan, at Washington, Dec. 13, 1921, U. S. Treaty Vol. III, 3094, 3095. See also Lauterpacht's 5 ed. of Oppenheim, I, 759, note (2).

<sup>7</sup> They may take cognizance of the fact that through a combination of States a fiscal entity or power may spring into being that is capable of destroying the economic existence of a particular outside State remaining unwilling to become a member; and they may, accordingly, create safeguards for the protection of such non-member.

The inquiry suggests itself whether, for example, a provision such as that contained in Article IV of the treaty of reciprocity between the United States and the Hawaiian Islands of January 30, 1875, Malloy's Treaties, I, 917, declaring in part that His Hawaiian Majesty would not "make any treaty by which any other nation shall obtain the same privileges, relative to the admission of any articles free of duty, hereby secured to the United States," may ultimately be deemed sufficiently adverse to the family of nations to justify a rule of prohibition.



privilege of concluding economic arrangements or relationships at variance with a declared scheme or polity.<sup>8</sup>

The special relationships which have distinguished the United States as a State have for the most part concerned political rather than economic affairs.

(3)

**§ 58. The Acquisition of Territory.** An independent State is deemed to enjoy the right to acquire territory, and by normal processes to increase the extent of its national domain.<sup>1</sup> At the present time these commonly involve a transaction between States or countries whose assertions of exclusive control are respected, and which is productive of a change of sovereignty over particular areas. The acquisition of territory by a State is, therefore, a form of conduct likely to be intimately associated with the management of its foreign relations. Even when the acquisition of territory does not call for such change or transfer, and is effected by acts attributable solely to the conduct of the State chiefly concerned, the fact of territorial enlargement is still a matter of interest to the outside world.

A neutralized State, by reason of the nature of its status, may find it incompatible therewith to acquire territory the control of which is likely to require the sovereign thereof to commit acts which are inconsistent with the obligations which such a State has undertaken as a condition upon which its special position has been yielded.

(4)

THE ADMISSION AND EXPULSION OF ALIENS

(a)

**§ 59. Admission.** A State is acknowledged to enjoy the broadest right to regulate the admission of aliens to its territory. Declared Mr. Justice Gray in the course of the opinion of the Supreme Court in the case of *Nishimura Ekiu v. United States*:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.<sup>1</sup>

<sup>8</sup> See in this connection, Advisory Opinion of the Permanent Court of International Justice, together with concurrent and dissenting opinions, September 5, 1931, on the question whether a régime established between Germany and Austria on the basis and within the limits laid down by a Protocol of March 19, 1931, would be compatible with Article 88 of the Treaty of Saint-Germain and with Protocol No. 1, signed at Geneva on October 4, 1922. Publications, Permanent Court of International Justice, Series A/B, No. 41.

<sup>1</sup> Declared Mr. Justice White in *Downes v. Bidwell*, 182 U. S. 244, 300:

"It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest." *Cf. Fuller, C. J., id.*, 369.

<sup>§ 59.</sup> <sup>1</sup> 142 U. S. 651, 659, *citing* Vattel, lib. 2, §§ 94, 100; 1 Phillimore, 3 ed., c. 10, § 220. See also, *Fong Yue Ting v. United States*, 149 U. S. 698, 705-707; *The Chinese Exclusion Case*, 130 U. S. 581, 606-611; *Lem Moon Sing v. United States*, 158 U. S. 538; *Turner v. Williams*, 194 U. S. 279. See Mr. Marcy, Secy. of State, to Mr. Gadsden, Minister to Mexico,

Those conditions may obviously embrace the terms of permitted sojourn or residence.<sup>2</sup> These may, for example, be exemplified by a statutory requirement that aliens residing within the national domain for or after a specified length of time, apply for registration and be finger-printed.<sup>3</sup>

The Legal Adviser of the Department of State has recently declared: "A State is under no duty, in the absence of treaty obligations, to admit aliens to its territory. If it does admit them, it may do so on such terms and conditions as may be deemed by it to be consonant with its national interests. Likewise a State may deport from its territory aliens whose presence therein may be regarded by it as undesirable. These are incidents of sovereignty."<sup>4</sup> In 1933, the Supreme Court of the United States declared that "the power of Congress to prescribe the terms and conditions upon which aliens may enter or remain in the United States is no longer open to serious question."<sup>5</sup>

The law of nations has not as yet forbidden a State to exercise largest discretion in establishing tests of the undesirability of aliens seeking admission to its territory, and to that end, to enforce discriminations of its own devising.<sup>6</sup> There

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No. 54, Oct. 22, 1855, MS. Inst. Mexico, XVII, 54, Moore, Dig., IV, 71; Mr. Marcy, Secy. of State, to Mr. Fay, Minister to Switzerland, No. 37, Mar. 22, 1856, MS. Inst. Switzerland, I, 47, Moore, Dig., IV, 72; Mr. Fish, Secy. of State, to Washburne, Sept. 17, 1869, MS. Inst. France, XVIII, 297, Moore, Dig., IV, 74; Mr. Fish, Secy. of State, to Mr. Weile, Dec. 4, 1869, 57 MS. Inst. Consuls, 35, Moore, Dig., IV, 74; Mr. Frelinghuysen, Secy. of State, to Mr. Stillman, Aug. 3, 1882, 143 MS. Dom. Let. 238, Moore, Dig., IV, 76; Mr. Pendleton, Minister to Germany, to Mr. Bayard, Secy. of State, Nov. 16, 1885, concerning admission by Count Kalnoky, Austrian Premier, of right of Germany to refuse sojourn to foreigners with or without cause, For. Rel. 1886, 309, Moore, Dig., IV, 79, also note, *id.*, IV, 79; Mr. Bayard, Secy. of State, to Mr. Lothrop, Minister to Russia, No. 95, July 1, 1887, MS. Inst. Russia, XVI, 518, Moore, Dig., IV, 80.

"By calling attention to the fundamental principles in respect to the sovereign right of a nation to deal with the exclusion of foreigners in any manner which, in its judgment, the national interests may require, I do not mean to imply that arbitrary measures of exclusion directed in a discriminatory manner against a particular nation might not warrant appropriate diplomatic representations. But I beg to point out that the exercise of a sovereign right to exclude aliens can not furnish grounds for a diplomatic protest based on a claim of violation of legal rights." (Mr. Davis, Acting Secy. of State, to Senator G. W. Norris, Jan. 11, 1921, For. Rel. 1921, Vol. II, 125, 126.)

<sup>2</sup> See Art. 1 of Convention on the Status of Aliens, concluded at the Sixth International Conference of American States at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4722, 4723.

Also documents in Hackworth, Dig., III, § 277.

<sup>3</sup> See, for example, requirements of Sec. 31 of Act of Congress approved June 28, 1940, 54 Stat. 673. Also in this connection, *Hines v. Davidowitz*, 312 U. S. 52, announcing the unconstitutionality of a Pennsylvania statute of June 21, 1939, requiring the registration of certain classes of aliens. From the conclusion of the Court Mr. Justice Stone, with whom concurred the Chief Justice and Mr. Justice McReynolds, dissented.

<sup>4</sup> Statement in Hackworth, Dig., III, 717, where it is added: "Treaties of commerce and navigation usually provide that the nationals of the respective high contracting parties shall have liberty freely to enter, travel, and reside in the territories of the other. . . . Such treaty provisions do not, however, prevent the contracting parties from enacting and enforcing laws relating to immigration. A surrender of the right to exclude or deport aliens is not to be implied from treaty provisions of a general character. The more recent treaties of friendship, commerce, and consular rights entered into by the United States with other powers, while containing provisions with respect to entry, residence, etc., contain a further provision reserving to the contracting parties freedom of action in relation to the immigration of aliens. See, for example, the last paragraph of article I of the treaty signed June 5, 1928 by the United States and Norway."

<sup>5</sup> *United States ex rel. Volpe v. Smith*, 289 U. S. 422, 425.

<sup>6</sup> See "International Regulations on the Admission and Exclusion of Aliens," adopted by the Institute of International Law, Sept. 9, 1892, *Annuaire*, XII, 226, J. B. Scott's Resolutions, 104.

is thus apparent a sharp distinction between the lawfulness, in an international sense, and the ultimate expediency of various types of exclusion laws. Those that reflect the exercise of the full measure of the privilege by a territorial sovereign are thus to be challenged merely on grounds of policy rather than on those of law. Statutes that mark discriminations against aliens residing in, or emigrating from, particular geographical areas, or against those belonging to a particular race, are tokens of arrogance that defy explanation and produce resentment on the part of States whose nationals happen to be singled out for exclusion.

(i)

§ 60. **The Same.** The United States permits no other power, as Secretary Gresham stated in 1894, to question its authority to determine what aliens or classes of aliens are undesirable or dangerous.<sup>1</sup>

Some years later the Congress undertook to enact a new immigration law designed to supersede that of May 19, 1921,<sup>2</sup> as amended May 11, 1922,<sup>3</sup> based upon a policy of selective immigration, and providing for the assignment of quotas to foreign areas. A bill introduced in the House of Representatives excluded as quota immigrants aliens who were ineligible for American citizenship, of which the practical effect was, to quote Secretary Hughes "to single out Japanese immigrants for exclusion."<sup>4</sup> In the course of a note to Secretary Hughes, of April 10, 1924, making objection to such features of the proposed enactment and also setting forth the terms of the so-called "Gentlemen's Agreement" between the United States and Japan of 1907 and 1908, Mr. Hanihara, the Japanese Ambassador at Washington declared:

It is needless to add that it is not the intention of the Japanese Government to question the sovereign right of any country to regulate immigration to its own territories. Nor is it their desire to send their nationals to the countries where they are not wanted. On the contrary, the Japanese Government showed from the very beginning of this problem their perfect willingness to co-operate with the United States Government to effectively prevent by all honorable means the entrance into the United States of such Japanese nationals as are not desired by the United States, and have given

§ 60.<sup>1</sup> See communication to Mr. Lamont, Dec. 22, 1894, 200 MS. Dom. Let. 703, Moore, Dig., IV, 137; Count Welsersheimb, Austro-Hungarian Minister of Foreign Affairs, to Mr. Grant, Sept. 5, 1891, For. Rel., 1891, 30, Moore, Dig., IV, 149, note; President Cleveland, special message, Oct. 1, 1888, Senate Ex. Doc. 273, 50 Cong., 1 Sess., Moore, Dig., IV, 199-200; Swayne, J., in the Passenger Cases, 7 How. 283, 423; *Lapina v. Williams*, 232 U. S. 78, 88; Clement L. Bouvé, *Exclusion and Expulsion of Aliens in the United States*, Washington, 1912, 3-14.

<sup>2</sup> 42 Stat. 5.

<sup>3</sup> 42 Stat. 540.

<sup>4</sup> See Mr. Hughes, Secy. of State, to Hon. Albert Johnson, M.C., Feb. 8, 1924, H.Rep. 350, Part II, 68 Cong., 1 Sess., p. 25. In this communication the Secretary questioned the wisdom of this feature of the proposed law. He was able to show that the matter of Chinese immigration was regulated by existing legislation and by the so-called "barred-zone" provisions of the immigration laws prohibiting immigration from certain other portions of Asia. He was also able to show that the proposed measure would serve to deny entrance to only 246 Japanese immigrants a year, inasmuch as through the operation of the "Gentlemen's Agreement" of 1907-1908, Japan herself undertook to control and regulate the emigration of her laborers to the United States.

ample evidences thereof, the facts of which are well known to your Government.<sup>5</sup>

The foregoing note was duly communicated to the chairmen of the appropriate Committees of both Houses of the Congress.<sup>6</sup> That body, preferring to fix by statute the treatment of alien immigrants ineligible to citizenship rather than to permit the matter to be regulated through the diplomatic channel, enacted a law, approved on May 26, 1924, that contained the discrimination against such individuals.<sup>7</sup> Upon further protest from the Japanese Government,<sup>8</sup> the Secretary of State on June 16, 1924, proceeded to defend the exercise of the legal right by his country. In so doing he adverted to the admission on the part of Japan of the right of the United States to take such steps, and he declared that the action of the Congress rendered it mandatory upon the President to release Japan from her undertakings under the Gentlemen's Agreement.<sup>9</sup>

From its earliest days the United States has not refrained from concluding conventions permitting the entrance of aliens into its territory for specified purposes. Numerous treaties so providing were in force when, in 1924, the new immigration law, based upon the policy of selective immigration, and imposing broad restrictions, became operative. Those treaties obviously bound the contracting parties to take no steps, by legislation or otherwise, in contravention of their terms. This restriction, in so far as it affected the United States had been

<sup>5</sup> For. Rel., 1924, Vol. II, 369, 372. The Ambassador added: "To Japan the question is not one of expediency, but of principle. To her the mere fact that a few hundreds or few thousands of her nationals will or will not be admitted into the domains of other countries is immaterial, so long as no question of national susceptibilities is involved. The important question is whether Japan as a nation is or is not entitled to the proper respect and consideration of other nations. In other words the Japanese Government ask of the United States Government simply that proper consideration ordinarily given by one nation to the self-respect of another, which after all forms the basis of amicable international intercourse throughout the civilized world." (372.) The Ambassador concluded his note with the words: "I realize, as I believe you do, the grave consequences which the enactment of the measure retaining that particular provision would inevitably bring upon otherwise happy and mutually advantageous relations between our two Countries." (373.)

See also Mr. Hughes, Secy. of State, to Mr. Hanihara, Japanese Ambassador, April 10, 1924, *id.*, 374; same to same, June 16, 1924, *id.*, 403; Mr. Hanihara, Japanese Ambassador, to Mr. Hughes, Secy. of State, April 17, 1924, *id.*, 381; same to same, May 31, 1924, *id.*, 398.

Also, in this connection, A. W. Parker, "The Ineligible to Citizenship Provisions of the Immigration Act of 1924," *Am. J.*, XIX, 23; Roy L. Garis, *Immigration Restriction*, New York, 1927.

<sup>6</sup> See discussions in the Senate, April 14, 1924, *Cong. Rec.* LXV., Part 6, 6302, 6305, 6315.

<sup>7</sup> 43 Stat. 154, 8 U. S. C. A. § 203.

<sup>8</sup> See Mr. Hanihara, Japanese Ambassador, to Mr. Hughes, Secy. of State, May 31, 1924, For. Rel. 1924, Vol. II, 398.

<sup>9</sup> Mr. Hughes, Secy. of State, to Mr. Hanihara, Japanese Ambassador, June 16, 1924, *id.*, 403. In this note the Secretary declared: "While the President would have preferred to continue the existing arrangement with the Japanese Government, and to have entered into negotiations for such modifications as might seem to be desirable, this Government does not feel that it is limited to such an international arrangement, or that by virtue of the existing understanding, or of the negotiations which it has conducted in the past with the Japanese Government, it has in any sense lost or impaired the full liberty of action which it would otherwise have in this matter. On the contrary, that freedom with respect to the control of immigration, which is an essential element of sovereignty and entirely compatible with the friendly sentiments which animate our international relations, this Government in the course of these negotiations always fully reserved." (405.)

See also, *Sketch of Charles Evans Hughes* by this author in *American Secretaries of State and Their Diplomacy*, Vol. X, Chap. XII, New York, 1929.

but lightly felt, because of a policy that for generations welcomed, rather than retarded the admission of aliens, and from which the principal deviation, itself not occurring until late in the nineteenth century, was confined to an effort to check the admission of aliens from certain oriental areas.<sup>10</sup> That policy was not conducive to the exercise of care in the drafting of treaty provisions pertaining to the matter. Nor did it serve to inspire inquiry whether aliens permitted to enter American territory were the beneficiaries of a privilege created by treaty for their benefit, rather than the grantees of a mere revocable license attributable solely to the unconcern or self-interest of a complacent territorial sovereign. There is no reason to assume that in the process of enacting the Act of 1924, the Congress intended to violate any of the existing contractual obligations of the nation.<sup>11</sup> Nevertheless, that body did essay, by the very terms of its enactment, to construe the content of the treaties that were in force, and to act upon its own construction thereof. It seemingly concluded that no existing contractual obligation forbade the United States to regulate the immigration of laborers to its shores, and also that no treaty conferred upon any other State the right to demand the entrance of a national into the United States save for purposes of trade.<sup>12</sup>

Thus, in Section 3(6) of the Act, the Congress excepted from its definition of the word "immigrant" as employed therein, "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."<sup>13</sup> The treaties of the United States thereafter concluded manifested in varying form respect for the freedom asserted by the Congress to legislate at will in respect to immigration. Moreover, they disclosed no design to permit aliens of the non-immigrant class to enter the United States for purposes at variance with those set forth in

<sup>10</sup> See *Cheung Sum Shee v. Nagle*, 268 U. S. 336, 345-346.

Also, A. W. Parker, "The Ineligible to Citizenship Provisions of the Immigration Act of 1924," *Am. J.*, XIX, 23; John B. Trevor, "An Analysis of the Immigration Act of 1924," *International Conciliation*, September, 1924, No. 204.

<sup>11</sup> No opinion is offered on the question whether the Congress made proper appraisal of the content of the existing treaties. It may be observed that Secretary Hughes in February, 1924, suggested to the Chairman of the House Committee on Immigration and Naturalization that the non-immigrant class of aliens within the proposed immigration law embrace "an alien entitled to enter the United States under the provisions of an existing treaty." This description, which the Congress did not see fit to adopt, avoided a legislative pronouncement on what the scope of the existing treaty privileges of aliens might be. See House Report No. 350, Part II, 68 Cong., 1 Sess., p. 3. See also Mr. Hughes, Secy. of State, to Representative Cable, Feb. 27, 1924, Hackworth, Dig., III, 768.

<sup>12</sup> It should be constantly borne in mind, however, that there was a Colonial regulation of immigration of aliens into America, and also that opposition and regulation assumed varying forms in the United States from its birth as a Nation until 1882. See in this connection, Roy L. Garis, *Immigration Restriction*, New York, 1927, Chapters I and IV. According to that author: "The power of Federal legislation, which has resulted in the growth of a complicated body of federal immigration laws, may be said to have begun with the Act of March 3, 1875, although it is also sometimes dated from the Act of August 3, 1882, since the latter is the first inclusive federal immigration law." (P. 86.)

<sup>13</sup> By an amendment of the Act, July 6, 1932, 47 Stat. 607, 8 U. S. C. A. § 203, the following words were added: "and his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him." Concerning this amendment see statement of House Committee on Immigration and Naturalization, H. Rept. 431, 72nd Cong., 1st Sess., 1.

See *infra*, § 60A.

the Act of Congress.<sup>14</sup> In a word, those possessed of the agreement-making power were far from disposed to over-rule by treaty the theory on which the Congress had seen fit to legislate. Nor has there since been a disposition to do so.<sup>15</sup>

The character and scope of privileges conferred by treaty for the benefit of nationals of foreign contracting States who are permitted to enter and to reside within American territory is obviously a matter of interpretation of relevant agreements, rather than one pertaining to the general right of a State to establish conditions for the admission of aliens into its domain.<sup>16</sup>

The following aliens are, apart from the operation of the Act of May 26, 1924,<sup>17</sup> generally excluded by the immigration laws of the United States, with the exceptions noted<sup>18</sup>:

1. *Mentally defective* (Section 3, Act of February 5, 1917):

Includes — (a) Idiots; (b) imbeciles; (c) feeble-minded persons; (d) insane persons; (e) epileptics; (f) persons having previously had attacks of insanity; (g) persons of psychopathic inferiority; (h) persons with chronic alcoholism.

2. *Paupers or vagrants* (Section 3, Act of February 5, 1917):

Includes — Paupers; vagrants; professional beggars.

3. *Diseased* (Section 3, Act of February 5, 1917):

Includes — (a) Persons afflicted with tuberculosis in any form; (b) persons afflicted with a loathsome or dangerous contagious disease.<sup>19</sup>

<sup>14</sup> The treaty of friendship, commerce and consular rights between the United States and Germany, signed December 8, 1923, received the approval of the Senate in February, 1925, under reservation that there be added to Article I the following: "Nothing herein contained shall be construed to affect existing statutes of either country in relation to the immigration of aliens or the right of either country to enact such statutes." Germany accepted the amendment. U. S. Treaty Vol. IV, 4191. See also Hackworth, Dig., III, 764-765.

A like provision was incorporated in Article I of the treaty of friendship, commerce and consular rights between the United States and Austria, of June 19, 1928, of which the ratifications were exchanged on May 27, 1931, U. S. Treaty Vol. IV, 3930.

<sup>15</sup> See list of treaties concluded by the United States to which § 3(6) of the Immigration Act of 1924, as amended in 1932, was deemed to be applicable, as of November, 1940, contained in For. Ser. Reg. U. S., Visa Supp. A, Notes to Section XXII-1, n. 41. This document is cited in a footnote in Hackworth, Dig., III, 763.

<sup>16</sup> See generally, documents in Hackworth, Dig., III, § 298.

As an illustration of the hesitation of the Supreme Court of the United States to impute to the Congress when enacting the Immigration Act of 1924, a design to violate the provisions of an existing treaty with China, see *Cheung Sum Shee v. Nagle*, 268 U. S. 336.

See *Outbreak of War between Contracting Parties, Certain Other Classes of Agreements, infra*, § 550, where there is discussion of the case of *Karnuth v. United States*, 279 U. S. 231.

<sup>17</sup> See Act of Feb. 5, 1917, 39 Stat. 875, which repealed the Acts of Feb. 20, 1907, 38 Stat. 898, and of March 3, 1903, 32 Stat. 1213.

Concerning earlier legislation of the United States from the enactment of the Act of March 3, 1875 (18 Stat. Part 3, p. 477) until that of March 22, 1904 (33 Stat. Part 1, p. 144), see Moore, Dig., IV, 151-187, and documents there cited. Also Clement L. Bouvé, *Laws Governing the Exclusion and Expulsion of Aliens in the United States*, Washington, 1912. Illustrative of unconstitutional attempts of certain States of the Union to regulate immigration, cf. *The Passenger Cases*, 7 How. 283; *Henderson v. Mayor of New York*, 92 U. S. 259; *Chi Lung v. Freeman*, 92 U. S. 275; *People v. Compagnie Générale Transatlantique*, 107 U. S. 59.

<sup>18</sup> The analysis of the exclusion provisions of the immigration laws set forth in the text is that contained in Appendix A to General Consular Instruction, No. 926, of March 23, 1929, relating to the Admission of Aliens into the United States. Subsequent amendments are noted to which reference is made in a statement in Hackworth, Dig., III, 742-743.

<sup>19</sup> See exceptions in Section 22, of Act of Feb. 5, 1917. "When a naturalized alien or alien having taken up permanent residence in the United States thereafter sends for his wife or minor children to join him, and his wife or any of his minor children shall be found to

4. *Persons who are mental or physical defectives:*

Includes — Persons certified by examining surgeon at port of entry as being mentally or physically defective when such physical defect is of a nature which may affect the ability of the alien to earn a living.<sup>20</sup>

5. *Criminals* (Section 3, Act of February 5, 1917):

Includes — (a) Persons convicted of a crime involving moral turpitude; (b) persons who admit having committed such crime.<sup>21</sup>

6. *Polygamists* (Section 3, Act of February 5, 1917):

Includes — (a) Persons who practice polygamy; (b) persons believing in or advocating the practice of polygamy.

7. *Anarchists* (Section 3, Act of February 5, 1917):

Includes — (a) Persons believing in overthrow of the Government of the United States by force or violence; (b) persons who advocate overthrow of the Government of the United States by force or violence; (c) persons believing in or advocating overthrow by force or violence of all forms of law; (d) persons who disbelieve in or are opposed to organized Government; (e) persons advocating assassination of public officials; (f) persons advocating or teaching the unlawful destruction of property.

8. *Members of unlawful organizations* (Section 3, Act of February 5, 1917):

Includes — (a) Members of or affiliated with organizations entertaining and teaching disbelief in or opposition to organized government; or (b) advocating or teaching the duty, necessity or propriety of the unlawful assaulting or killing of an officer, either specific individuals or officers generally of the Government of the United States or other organized government, because of his or their official character; or (c) advocating or teaching the unlawful destruction of property.

9. *Anarchists as defined by Act of October 16, 1918, as amended June 5, 1920*<sup>22</sup> and under the Alien Registration Act of 1940.<sup>23</sup>

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be affected with contagious disease, such wife or minor children shall be held, under regulations prescribed by the Secretary of Labor, until it is determined whether landing can be permitted without danger to other persons, and they shall not be admitted or deported until such facts are ascertained."

<sup>20</sup> See exceptions in Section 21, Act of Feb. 5, 1917. "An alien liable to be excluded because of physical disability other than tuberculosis or a loathsome or dangerous contagious disease may, if otherwise admissible, be admitted by the Secretary of Labor upon giving a bond or putting up a cash deposit under terms laid down by the Secretary holding the United States harmless against such alien becoming a public charge."

<sup>21</sup> See exceptions in Section 3, of Act of Feb. 5, 1917. "Persons convicted or admitting commission or teaching or advocating commission of an offense purely political not excluded if otherwise admissible."

<sup>22</sup> This broad group includes —

(a) Aliens who are anarchists.

(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group that advises, advocates, or teaches opposition to all organized government.

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law; or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government because of his or their official character; or (3) the unlawful damage, injury, or destruction of property; or (4) sabotage.

10. *Prostitutes and procurers* (Section 3, Act of February 5, 1917):

Includes — (a) Persons coming to the United States for purposes of prostitution; (b) persons coming to the United States for any immoral purpose; (c) persons directly or indirectly procuring or attempting to procure or import prostitutes or persons for the purpose of prostitution or any other immoral purpose; (d) persons who receive the proceeds of prostitution.

11. *Contract laborers* (Section 3, Act of February 5, 1917):

Includes — (a) Persons induced, assisted, encouraged or solicited to immigrate to the United States by offers or promises of employment, whether offers or promises are true or false, to perform labor in the United States of any kind, skilled or unskilled; (b) migrating to this country in consequence of agreements, oral, written, or printed, or express or implied, to perform labor in the United States of any kind, skilled or unskilled; (c) persons coming in consequence of advertisements for laborers, printed, published, or distributed in a foreign country.<sup>24</sup>

12. *Persons likely to become a public charge* (Sections 3 and 21, Act of February 5, 1917):<sup>25</sup>

13. *Persons previously deported* (Section 1, Act of March 4, 1929):

- (d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display any written or printed matter advising, advocating or teaching opposition to all organized government, or advising, advocating, or teaching: (1) The overthrow by force or violence of the Government of the United States or of all forms of law; or (2) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government; or (3) the unlawful damage, injury, or destruction of property; or (4) sabotage.
- (e) Aliens who are members or of affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays or causes to be written, circulated, distributed, printed, published, or displayed or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in subdivision 4.

<sup>23</sup> 54 Stat. 670, 673.

<sup>24</sup> See exceptions in Section 3, Act of February 5, 1917:

- (1) The provisions applicable to contract labor shall not be held to include —

- (a) Professional actors;
- (b) Artists;
- (c) Lecturers;
- (d) Singers;
- (e) Nurses;
- (f) Ministers of any religious denomination;
- (g) Professors for colleges or seminaries;
- (h) Persons belonging to a recognized learned profession;
- (i) Persons employed as domestic servants.

- (2) Skilled labor:  
Skilled labor otherwise admissible may be imported if labor of like kind unemployed can not be found in the United States.

- (3) Attendance at expositions:

The alien exhibitor or holder of a concession or privilege for any fair or exposition authorized by Congress may bring to the United States, under contract or otherwise, admissible alien natives of his country necessary for installing or conducting the business authorized or permitted under such concession.

<sup>25</sup> Exceptions — "An alien liable to be excluded because likely to become a public charge may, if otherwise admissible, be admitted by the Secretary of Labor upon giving a bond or putting up a cash deposit, under terms laid down by the Secretary, holding the United States harmless against such alien becoming a public charge."



Includes — (a) Aliens arrested and deported in pursuance of law; (b) Aliens who have been formally ordered deported who have been permitted to depart voluntarily in lieu of deportation.

14. *Persons excluded from admission and deported* (Section 3, Act of February 5, 1917, as amended by Act of March 4, 1929, Act of June 24, 1929, and Act of May 25, 1932):

Persons who have been excluded from admission to the United States and deported in pursuance of law may not reapply for admission within one year.<sup>26</sup>

15. *Persons financially assisted to come to the United States* (Section 3, Act of February 5, 1917):

Includes — (a) Persons whose ticket or passage is paid for with money of another; (b) persons who are otherwise assisted by others to come.<sup>27</sup>

16. *Stowaways*:<sup>28</sup>

17. *Children unaccompanied*:

Includes — Children under 16 years of age unaccompanied by or not coming to parent.<sup>29</sup>

18. *Natives of the Asiatic Barred Zone*:

Includes — Natives of certain islands near Asia and a portion of the Asiatic mainland defined in the law as lying between specified parallels of latitude and meridians of longitude. The Barred Zone, so-called, includes the eastern portions of Baluchistan and Afghanistan, all but the extreme northern portion of Oman, most of India, Turkestan, Nepal, Bhutan, Siam, French Indo-China, and the Malay Peninsula. It also includes

<sup>26</sup> The Secretary of Labor may, in his discretion, consent to re-application, prior to re-embarkation at a place outside of the United States or attempt to be admitted from foreign contiguous territory, within one year.

<sup>27</sup> Exceptions — "The law provides as exception to the above two classes, 'unless it is affirmatively and satisfactorily shown that such persons do not belong to one of the foregoing excluded classes.' Therefore, if it is affirmatively and satisfactorily shown in the course of examination of an applicant that he does not come within any one of the classes numbered 1 to 14 above, the fact that another person paid for his ticket or passage will not be ground for refusal of an immigration visa."

The attempt of a State to assist or compel the emigration of its criminals, paupers, incurably diseased or otherwise undesirable classes of its nationals will always be resisted by that other State to whose territory they are directed. The United States is not an exception in this regard. See correspondence between Mr. King, Minister to Great Britain, and the Duke of Portland, 1789, concerning the emigration of Irish national prisoners, 7 MS. Despatches from England, Moore, Dig., IV, 142-144; also the Duke of Portland to Lord Cornwallis, *id.*, Moore, Dig., IV, 144; Mr. Fish, Secy. of State, to Mr. Moulding, Dec. 26, 1872, 97 MS. Dom. Let. 87, Moore, Dig., IV, 145; Mr. Blaine, Secy. of State, to Mr. Cramer, Dec. 3, 1881, MS. Inst. Switzerland, II, 124, Moore, Dig., IV, 145; Mr. J. Davis, Acting Secy. of State, to Mr. Lowell, May 25, 1883, For. Rel. 1883, 422, 423, Moore, Dig., IV, 146; President Arthur, Annual Message, Dec. 4, 1883, For. Rel. 1883, iv, Moore, Dig., IV, 147; *in re* Nikolaus Bader, For. Rel. 1891, 17-30.

Again, laying stress upon the voluntary character of immigration, the United States opposes that which is constrained by foreign agencies. See Mr. Hay, Secy. of State, to Mr. Wilson, Minister to Roumania, July 17, 1902, For. Rel. 1902, 910, 912, Moore, Dig., IV, 151. See extracts from correspondence between Mr. Bayard, Secy. of State, and Sir L. West, British Minister at Washington, in 1887, Moore, Dig., IV, 148; Case of John Gibbons and family, For. Rel. 1892, 226-272, Moore, Dig., IV, 149-151.

<sup>28</sup> Exception — "May be admitted, in the discretion of the Secretary of Labor, if the alien, except for having been a stowaway, would be entitled to admission."

<sup>29</sup> Exceptions — "Unaccompanied children, if otherwise admissible, may be admitted by the Secretary of Labor, in his discretion, if, in his opinion, they are not likely to become a public charge."

the islands of Ceylon, Sumatra, Java, Borneo, Celebes, Timor, and New Guinea.<sup>30</sup>

19. *Illiterates:*

Includes — Aliens over 16 years of age physically capable of reading, unable to read English or any other language or dialect, including Hebrew or Yiddish.<sup>31</sup>

<sup>30</sup> Exceptions — "Natives of the Barred Zone in the following occupations or status, together with their legal wives and children under 16 years of age accompanying them or following to join them, are exempt from this excluding provision:

- (a) Government officials;
- (b) Ministers or religious teachers;
- (c) Missionaries;
- (d) Lawyers;
- (e) Chemists;
- (f) Civil Engineers;
- (g) Physicians;
- (h) Teachers;
- (i) Students;
- (j) Authors;
- (k) Artists;
- (l) Merchants;
- (m) Travelers for curiosity or pleasure;
- (n) Wives of the above and their children under 16 years of age."

"Chinese laborers, both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling and laundries, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation, are absolutely prohibited by treaty and statutes from entering the United States, its insular possessions and the Territory of Alaska, except Chinese laborers who have the right to leave American territory in which they are domiciled and to return thereto in accordance with the provisions of the act of September 13, 1888." (Note 1, Section 368, Consular Regulations of the United States, May, 1930.)

"Upon the Refusal of China to continue the treaty of 1894 after 1904, Congress, by the Act of April 27, 1904 (38 Stat. I, 428), amended Section I of the foregoing Act [that of Sept. 13, 1888] by omitting the reference to treaty obligations. Thus Congress re-enacted, extended and continued, all laws then in force in so far as they were not inconsistent with treaty obligations, so that absolute prohibition of Chinese laborers has continued to this day, for this exclusion law of 1904 is still in force." (Roy L. Garis, *Immigration Restriction*, New York, 1927, 304.)

See also *Treaty, Laws and Rules Governing the Admission of Chinese*, Dept. of Labor, Bureau of Immigration, Washington, 1931, embracing Rules of Oct. 1, 1926; Acts of May 6, 1882, 22 Stat. 58; July 5, 1884, 23 Stat. 115; Sept. 13, 1888, 25 Stat. 476; May 5, 1892, 27 Stat. 25; Nov. 3, 1893, 28 Stat. 7; joint resolution of July 7, 1898, 30 Stat. 751; April 30, 1900, 31 Stat. 141; April 29, 1902, 32 Stat. Part 1, 176; April 27, 1904, 33 Stat. 394-428; Feb. 5, 1917, 39 Stat. Part 1, 874; May 26, 1924, 43 Stat. 153.

For the text of the treaty between the United States and China of Nov. 17, 1880, see *Malloy's Treaties*, I, 239; for that of the convention regulating Chinese immigration of March 17, 1894, and terminated Dec. 7, 1904, *id.*, 241. Concerning the operation of the Chinese exclusion laws and their relation to existing treaties between the United States and China, *cf.* Moore, *Dig.*, IV, 187-238, and documents there cited; also Clement L. Bouvé, *Exclusion and Expulsion of Aliens in the United States*, 85-111.

Concerning the situation with respect to Chinese, see also documents in Hackworth, *Dig.*, III, § 299, pertaining to treaty and statutory provisions; *id.*, § 300, pertaining to excluded classes; *id.*, § 301, pertaining to exempt classes; *id.*, § 302, pertaining to certificate of exempt classes; and *id.*, § 303, pertaining to judicial hearing.

<sup>31</sup> Exceptions:

"(a) Certain relatives: A citizen or an admissible or legally admitted alien may bring in or send for his illiterate father or grandfather over 55 years of age, wife, mother, grandmother, unmarried or widowed daughter, the illiterate relatives being otherwise admissible.

(b) Religious refugees: Aliens proving to the satisfaction of the Secretary of Labor that they are seeking admission to avoid religious persecution in the country of their last permanent residence are exempt from the reading test.

(c) Aliens in transit.

(d) Aliens previously resident in the United States: Aliens legally admitted to the United

20. *Accompanying alien in certain cases* (Section 18, Act of February 5, 1917):

If an alien excluded is helpless from sickness, mental or physical disability, or infancy, and such alien is accompanied by another alien whose protection or guardianship is required, such accompanying alien may also be excluded.

(ii)

§ 60A. **Aspects of the Immigration Law of 1924.** From an international point of view the significance of the existing legislation of the United States in so far as it is based on or set forth in the Immigration Act of May 26, 1924, is attributable to two features: first, the broad definition of the immigrant; and secondly, to the mode and extent of the restriction placed upon immigration generally. The immigrant is defined as:

. . . Any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a *bona fide* alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him.<sup>1</sup>

"All aliens not classified as non-immigrants under section 3 of the act of 1924 are immigrants."<sup>2</sup> Immigrants are divided into two categories consisting of quota and nonquota classes.<sup>3</sup> Again, quota immigrants are in turn divided into

States who have resided there continuously for five years who are returning to the United States after a visit abroad of less than six months.

(e) Alien attendants at expositions: Aliens under exception 3, heading 11, are not subject to the reading test.

(f) War brides (Act of June 5, 1920): Aliens unable to read or write, if otherwise admissible, may be admitted within five years after June 5, 1920, when citizens of the United States who served in the military or naval forces of the United States during the war with Germany request such aliens to be admitted and, with the approval of the Secretary of Labor, marry such aliens at an immigration station."

§ 60A.<sup>1</sup> Section 3, 43 Stat. 153, 154, as amended July 6, 1932, 47 Stat. 607, 8 U.S.C.A. § 203.

See in this connection, Henry B. Hazard, "Immigration to the United States during the Fiscal Year 1931," American University, Cumulative Digest of International Law and Relations, II, Bulletin No. 1 and 2, Jan. 9, 1932.

Concerning the requirement as to the international character of trade contemplated in Sec. 3 (6) of the Act, see documents in Hackworth, Dig., III, § 298.

<sup>2</sup> Statement in Hackworth, Dig., III, 746.

<sup>3</sup> Sections 5 and 4, respectively.

Aliens, with respect to their classification for admission into the United States as defined by section 28(a) of the Immigration Act of 1924, may be divided, according to a statement from the Department of State, revised to January 1, 1936 (of which no revision up to 1942 has appeared) into the following categories:

two groups — (a) those entitled to a preference up to 50 per cent of the quota, and (b) those entitled to the remainder of the quota.

Immigrants entering the United States must present unexpired passports or official documents in the nature of passports issued by the Governments of the countries to which they owe allegiance or other travel documents showing their origin and identity, and valid immigration visas, quota or nonquota, in accordance with the requirements of the Immigration Act, except in certain specified cases.<sup>4</sup>

By these processes, the United States has put into operation a selective system whereby, at the source of emigration, through the agency of its Consular Officers, assisted by immigrant inspectors and officers of the Public Health Service attached to Consulates, it examines, restricts, and makes preliminary regulation of the admission to its domain, of aliens classified as immigrants.<sup>5</sup> A result has

Aliens	Immigrants	Quota	Preference up to 50 per cent of quota  Remainder of quota	1a Parents of American citizens 21 years of age or over, or husbands by marriages on or after July 1, 1932. Sec. 6(a)(1)(A)
				1b In quotas of 300 or over, skilled agriculturists, their wives and dependent children under 18 of age. Sec. 6(a)(1)(B)
				2 Wives and unmarried minor children of aliens lawfully admitted to the United States for permanent residence. Sec. 6(a)(2)
				3 Remainder after (1) and (2) available for other quota immigrants. Sec. 6(a)(3)
Aliens	Nonquota			1 Wives, unmarried minor children, husbands by marriages before July 1, 1932, of American citizens. Sec. 4(a)
				2 Aliens returning from temporary visit abroad. Sec. 4(b)
				3 Aliens born in certain countries of the Western Hemisphere, their wives, and unmarried children under 18 years of age. Sec. 4(c)
				4 Ministers, professors, their wives and unmarried children under 18 years of age. Sec. 4(d)
Aliens	Other classes not subject to quota restrictions			5 Students, at least 15 years of age. Sec. 4(e)
				6 American women who have lost their citizenship. Sec. 4(f)
				1 American Indians born in Canada. Act of April 2, 1928
				2 Certain Spanish nationals returning to Puerto Rico. Act of May 26, 1926
Non-immigrants				3 Aliens born in Puerto Rico or the Virgin Islands. Sec. 3(1)
				2 Temporary visitors. Sec. 3(2)
				3 Aliens in transit. Sec. 3(3)
				4 Aliens entering from transit across foreign contiguous territory. Sec. 3(4)
Non-immigrants				5 Alien seamen. Sec. 3(5)
				6 Treaty aliens. Sec. 3(6)

<sup>4</sup> See Dept. of State, Admission of Aliens into the United States, revised to Jan. 1, 1936, Publication No. 805, Note 69, appended to which is an enumeration of the exceptional cases. See also documents in Hackworth, Dig., III, 745-749.

<sup>5</sup> See Dept. of State, *Admission of Aliens into the United States*, revised to Jan. 1, 1936, Publication No. 805.

been the absence of the rejection at American ports of entry of almost all immigrants able to satisfy the preliminary tests as applied at points of departure.<sup>9</sup>

(iii)

§ 60B. **Miscellaneous Considerations.** The Supreme Court of the United States has declared it to be entirely settled that the authority of Congress to prohibit aliens from coming within the United States and to regulate their coming includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments to the Constitution; that such an inquiry may be properly placed upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the Act of Congress.<sup>1</sup>

As a means of preventing the illegal entry of aliens into its continental territory, the United States maintains an effective Border Patrol, composed largely of men of military training, who watch the land boundaries and a portion of the Atlantic and Gulf Coasts.<sup>2</sup>

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Also Dept. of Labor, Immigration Laws (Immigration Rules and Regulations of January 1, 1930, as amended up to and including December 31, 1936), Washington, 1937.

<sup>9</sup> It should be observed, however, that neither an immigration visa nor a passport visa is, or purports to yield, permission to enter American territory. See Section 2(g) of the Act of May 26, 1924.

"Pursuant to the Reorganization Act of 1939, approved April 3, 1939 (53 Stat. 561), the President transmitted to Congress, on May 22, 1940, Reorganization Plan V transferring to the Department of Justice the Immigration and Naturalization Service and its functions, as well as the powers of the Secretary of Labor in regard to them and to the administration of the immigration and naturalization laws. Under section 37(a) of the Alien Registration Act, approved June 28, 1940 (54 Stat. 670, 675), the powers conferred upon the Attorney General by that act 'and all other powers of the Attorney General relating to the administration of the Immigration and Naturalization Service may be exercised by the Attorney General through such officers of the Department of Justice,' including officers of that service, as he may designate." (Statement in Hackworth, Dig., III, 718-719, where it is added: "Under a joint resolution approved June 4, 1940 (54 Stat. 230), Reorganization Plan V took effect on June 14, 1940.")

§ 60B. <sup>1</sup> *Zakonaite v. Wolf*, 226 U. S. 272, 275, *citing* *Fong Yue Ting v. United States*, 149 U. S. 698, 730; *United States v. Zucker*, 161 U. S. 475, 481; *Wong Wing v. United States*, 163 U. S. 228, 237; *Turner v. Williams*, 194 U. S. 279, 289; *Chin Yow v. United States*, 208 U. S. 8, 11; *Tang Tun v. Edsell*, 223 U. S. 673, 675; *Low Wah Suey v. Backus*, 225 U. S. 460, 468. See also *Bugajewitz v. Adams*, 228 U. S. 585; *Tiaco v. Forbes*, 228 U. S. 549, 556; *United States ex rel. Volpe v. Smith*, 289 U. S. 422, 425.

<sup>2</sup> "Barely 800 strong, during the fiscal year just closed they patrolled a total of 7,266,785 miles — 6,730,822 by automobile, 136,904 by railroad, 48,181 by horse, 2,625 by boat, 707 by aircraft, and 347,546 afoot. During this period they questioned 573,480 passengers in all manner of vehicles, as well as 415,525 pedestrians, and apprehended 22,504 persons who had violated the immigration laws. Of these, 21,335 were aliens captured in endeavoring to enter the United States, 228 were smugglers of aliens, and 941 were aliens taken into custody under warrants of arrest. The number of automobiles seized was 482, of an estimated value of \$176,305, and of other conveyances captured was 125, with an estimated value of \$38,956. The cost of salaries for 1931 was \$1,595,063.92. During the seven years of its existence, the patrol has covered 36,279,027 miles, and apprehended 109,839 smuggled aliens and 2,612 of their smugglers." (Henry B. Hazard, Chief Counsel, Bureau of Naturalization, Department of Labor, "Immigration to the United States During the Fiscal Year 1931," American Uni-

Without questioning the right of a foreign country to adopt appropriate and humane measures for the deportation of aliens, the Department of State has at least on one occasion expressed the opinion that the provisions of the law of a particular foreign country were "neither appropriate nor humane as measured by the standards of modern life," which were said to involve invariably an obligation upon the deporting Government to pay the expenses of deportation.<sup>3</sup>

It is of course possible for a contracting State to agree to restrict under certain conditions the exercise of the right to deport aliens. The declaration of the Egyptian Government associated with the convention and protocol for the abolition of the capitulations in Egypt, signed at Montreux on May 8, 1937, is an instance.<sup>4</sup>

While it is said to be the traditional policy of the United States to grant refuge in its territory to persons whose lives are believed to be in jeopardy as a result of their political activities in a foreign country, and that such persons applying for admission to the United States as so-called political refugees are customarily admitted for a reasonable period under a liberal interpretation of the immigration laws, provided they can establish to the satisfaction of the competent authorities that their personal safety is actually threatened, and that the offenses in which they have been involved are not such as would render them inadmissible under the law, it is also said that there would appear to be a marked distinction between persons who thus voluntarily seek refuge in the United States from political persecution in their own country, and those who are forced to proceed to the United States under compulsion exercised by the authorities of their Government.<sup>5</sup> Accordingly, it is declared that the Government of the United States would be reluctant to extend its hospitality to politically undesirable persons which such a government might deem it desirable to thrust upon American territory.<sup>6</sup>

(iv)

§ 60C. **Wartime Restrictions.** A State engaged in war, or otherwise confronted with what it conceives to be a national emergency, may find that the public safety requires that restrictions and prohibitions, in addition to those normally provided, be imposed upon the departure of persons from, and their entry into, its domain. Aliens may find themselves subjected to special re-

versity, Cumulative Digest of International Law and Relations, Vol. II, Bulletin No. 1 and 2, Jan. 9, 1932, p. 6.)

<sup>3</sup> See Mr. Carr, Acting Secy. of State, to the Legation at Santo Domingo, March 19, 1932, Hackworth, Dig., III, 730.

<sup>4</sup> U. S. Treaty Series No. 939, Hackworth, Dig., III, 729. See in this connection, reference to an instruction to the American Minister in Cairo, of March 18, 1940, in which it was announced that the American Government was unable to admit the validity of the interpretation given by the Egyptian Government to the declaration, Hackworth, Dig., III, 730.

<sup>5</sup> Mr. Welles, Under Secy. of State, to the Ambassador at Mexico City, Aug. 15, 1936, Hackworth, Dig., III, 734.

<sup>6</sup> *Id.* See also Mr. Hull, Secy. of State, to the French Ambassador at Washington, Dec. 27, 1940, Dept. of State Bulletin, Jan. 11, 1941, 57, Hackworth, Dig., III, 735.

Concerning the reasons why the Government of the United States felt unable to encourage the nation to become a party to the convention of October 28, 1933, relating to the international status of refugees and accepted by numerous countries, see documents in Hackworth, Dig., III, 737-739.

strictions. The Congress of the United States has at times made enactments applicable to them.<sup>1</sup> Moreover, in so doing, it has announced special reasons for the withholding of immigration visas, passport visas, and kindred documents.<sup>2</sup>

(b)

EXPULSION

(i)

§ 61. **In General.** A State may decide for itself whether the continued presence within its territory of a particular alien is so adverse to the national interests that the country needs to rid itself of him. A conclusion in the affirmative gives rise to the privilege of expulsion. Under such circumstances the United States regards itself as possessed of, and accordingly, exercises that privilege.<sup>1</sup> Declared Secretary Gresham, on November 5, 1894: "This Government does not propose to controvert the principle of international law, which authorizes every independent State to expel objectionable foreigners or classes of foreigners from its territory. The right of expulsion or exclusion of foreigners is one which the United States, as well as many other countries, has upon occasion exercised when deemed necessary in the interest of the Government or its citizens."<sup>2</sup>

Expulsion may savor of an abuse of power if the decision to expel be not founded on a *bona fide* belief as to the evil effect upon the State of the continued presence of the individual within its domain. A conclusion in favor of expulsion need not necessarily coincide with one to which the State of which the alien is a national would, under like circumstances, assent. On the other hand, a decision to expel must not be one which no State could in good faith be reasonably expected to reach.<sup>3</sup> Thus arbitrary action, either in the choice of the

§60C.<sup>1</sup> See Act of May 22, 1918, 40 Stat. 559, and an amendment thereof of June 21, 1941, 55 Stat. 252.

<sup>2</sup> See Act of June 20, 1941, declaring that: "Whenever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa, passport visa, transit certificate, or other document entitling such alien to present himself for admission into the United States; but in any case in which a diplomatic or consular officer denies a visa or other travel document under the provisions of this Act, he shall promptly refer the case to the Secretary of State for such further action as the Secretary may deem appropriate." (55 Stat. 252, quoted in Hackworth, Dig., III, 744.)

§ 61.<sup>1</sup> *Fong Yue Ting v. United States*, 149 U. S. 698, 711-714.

<sup>2</sup> For. Rel. 1895, II, 801, 802. See, also, Art. 6 of convention on Status of Aliens, concluded at Sixth International Conference of American States, at Havana, Feb. 20, 1928, U. S. Treaties, Vol. IV, 4723.

<sup>3</sup> "The just rule would seem to be that no nation can single out for expulsion from its territory an individual citizen of a friendly nation without special and sufficient grounds therefor. And even when such grounds exist the expulsion should be effected with as little injury to the individual and his property interests as may be compatible with the safety and interest of the country which expels him." (Mr. Gresham, Secy. of State, to Mr. Smythe, Minister to Haiti, Nov. 5, 1894, For. Rel. 1895, II, 801, 802.) It should be observed that in a note of Jan. 24, 1895 (*id.*, 809), Secretary Gresham declared that the Haitian Government had submitted to his examination evidence establishing *prima facie* grounds "for the exercise of the sovereign prerogative of expulsion in the case of this apparently undesirable alien," and that under the circumstances, the Government of the United States deemed it proper to refrain from remonstrance against his expulsion.

"The modern theory and practice of Christian nations is believed to be founded on the

individual expelled, or in the method of expulsion, would indicate an abuse of power and point to internationally illegal action.<sup>4</sup> As Secretary Root declared in 1907: "The right of a government to protect its citizens in foreign parts against a harsh and unjustified expulsion must be regarded as a settled and fundamental principle of international law. It is no less settled and fundamental that a government may demand satisfaction and indemnity for an expulsion in violation of the requirements of international law."<sup>5</sup> As a matter of fact, arbitrariness in the methods applied in the particular case, rather than in the choice of the individual concerned or in the determination to expel him, usually constitutes the chief cause of foreign complaint, and is commonly an element to be found in the cases where the conduct of the territorial sovereign is subjected to sharpest criticism.

The effective expulsion of an alien normally calls for co-operative acquiescence by the State of which he is a national. Thus it is generally deemed to be its duty to receive him if he seeks access to its territory.<sup>6</sup> Nor can it well refuse to receive him if during his absence from its domain he has lost its nationality without having acquired that of another State.<sup>7</sup> Conversely, it is not apparent how a State, having put an end to the nationality of an individual owing allegiance to itself, may reasonably demand that any other State whose nationality he has not subsequently acquired, shall receive him into its domain when attempt is

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principle that the expulsion of a foreigner is justifiable only when his presence is detrimental to the welfare of the State, and that when expulsion is resorted to as an extreme police measure it is to be accomplished with due regard to the convenience and the personal and property interests of the person expelled." (Mr. Olney, Secy. of State, to Mr. Young, Minister to Guatemala, Jan. 30, 1896, For. Rel. 1895, II, 775, Moore, Dig., IV, 102, 103. Cf., also, Mr. Ralston, Umpire in the Boffolo Case, before Italian-Venezuelan Commission, under protocol of Feb. 13, 1903, Ralston's Reports, 699-700.)

<sup>4</sup> Report of M. Rolin-Jacquemyns on Expulsion, to the Institute of International Law, 1888, *Annuaire*, X, 229; also project of declaration, adopted by the Institute Sept. 8, 1888, *id.*, 244; also proceedings of the Institute, Hamburg Meeting, 1891, *Annuaire*, XI, 273-321; Rules for the Admission and Expulsion of Foreigners, adopted by the Institute, at Geneva, Sept. 9, 1892, *Annuaire*, XII, 218; preliminary discussion, *id.*, 185. An English translation of the rules adopted in 1892 is contained in J. B. Scott, Resolutions of the Institute, 104. Cf., also, Prof. von Bar, in *Clunet*, XIII, 5; Tchernoff, *La Protection des Nationaux Résident à L'Etranger*, 449-451; Borchard, Diplomatic Protection, §§ 27-32, bibliography, *id.*, p. 869; Clement L. Bouvé, Laws Governing the Exclusion and Expulsion of Aliens in the United States, Washington, 1912.

See also Robert Cugnin, *L'Expulsion des Étrangers*, Paris, 1912; Bento de Faria, *Sobre o Direito de Expulsao*, Rio de Janeiro, 1929.

<sup>5</sup> Communication to the Minister in Caracas, Feb. 28, 1907, For. Rel. 1908, 774, 776, Hackworth, Dig., III, 690.

See also Opinion of the Solicitor for the Dept. of State, March 14, 1911, Hackworth, Dig., III, 691, footnote.

<sup>6</sup> "States are required to receive their nationals expelled from foreign soil who seek to enter their territory." (Art. 6 of convention on Status of Aliens, concluded at Sixth International Conference of American States, at Habana, Feb. 20, 1928, U. S. Treaty Vol. IV, 4722, 4724.)

See § 20 of Act of Feb. 5, 1917, 39 Stat. 875, 890. Also in this connection Mr. Donovan, Assist. to the Atty. Gen., to Mr. Grew, Under Secy. of State, Oct. 12, 1926, Hackworth, Dig., III, 740.

<sup>7</sup> See Art. 20 of Harvard Draft Convention on Nationality, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 16.

See, also, Art. 1 of Special Protocol Concerning Statelessness, concluded at the Hague Conference for the Codification of International Law, 1930, *Am. J.*, XXIV, *Official Documents*, 211.



made as by banishment to cause him to depart the territory of the former.<sup>8</sup> It may be greatly doubted whether a State is precluded from expelling an alien from its domain by the circumstance that he has been denationalized by the country of origin and has subsequently failed to attain the nationality of any other.<sup>9</sup> No international legal duty rests upon the State which has recourse to expulsion to allow the alien to remain within its limits until a particular foreign State evinces willingness to receive him within its domain.<sup>10</sup>

A State which has recourse to expulsion should be prepared to make known the reasons for its decision to the State of which the expelled alien is a national.<sup>11</sup> The former does not appear, however, to be required to furnish evidence in justification of its conduct as a condition precedent to such action.<sup>12</sup>

(ii)

§ 62. **Method of Expulsion.** Arbitrary action is, as has been observed, frequently apparent in the method by which expulsion is effected. That once applied by a certain State in the case of one Hollander, an American citizen, is illustrative. Having been arrested February 8, 1889, on a charge of calumny and forgery, Hollander was held in custody until May 14, following, when, before the trial of the case, he was expelled from the country by executive decree, and without opportunity to see his family or make any business arrangements.<sup>1</sup>

<sup>8</sup> See Sir John Fischer Williams, "Denationalization," *Brit. Y.B.*, 1927, 45, 61.

<sup>9</sup> Cf. Lawrence Preuss, "International Law and Deprivation of Nationality," *Georgetown Law Journal*, XXIII, 250, 270, 272, where it is said: "It cannot be concluded that the refusal to receive is countenanced by international law. There is no dissent from the proposition that every State possesses the power of expulsion, as the corollary to its right to determine the conditions for entry upon its territory. This right is destroyed if another State refuses to fulfill the conditions which it presupposes, and which are essential to its exercise."

<sup>10</sup> A State is not, however, likely to resort to expulsion of an alien who is able to establish that no foreign State will receive him in its domain. He may be unable to make a satisfactory showing that such is the case. See in this connection *United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928.

See Non-exclusion of Stateless Persons from the Territory of the State of which they were Formerly Nationals, *infra*, § 387A.

<sup>11</sup> Declared Mr. Ralston, Umpire, in the course of a well-considered opinion in the Boffolo Case, before the Italian-Venezuelan Commission, under protocol of Feb. 13, 1903: "The country exercising the power must, when occasion demands, state the reason of such expulsion before an international tribunal, and an insufficient reason or none being advanced, accepts the consequences." (Ralston's Reports, 696, 705.)

According to Art. XXX of the regulations of the Institute of International Law, of 1892: "The act decreeing expulsion shall be notified to the expelled individual. The reasons on which it is based must be stated in fact and in law." (J. B. Scott, Resolutions, 109.)

<sup>12</sup> Mr. Gresham, Secy. of State, to Mr. Smythe, Minister to Haiti, Jan. 24, 1895, For. Rel. 1895, II, 809, Moore, Dig., IV, 87. Concerning the important case of A. F. Jaurett, an American citizen expelled from Venezuela in 1904, cf. Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, For. Rel., I, 908, 774-778; Same to Same, June 21, 1907, *id.*, 800-801; Mr. Churion, Venezuelan Minister of Foreign Affairs, to Mr. Russell, July 24, 1907, *id.*, 806. See, also, agreement of Feb. 13, 1909, for the settlement of the claim, For. Rel. 1909, 629. See, also, Mr. Root, Secy. of State, to Mr. Furniss, Minister to Haiti, Feb. 24, 1906, For. Rel. 1906, II, 870.

§ 62. <sup>1</sup> In commenting on this case Mr. Olney, Secy. of State, said: "After deliberating three months and more, with Hollander absolutely in its power, the executive authority expelled him in a manner that defeated the course of justice in the courts of the country; that violated the rules of international law and the existing provisions of the treaty, and was contrary to the practice of civilized nations." Communication to Mr. Young, Minister to Guatemala, Jan. 30, 1896, For. Rel. 1895, II, 775, 779, Moore, Dig., IV, 102, 108.

See, also, Case of F. Scandella, For. Rel. 1898, 1137-1147, referred to in Moore, Dig., IV,

Other instances have arisen in more recent years where the procedure applied in the course of expulsion has manifested a harsh treatment against which the United States has felt constrained to make emphatic protest.<sup>2</sup>

A State is not forbidden to expel an alien who is domiciled, or possessed of a residence within its territory.<sup>3</sup> When such, however, is the case, the reasonable exercise of the privilege of expulsion would appear to demand some respect for the consequences of the connection between the alien and his habitat. Thus the procedure that might not be inequitably applied to a transient visitor, may, on the other hand, work grave hardship to one who through a protracted residence within the territory of the expelling State, has dug his roots deep into its commercial or economic life as a participant therein.<sup>4</sup> While this circumstance should not, and does not, deprive the territorial sovereign of its privilege as such, it justifies the challenging of methods that ignore the injury necessarily entailed when a permanent resident is compelled on short notice to depart the country.

A State which in the process of expelling an alien from its territory has recourse to methods that violate its own constitution, is regarded by the United States as guilty of internationally illegal conduct.<sup>5</sup>

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108; Mr. Gresham, Secy. of State, to Mr. Smythe, Minister to Haiti, Nov. 5, 1894, For. Rel. 1895, II, 801; Bluefields Cases, 1894, Moore, Dig., IV, 99-101, and documents there cited; Paquet Case (expulsion, before Belgian-Venezuelan Commission under protocol of Mar. 7, 1903), Ralston's Reports, Venezuelan Arbitrations, 1903, 265; Oliva Case, before Italian-Venezuelan Commission, under protocol, Feb. 13, 1903, *id.*, 771; Boffolo Case, before same Commission, *id.*, 696; Maal Case before Netherlands-Venezuelan Commission, under protocol, Feb. 28, 1903, *id.*, 914. *Cf.*, also, decision of the Umpire, M. Desjardins, Dec. 25, 1898, in the Ben Tillet Case between Great Britain and Belgium, *Clunet*, XXVI, 203; Cases of Expulsion considered by Mexican Claims Commission under Act of Congress of March 3, 1849, Moore, Arbitrations, IV, 3334; by American-Mexican Claims Commission, convention of 1868, *id.*, 3347; by Spanish Claims Commission, 1871, *id.*, 3350; by United States and Venezuelan Claims Commission, convention of 1885, *id.*, 3354.

"There may be no rule of international law or practice with regard to precise, proper methods of expelling an alien, such as those that have been suggested by writers, by conducting a man to an international border or by delivering him to a representative of his government. But when resort is had to a use of unnecessary force or other improper treatment there may be ground for a charge such as is made in the instant case, account being taken of the manner in which expulsion might have been effected." (Nielsen, Commissioner, in concurring opinion in the Daniel Dillon Case, Opinions of Commissioners, convention of Sept. 8, 1923, United States and Mexico, 1929 Vol. 63, 64.)

See award of Beichmann, Arbitrator, in Matter of the Claim of Madame Chevreau against the United Kingdom, June 9, 1931, *Am. J.*, XXVII, 153.

<sup>2</sup> See, for example, case of Joseph De Courcy, arrested by Mexican authorities on Aug. 9, 1927, and expelled from the country the following day, as set forth in Hackworth's Dig., III, 702-704, and in special reference to the matter, instruction from the Department of State to the Embassy in Mexico City, of Sept. 15, 1927; also case of Ulises Loubriel, in Venezuela in 1923, Hackworth, Dig., III, 699-702.

See instruction of the Dept. of State to the Chargé d'Affaires in Germany, April 27, 1925, in which complaint was made against the failure to grant a hearing to the person expelled, Hackworth, Dig., III, 695.

See other instances set forth in documents in Hackworth, Dig., III, 696-698.

<sup>3</sup> *Fong Yue Ting v. United States*, 149 U. S. 698, 724. *Cf.* dissenting opinions of Justices Brewer and Field, and Chief Justice Fuller, respectively, *id.*, 734, 757 and 761.

<sup>4</sup> See communication of Mr. Olney, Secy. of State, Jan. 30, 1896, in *Hollander Case*, Moore, Dig., IV, 102-104; Report of M. Rollin-Jacquemyns, *Annuaire*, X, 229, 233; Article XLI of Rules adopted by Institute of International Law, Sept. 9, 1892, *Annuaire*, XII, 218, 225, J. B. Scott, Resolutions, 110. Also Borchard, *Diplomatic Protection*, § 29.

<sup>5</sup> See, for example, Mr. Root, Secy. of State, to Mr. Russell, Minister to Venezuela, Feb. 28, 1907, concerning the case of A. F. Jaurett, For. Rel. 1908, 774, 777.

## (iii)

§ 63. **Causes of Expulsion.** States differ with respect to the causes that are regarded as sufficient to justify the expulsion of aliens. No commonly accepted tests of such causes are available. Thus in practice, an aggrieved State enjoys a wide latitude. It may expel from its territory one who commits acts that are forbidden by its laws, or who may be fairly regarded as a prospective violator of them, or who proclaims his opposition to them, regardless of the view of his conduct or anticipated conduct that is entertained by his own State.<sup>1</sup> It would be difficult to maintain that a State violates a duty imposed by international law if it sees fit to expel an alien who persists in teaching or proselyting in behalf of a religious sect whose tenets are deemed gravely objectionable to such State.<sup>2</sup> That the United States does not enquire into the religious views of its nationals, and seeks to protect equally all residents within its domain without regard to their opinions on such matters, does not suffice to fetter the freedom of other states that elect to proceed upon a different principle.<sup>3</sup> Again, it would be difficult to maintain that as yet the law of nations forbids a State to expel from its

§ 63.<sup>1</sup> Case of Paul Edwards, expelled from Belgium on account of practicing in that country the art of healing without medicines, by laying on of hands, hypnotic suggestion and personal magnetism, in violation of the Belgian law, For. Rel. 1900, 45-53, Moore, Dig., IV, 93.

<sup>2</sup> Cf. case of Lewis T. Cannon and Jacob Muller, expelled from Prussia, 1900, on account of their preaching and practicing the Mormon faith. For. Rel. 1901, 165, Moore, Dig., IV, 135; also For. Rel. 1898, 347-354; also case of expulsion of Mormon missionaries from Germany in 1908, For. Rel. 1908, 366-371. *Contra* Mr. Uhl, Asst. Secy. of State, to Mr. Doty, U. S. Consul at Tahiti, June 25, 1895, For. Rel. 1897, 124, Moore, Dig., IV, 133.

<sup>3</sup> The protracted controversy between the United States and Russia concerning the treatment of American Jews in Russian territory, related chiefly to the interpretation of the treaty of December 18, 1832. Malloy's Treaties, II, 1514. See, in this connection Moore, Dig., IV, 111-129, and documents there cited, and in particular communication of Mr. Blaine, Secy. of State, to Mr. Foster, Minister to Russia, No. 87, July 29, 1881, For. Rel. 1881, 1030, Moore, Dig., IV, 119. See, also, Termination of the Treaty of 1832 between the United States and Russia, Hearing before Committee on Foreign Affairs, House of Representatives, Dec. 11, 1911, revised edition, 1911; Treaty of 1832 with Russia, Hearing before Committee on Foreign Relations, United States Senate, 62 Cong., on S. J. Res. 60, Dec. 13, 1911, Washington, 1911; President Taft, message to the Senate, Dec. 18, 1911, transmitting copy of notice forwarded by the Secretary of State to the American Ambassador at St. Petersburg, relative to the termination of the treaty of 1832, Senate Doc. No. 161, 62 Cong., 2 Sess. Concerning treatment by Turkish authorities of American Jews in Palestine, *cf.* Moore, Dig., IV, 130-132.

"The following cases, a few among many, which have occurred in international practice indicate a wide range of grounds for expulsion: for spreading socialistic propaganda, Juarez case; for promoting and organizing a strike, Ben Tillet's case; for practicing the art of healing without a license, Edwards' case; for writings or speeches derogatory to the government or the army, case of Father Forbes in France; Hottmann case in Switzerland; Kennan case in Russia; for anarchy, Kropotchine case in Switzerland; for preaching polygamy, Mormon missionaries in Germany; for spying or suspicion thereof, Hofmann and Richtofen cases in Switzerland; for giving immoral performances, Belgium; for intrigues against the State, expulsion of Spanish ambassador from England in 1584 and similar cases, or against third states, General Boulanger and Count Chambord in Belgium; and, among the cases with which the United States has had to deal, the expulsion by European countries, particularly Germany and Austria, of natives of those countries who by naturalization in the United States have evaded military service." E. M. Borchard, *Diplomatic Protection*, § 28. In connection with the last clause of the foregoing statement see, for example, Mr. Bacon, Acting Secy. of State, to Mr. Francis, American Ambassador at Vienna, April 13, 1907, concerning the case of Selig Fink, a naturalized American citizen of Austrian origin, For. Rel. 1908, 20.

domain aliens belonging to a particular race, however imprudent such action may be.<sup>4</sup>

It should be observed that the Department of State has not hesitated to instruct a Legation that if it was satisfied that a certain American citizen was engaged in subversive activities as alleged by the territorial sovereign, it should inform him that the Government of the United States could not countenance any attempt of American citizens to foment disorders in foreign territory and would not intervene "to prevent his just punishment by the authorities."<sup>5</sup>

The deportation, as distinct from the expulsion, of an alien who has entered or attempted to enter the territory of a State in violation of its immigration or exclusion laws is to be regarded as merely incidental to their enforcement.<sup>6</sup> Within such a category may be placed the cases of aliens who, after having failed to comply with conditions upon which their admission was yielded, as by having overstayed a brief period of permitted sojourn, or by having failed to maintain the status on which their entrance was permitted, are, in due course, obliged to leave the country.<sup>7</sup> According to the existing statutory law of the United States, the deportation of an alien is made the consequence not merely of unlawful entrance into its territory, but also of the commission of certain classes of offenses within a specified period after entrance, and of others, at any time thereafter.<sup>8</sup>

#### (iv)

§ 64. **Expulsion as a War Measure.** The exigencies of war may justify the action of a belligerent in expelling from its territory aliens whose presence there might not, under normal circumstances, be regarded as dangerous to the safety of the State or gravely detrimental to its welfare. The bare fact of war suffices to excuse the expulsion of aliens who are nationals of the enemy should the territorial sovereign deem it expedient to take such a step. The United States has availed itself of such a right,<sup>1</sup> which it has also necessarily acknowledged to be possessed by other belligerents. It has had occasion, however, to complain of

<sup>4</sup> Cf. communication of Mr. Frelinghuysen, Secy. of State, to Mr. Hamlin, No. 74, June 19, 1882, MS. Inst. Spain, XIX, 139, Moore, Dig., IV, 109; also Sir J. Pauncefote, British Minister at Washington, to Mr. Blaine, Secy. of State, Nov. 25, 1891, For. Rel. 1892, 255, Moore, Dig., IV, 229.

<sup>5</sup> Communication to the Legation at Panama, Feb. 26, 1925, Hackworth, Dig., III, 699-700. The penalty in the instant case assumed the form of expulsion.

<sup>6</sup> See, generally, Jane Perry Clark, *Deportation of Aliens from the United States to Europe*, New York, Columbia University Press, 1931.

<sup>7</sup> See, for example, *Ng Fung Ho v. White*, 259 U. S. 276; *Philippides v. Day*, 283 U. S. 48; *United States v. Vanbiervliet*, 284 U. S. 590; *Sugaya v. Haff*, 78 F. (2) 989.

<sup>8</sup> See 8 U.S.C.A. §§ 137 (g) and (h), 155, 156a, 157, 167 and 214.

See Ellery C. Stowell, "The Deportation of Aliens," *Am. J.*, XXIX, 673, in relation to the adoption by the Congress, Aug. 23, 1935, of a Joint Resolution requesting the Commissioner of Immigration and Naturalization to stay the deportation until March 1, 1936, of aliens of good character, under specified conditions.

See, also, E. W. Puttkammer, "Legislation Affecting the Deportation of Aliens," *Univ. of Chicago Law Rev.*, III, 229.

§ 64. <sup>1</sup> See statement in Moore, Dig., IV, 138, paraphrasing early legislation of the United States, embraced in the Acts of July 6, 1798, 1 Stat. 577, and July 6, 1812, 2 Stat. 781.

the harsh methods by which other States when engaged in war have had recourse to expulsion.<sup>2</sup>

It may be observed that the United States, while a belligerent in the course of the World War, did not expel alien enemies *en masse*, but sought to protect itself against them by other means.<sup>3</sup>

A belligerent may not unreasonably expel from its territory neutral nationals who, although domiciled therein, endeavor to escape the common burdens of military service.<sup>4</sup>

(v)

§ 64A. *Expulsions En Masse.* A territorial sovereign may in fact proceed to expel a considerable number of aliens *en masse* if their continued presence within its domain is deemed to be highly detrimental thereto.<sup>1</sup> It may be difficult in the particular case to establish any impropriety in such action, even though it may operate harshly upon individuals who find themselves suddenly obliged to leave the country. Respect for the dictates of humanity is, however, likely to be found wanting when national exigencies encourage a State to rid itself in short order of large numbers of aliens. Accordingly, the maintenance of friendly relations between States should strengthen the endeavor through any instrumentality to deter the expulsion of groups of persons save at least under conditions that deal humanely with those whose removal is sought.<sup>2</sup>

<sup>2</sup> See, for example, Mr. Olney, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, Sept. 27, 1895, For. Rel. 1895, II, 1229, Moore, Dig., IV, 139; also Mr. Hay, Secy. of State, to Mr. Choate, American Ambassador at London, No. 494, Nov. 14, 1900, MS. Inst. Great Britain, XXXIII, 505, Moore, Dig., IV, 141.

<sup>3</sup> After the conclusion of the armistice Nov. 11, 1918, and prior to the establishment of peace with Germany, the United States caused the deportation of numerous alien enemies whose conduct had previously been such as to necessitate their internment during the period of hostilities. Thus a number of such individuals who had not complied with the immigration regulations were deported. "Furthermore, in accordance with an agreement entered into with the German Government, most of the interned civilians of German birth, as well as subjects of other nations, who formed part of the crews of German merchant ships, were repatriated during the summer of 1919." (Mr. Adee, Second Assist. Secy. of State, to the author, Nov. 6, 1919.)

See, also, Act of April 16, 1918, 40 Stat. 531, amending Rev. Statutes, sec. 4067, and authorizing the President, in the event of war, to direct the conduct to be observed by the United States toward its alien enemies. Also proclamations of President Wilson, No. 1364, April 6, 1917, No. 1408, Nov. 16, 1917, No. 1417, Dec. 11, 1917, No. 1443, April 19, 1918, and No. 1506, Dec. 23, 1918; also broad provisions of Act of May 10, 1920, "to deport certain undesirable aliens, and to deny re-admission to those deported."

<sup>4</sup> Cf. Neutral Persons and Property in Belligerent Territory, Exaction of Military Service, Theory of the Belligerent Right, *infra*, § 625.

§ 64A. <sup>1</sup> Documents in For. Rel. 1914, 784-838, in relation to the protection by the United States of Spanish subjects in Mexico in 1914, refer to numerous instances of the expulsion of Spaniards.

In relation to the expulsion by Poland of German optants, and by Germany of Polish optants, in 1925, see J. W. Garner, in *Am. J.*, XX, 130, 134-135.

Following the complaint of the Government of Yugoslavia against that of Hungary with reference to the assassination of King Alexander at Marseilles on Oct. 9, 1934, expulsions *en masse* of Hungarian nationals from portions of Yugoslavia near the Hungarian boundary were effected. The achievement was productive of great hardship to the individuals concerned. See statements of M. de Eckhardt, representative of Hungary, before the Council of the League of Nations, Dec. 7, and Dec. 10, 1934, League of Nations, *Official Journal*, 1934, 1717 and 1755.

<sup>2</sup> A Report of the Inter-Governmental Advisory Commission for Refugees of the League of Nations, which was adopted by the Council on May 20, 1935, expressed the hope

## 5

## CERTAIN NON-POLITICAL ACTS OF SELF-DEFENSE

## a

§ 65. **In General.** An act of self-defense is that form of self-protection which is directed against an aggressor or contemplated aggressor. No act can be so described which is not occasioned by attack or fear of attack. When acts of self-preservation on the part of a State are strictly acts of self-defense, they are permitted by the law of nations, and are justified on principle, even though they may conflict with the normal rights of other States.<sup>1</sup>

The steps which a State may take in order to defend itself, within its own domain, are generally regarded as the mere exercise of the right of political independence. Military and naval forces may be established, and fortifications erected. Such instrumentalities may, however, by reason of their magnitude or location, be out of proportion to the legitimate defensive requirements of the State; and in such case, the circumstance that they are developed or established within places under the control of the territorial sovereign does not lessen their threatening aspect, or diminish the menace to the general peace. The international society may, therefore, not unjustly endeavor to restrain that sovereign from acquiring a military power obviously designed to enable the possessor to fulfill aggressive ambitions rather than safeguard its territories from attack.<sup>2</sup> It is, however, difficult to align opinion against the propriety of the conduct of a State that professes to act on ground of self-defense and within the limits of its own domain, because of the likelihood of divergent opinions whether the requirements of that defense excuse or demand the steps that are taken. This is notably the case when national exigencies are invoked in justification for the establishment of permanent fortifications. Thus it may prove to be impossible to establish that the international society as such disapproves of the particular military achievement. Moreover, political considerations may project themselves,

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that "Governments will (1) Not have recourse to refusal of entry and the expulsion of refugees legally admitted to the country except in cases in which their presence would represent a menace to public order and security; . . . (5) Substitute for expulsion, in the case of legally admitted refugees who are recognised as dangerous and are unable to obtain visas, measures of security of an internal character; such measures should not have the character of criminal penalties and should be applied for a specified period." (League of Nations, *Official Journal*, 1935, 595, and 657-658.)

§ 65.<sup>1</sup> "The first interest of a society, national or international, is justice; and justice is violated when any State which has not failed in its duty is subjected to aggression intended for the preservation or perfection of another." (Westlake, 2 ed., I, 312.) Compare Rivier, I, 277.

<sup>2</sup> Hall, Higgins' 8 ed., 51, where it is said: "If a country offers an indirect menace through a threatening disposition of its military force, and still more through clear indications of dangerous ambition or of aggressive intentions, and if at the same time its armaments are brought up to a pitch evidently in excess of the requirements of self-defence, so that it would be in a position to give effect to its intentions, if it were allowed to choose its opportunity, the State or States which find themselves threatened may demand securities, or the abandonment of the measures which excite their fear, and if reasonable satisfaction be not given they may protect themselves by force of arms." See in this connection the treatment applied to Germany through the military, naval and aerial clauses of the Treaty of Versailles, of June 28, 1919. Cf. Part V thereof.

and serve effectually to remove the problem from the domain of law to that of politics, and to leave unfettered the aggressively minded State as it goes on from strength to strength, under a plea of self-defense. Accordingly, it can not yet be confidently maintained that in general the mere enlargement or broadening of military power by an independent State, confined to acts committed within the limits of its own territory, is as yet in practice deemed to constitute internationally illegal conduct.

A State may of course agree to curtail its freedom of action, and so to render itself less dangerous to its neighbors.<sup>3</sup> It is not likely, however, to give up voluntarily a relative military advantage attributable, for example, to the achievements of its strong arm within its own domain; and it is only when that advantage is in fact successfully challenged and forcibly removed that any loss or impairment of freedom is acknowledged.

The terms of the Covenant of the League of Nations announce the recognition by the members thereof of the principle that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with the national safety and the enforcement by common action of international obligations. While the Council of the League is empowered merely to formulate plans for reduction, subject to adoption by the members, the latter, after the adoption of them, agree not to exceed the limits fixed by those plans without the concurrence of the Council.<sup>4</sup> This arrangement is significant proof of the international interest already evinced in the military activities of the individual State.

On grounds of self-defense a State may, as will be seen, deem itself justified in interfering with the political independence of another.<sup>5</sup> On similar grounds a State may employ force outside of its own domain, as in the territory of a neighboring country, or upon the high seas in restraint of a foreign vessel, without, however, contemplating such interference and frankly disclaiming any design to effect it. As such acts are, in times of peace, normally regarded as unlawful because in derogation of the rights of the State whose territory is invaded or whose ships are subjected to control, there is general unwillingness to recognize any excuse as justifying what is commonly forbidden, save under special if not extraordinary circumstances. These may arise. They are to be observed in certain enlightening cases affecting the United States. These cases illustrate what has been and what may be done without betokening interference with rights of political independence or without impairment of the territorial integrity of a State whose domain is invaded.<sup>6</sup>

<sup>3</sup> See, for example, Art. 1 of Treaty to Avoid or Prevent Conflicts between the American States, concluded at the Fifth International Conference of American States at Santiago, May 3, 1923, U. S. Treaty Vol. IV, 4692.

<sup>4</sup> Art. VIII. It is there also provided that the plans formulated by the Council shall be subject to reconsideration and revision at least every ten years.

See Report by Committee of Experts on Budgetary Questions, Preparatory Commission for the Disarmament Conference, Feb. 1931, League of Nations Document, C. 182. M. 69. 1931, IX.

<sup>5</sup> Intervention, Self-Defense, *infra*, § 70. See, Charles E. Hughes, *Our Relations to the Nations of the Western Hemisphere*, Princeton, 1928, 81-83.

<sup>6</sup> Intervention, In General, *infra*, § 69.

## b

## Invasion of Territory

## (1)

§ 66. **The Case of the *Caroline*.** During an insurrection in Canada in 1837, the insurgents secured recruits and supplies from the American side of the border. There was an encampment of one thousand armed men organized at Buffalo, and located at Navy Island in Upper Canada; there was another encampment of insurgents at Black Rock, on the American side. The *Caroline* was a small steamer employed by these encampments. On December 29, 1837, while moored at Schlosser, on the American side of the Niagara River, and while occupied by some thirty-three American citizens, the steamer was boarded by an armed body of men from the Canadian side, who attacked the occupants. The latter merely endeavored to escape. Several were wounded; one was killed on the dock; only twenty-one were afterwards accounted for. The attacking party fired the steamer and set her adrift over Niagara Falls. In 1841, upon the arrest and detention of one Alexander McLeod, in New York, on account of his alleged participation in the destruction of the vessel, Lord Palmerston avowed responsibility for the destruction of the *Caroline* as a public act of force in self-defense, by persons in the British service. He therefore demanded McLeod's release. McLeod was, however, tried in New York, and acquitted.<sup>1</sup> In 1842 the two Governments agreed on principle that the requirements of self-defense might necessitate the use of force. Mr. Webster, Secretary of State, denied, however, that the necessity existed in this particular case, while Lord Ashburton, the British Minister, apologized for the invasion of American territory.<sup>2</sup> Said Mr. Webster in the course of a communication to the British Minister, August 6, 1842:

Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.<sup>3</sup>

The facts in the case of the *Caroline* seem to have satisfied these requirements.<sup>4</sup> There was a threatened attack on British territory which the sovereign thereof possessed the right to prevent and resist. In this respect that which required protection differed sharply from a mere national interest or policy.<sup>5</sup>

§ 66.<sup>1</sup> See *infra*, Exemptions from Territorial Jurisdiction, Individual Members of Foreign Military forces, § 249.

<sup>2</sup> The statement of facts concerning the *Caroline* is based on a fuller statement contained in Moore, Dig., II, 409-411. See, also, Lord Ashburton, British Minister, to Mr. Webster, Secy. of State, July 28, 1842, Moore, Dig., II, 411; Mr. Webster, Secy. of State, to Lord Ashburton, Aug. 6, 1842, *id.*, II, 412.

<sup>3</sup> Webster's Works, VI, 301, 302, Moore, Dig., II, 412. See R. Y. Jennings, "The Caroline and McLeod Cases," *Am. J.*, XXXII, 82.

<sup>4</sup> Hall, Higgins' 8 ed., 323-324; Westlake, 2 ed., I, 313-314; Autobiography of Lord Campbell, 2 ed., 1881, 19, quoted in Moore, Dig., II, 414.

<sup>5</sup> In the Case of the Fur Seal Arbitration, between the United States and Great Britain,



Again, the foreign State within whose territory the hostile operations were in progress, lacked the power at the time to protect its neighbor by removing the source of danger. Thus, the British force did in one sense that which the United States itself would have done, had it possessed the means and disposition to perform its duty. Finally, there was instant necessity, requiring immediate action.<sup>6</sup> It was the presence of all of these circumstances that combined to justify the British plea.<sup>7</sup>

## (2)

§ 67. **The Pursuit of Villa, 1916.** For some time prior to March, 1916, the frontier of the United States along the lower Rio Grande was thrown into a state of constant apprehension and turmoil because of frequent and sudden incursions into American territory and depredations and murders on American soil by Mexican bandits, who took the lives and destroyed the property of American citizens, sometimes carrying such individuals across the international

1893, the former State sought justification for its conduct in preventing the killing of seals in Bering Sea by foreign vessels, on grounds of self-defense. This contention was successfully met by British counsel by showing to the satisfaction of the Court that what the United States sought to defend was an interest rather than a right of property recognized as such by international law. See oral argument of Mr. Carter in behalf of the United States, *Fur Seal Arbitration, Proceedings*, XII, 101-102, 246-249; oral argument of Sir Charles Russell, *id.*, XIII, 298-300, 301-308.

<sup>6</sup> Declared Sir Charles Russell in the course of his oral argument in the *Fur Seal Arbitration*: "The occasions for acts of self-defence, or self-preservation, are occasions of emergency, — sudden emergency — occasions when there is no time (to use the expressive language of an eminent statesman of the United States, to which I shall refer), — for deliberation, no time for contrivance, no time for warning, no time for diplomatic expostulation. That is the only idea at the bottom of all those exceptional acts of self-defence or self-preservation." *Fur Seal Arbitration, Proceedings*, XIII, 299.

<sup>7</sup> Hall, Higgins' 8 ed., § 84.

On grounds of self-defense the United States, while at war with Great Britain, invaded, in 1814, West Florida, which was then Spanish territory. Moore, *Dig.*, II, 402, and documents there cited.

In 1818, by reason of the failure of Spanish authorities to check incursions of Spanish Indians into American territory, General Jackson invaded West Florida and occupied St. Marks, Pensacola and Fort Carlos de Baranças. See statement in Moore, *Dig.*, II, 403-404, and documents there cited from American State Papers, *For. Rel.*, IV, 496, 776-808; President Monroe, Annual Message, Nov. 16, 1818, *id.*, 215, Moore, *Dig.*, II, 404; Mr. Adams, Secy. of State, to Mr. Erving, American Minister to Spain, Nov. 28, 1818, American State Papers, *For. Rel.*, IV, 539, Moore, *Dig.*, II, 405, in which it was declared that General Jackson took possession of the places occupied by him "not in a spirit of hostility to Spain, but as a necessary measure of self-defense; giving notice that they should be restored whenever Spain should place commanders and a force there able and willing to fulfill the engagements of Spain towards the United States, or of restraining by force the Florida Indians from hostilities against their citizens." *Cf.* also Memorandum by J. R. Clark, Jr., Solicitor, Dept. of State, on the Right to Protect Citizens in Foreign Countries by Landing Forces, Department of State, Division of Information, 3 ed. (1933), p. 53.

Amelia Island, Spanish territory, at the mouth of St. Mary's River near the boundary of Georgia, was taken in 1817 by adventurers, claiming to act under authority of the South American insurgent governments. Feeble effort was made by Spain to recover possession. The island was made a channel for illicit introduction of slaves into the United States, and for other purposes detrimental to the safety of the country. The United States therefore occupied the island in 1817. Said Mr. Adams, Secy. of State, to Mr. Hyde de Neuville, French Minister, Jan. 27, 1818: "When an island is occupied by a nest of pirates, harassing the commerce of the United States, they may be pursued and driven from it, by authority of the United States, even though such island were nominally under the jurisdiction of Spain, Spain not exercising over it any control." MS. Notes to *For. Leg.*, Moore, *Dig.*, II, 408. See also Mr. Adams, Secy. of State, to Mr. Erving, Minister to Spain, Nov. 11, 1817, MS. Inst. United States Ministers, VIII, 169, Moore, *Dig.*, II, 406; President Monroe, Annual Message, Dec. 2, 1817, American State Papers, *For. Rel.*, IV, 130, Moore, *Dig.*, II, 407.

boundary with the booty seized.<sup>1</sup> The bandit Francisco Villa early in March, of that year, after having been guilty of the barbarous slaughter of innocent American citizens in Mexican territory,<sup>2</sup> proceeded slowly with his followers towards the American frontier. The Mexican authorities appear to have been fully cognizant of his movements, which were not, however, hindered.<sup>3</sup> On the night of March 9, 1916, Villa and his band crossed the boundary and made an unprovoked attack on American soldiers and citizens at Columbus, New Mexico, thereby causing the death of sixteen Americans and the destruction by fire of the principal buildings of the town.<sup>4</sup>

Thereupon, the marauders were driven back across the border by American cavalry, and subsequently, as soon as a sufficient force could be collected, were pursued into Mexico by an American military force in the effort to capture or destroy them.<sup>5</sup>

On March 10, the Mexican authorities proposed to the Government of the United States a plan permitting Mexican forces to enter American territory in pursuit of bandits, and acknowledging a reciprocal right to American forces to cross into Mexican territory "if the raid effected at Columbus should unfortunately be repeated at any other point of the border."<sup>6</sup> In accepting this

§ 67. <sup>1</sup> The language employed in the text is substantially that of Mr. Lansing, Secy. of State, in a communication to the Secy. of Foreign Relations of the *de facto* Government of Mexico, June 20, 1916, For. Rel. 1916, 581-582, where he added: "American garrisons have been attacked at night, American soldiers killed and their equipment and horses stolen; American ranches have been raided, property stolen and destroyed, and American trains wrecked and plundered. The attacks on Brownsville, Red House Ferry, Progreso Post Office, and Las Peladas, all occurring during September last, are typical. In these attacks on American territory, Carrancista adherents, and even Carrancista soldiers took part in the looting, burning and killing. Not only were these murders characterized by ruthless brutality, but uncivilized acts of mutilation were perpetrated. Representations were made to General Carranza and he was emphatically requested to stop these reprehensible acts in a section which he has long claimed to be under the complete domination of his authority. Notwithstanding these representations and the promise of General Nafarrete to prevent attacks along the international boundary, in the following month of October a passenger train was wrecked by bandits and several persons killed seven miles north of Brownsville, and an attack was made upon United States troops at the same place several days later. Since these attacks leaders of the bandits well known both to Mexican civil and military authorities, as well as to American officers, have been enjoying with impunity the liberty of the towns of northern Mexico. So far has the indifference of the *de facto* government to these atrocities gone that some of these leaders, as I am advised, have received not only the protection of that government, but encouragement and aid as well."

<sup>2</sup> *Id.*, 582.

<sup>3</sup> *Id.*, 583.

<sup>4</sup> See telegram of Mr. Polk, Acting Secy. of State, to all American consular officers in Mexico, and to Mr. Parker at Mexico City, March 14, 1916, For. Rel. 1916, 490.

See generally, in this connection, statement in Hackworth, Dig., II, § 150, and documents there cited.

<sup>5</sup> *Cf.* telegram of Mr. Polk, Acting Secy. of State, to all American consular officers in Mexico, and to Mr. Parker at Mexico City, March 14, 1916, For. Rel. 1916, 490; also communication of Mr. Lansing, of June 20, above cited, *id.*, 581, 583, where it was said: "Without cooperation or assistance in the field on the part of the *de facto* Government, despite repeated requests by the United States, and without apparent recognition on its part of the desirability of putting an end to the systematic raids, or of punishing the chief perpetrators of the crimes committed, because they menaced the good relations of the two countries, American forces pursued the lawless bands as far as Parral, where the pursuit was halted by the hostility of Mexicans, presumed to be loyal to the *de facto* Government, who arrayed themselves on the side of outlawry and became in effect the protectors of Villa and his band."

<sup>6</sup> Telegram of Mr. Silliman, American Consul at Guadalajara, to Mr. Lansing, Secy. of State, March 10, 1916, For. Rel. 1916, 485.

proposal on March 13,<sup>7</sup> the Department of State was under the impression that the Mexican authorities consented to the punitive expedition against Villa.<sup>8</sup> Those authorities denied, however, that they had yielded consent,<sup>9</sup> and demanded withdrawal of the American force.<sup>10</sup> They also thereupon suspended negotiations relative to terms of the agreement for the reciprocal passage of troops across the border.<sup>11</sup> In the meantime the United States had given definite assurance that the object of the punitive expedition was merely to eliminate the marauders, and that it would not trench upon the sovereignty of Mexico or ripen into intervention.<sup>12</sup> Conferences were, however, held between the American and Mexican military authorities at the border with a view to solving the problem. These proved abortive.<sup>13</sup> While they were in progress at El Paso, an attack was made on the night of May 5, by a band of Mexicans at Glen Springs, Texas, about twenty miles north of the border, resulting in the killing of American soldiers and civilians, the burning and sacking of property, and the carrying off of two Americans as prisoners.<sup>14</sup> On May 10, another body of American troops crossed the border, penetrating 68 miles into Mexican territory in pursuit of the marauders, but recrossing into Texas, on May 22. On that date Mr. Aguilar, the Mexican Foreign Secretary, addressed to Mr. Lansing a note which, in "discourteous tone and temper," impugned the good faith of the United States,

<sup>7</sup> Mr. Lansing, Secy. of State, to Mr. Silliman, American Consul, telegram, March 13, 1916, *id.*, 487.

<sup>8</sup> Mr. Polk, Acting Secy. of State, to Mr. Arredondo, Confidential Agent of the *de facto* Mexican Government, March 19, 1916, *id.*, 494.

<sup>9</sup> Mr. Arredondo to Mr. Polk, March 18, 1916, *id.*, 493; same to Mr. Lansing, April 13, 1916, *id.*, 515.

In the course of his note of June 20, 1916, to the Foreign Secretary of the *de facto* Mexican Government, Mr. Lansing declared: "It is admitted that American troops have crossed the international boundary in hot pursuit of the Columbus raiders and without notice to or the consent of your Government, but the several protestations on the part of this Government by the President, by this department, and by other American authorities, that the object of the expedition was to capture, destroy, or completely disperse the Villa bands of outlaws or to turn this duty over to the Mexican authorities when assured that it would be effectively fulfilled, have been carried out in good faith by the United States." *Id.*, 581, 588.

<sup>10</sup> Mr. Arredondo to Mr. Lansing, April 13, 1916, *id.*, 515.

<sup>11</sup> *Id.* In the course of his note of June 20, 1916, Mr. Lansing declared: "It was General Carranza who suspended through your note of April 12th all discussions and negotiations for an agreement along the lines of the protocols between the United States and Mexico concluded during the period 1882-1896, under which the two countries had so successfully restored peaceful conditions on their common boundary." See, for example, the agreement of June 4, 1896, Malloy's Treaties, I, 1177.

<sup>12</sup> See, for example, statement by President Wilson, March 25, 1916, *Am. J.*, X, Supp., 191; also telegram of Mr. Lansing, to Mr. Rodgers, Special Representative, April 14, 1916, *For. Rel.* 1916, 518; Resolution adopted by the Senate March 17, 1916, *Cong. Record*, LIII, 4274, also *For. Rel.* 1916, 491.

See comment on the punitive expedition by Dr. Octavio, Presiding Commissioner, in his Opinion of April 26, 1926, in the Case of the so-called Santa Isabel Claims against Mexico, before the Special Claims Commission, United States and Mexico, under convention of Sept. 10, 1923, Docket No. 449, *Am. J.*, XXVI, 172, 178.

<sup>13</sup> It should be observed that these conferences were productive of a memorandum *ad referendum* regarding the terms of withdrawal of the American troops. Gen. Carranza refused to ratify the arrangement because he was dissatisfied with the conditions imposed upon the Mexican Government. *Cf.* note of Mr. Lansing of June 20, 1916, *For. Rel.* 1916, 581, 584. Gen. Carranza apparently demanded the unconditional withdrawal of the troops, objecting to the claim of the United States to suspend it if any further incident might happen which should lead it to believe that Mexico was unable to protect the frontier as agreed upon. See note of Mr. Aguilar of May 22, 1916, *id.*, 552, 554.

<sup>14</sup> Note of Mr. Lansing of June 20, 1916, *id.*, 581, 585.

intimated that its design was to extend its sovereignty over Mexican territory, and demanded a definition of American political intentions as well as a withdrawal of the punitive expedition.<sup>15</sup> In his response repudiating such designs on the part of the United States, Secretary Lansing adverted to the deplorable conditions which gave rise to the expedition and the opposition which it had encountered from Mexican authorities, and declared that in view of the increasing menace to American territory from Mexican bandits through the inactivity or encouragement of the Carranza forces, it was unreasonable to expect the United States to withdraw its troops, or to refrain from sending others into Mexico when they offered the only efficient means of protecting American life and property.<sup>16</sup> Moreover, he declared that the existing inability of the Mexican Government to check marauding attacks served to make stronger the obligation of the United States to prevent them.<sup>17</sup> On June 22, the American expedition was in conflict with a Mexican force which attacked it.<sup>18</sup>

After further diplomatic negotiations in July, the problem was referred to a Joint Commission representative of the two Governments.<sup>19</sup> In November, 1916, the commissioners signed a protocol providing for the withdrawal of the American troops, but which was not ratified by General Carranza.<sup>20</sup> The Commission adjourned its meetings in January, 1917, and the same month orders were issued for the withdrawal of the troops, the last of which were in fact withdrawn during the following month. But Villa remained uncaptured.

It is believed that conditions justified the pursuit of Villa by an American

<sup>15</sup> For. Rel. 1916, 552.

<sup>16</sup> See communication to the Mexican Foreign Secretary, June 20, 1916, *id.*, 581, in the course of which he said: "The United States Government cannot and will not allow bands of lawless men to establish themselves upon its borders with liberty to invade and plunder American territory with impunity and, when pursued, to seek safety across the Rio Grande, relying upon the plea of their Government that the integrity of the soil of the Mexican Republic must not be invaded," 590.

In justification of the pursuit into Mexican territory in 1836, of predatory Indians, plundering and invading American soil from the Mexican border, Mr. Forsyth, Secy. of State, in a communication to Mr. Ellis, Minister to Mexico, Dec. 10, 1836, said in part: "You will find no difficulty in showing to the Mexican Government that it [the right] rests upon principles of the law of nations, entirely distinct from those on which war is justified — upon the immutable principles of self-defense — upon the principles which justify decisive measures of precaution to prevent irreparable evil to our own or to a neighboring people." Brit. and For. State Pap., XXVI, 1419, Moore, Dig., II, 420. See, also, statement in Moore, Dig., II, 418–420, *citing* Brit. and For. State Pap., XXV, 1089, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099; Mr. Evarts, Secy. of State, to Mr. Foster, Minister to Mexico, Aug. 13, 1878, For. Rel. 1878, 572, Moore, Dig., II, 425.

<sup>17</sup> For. Rel. 1916, 591.

<sup>18</sup> *Id.*, 593. In this connection see "Mexico and the United States," by George A. Finch, *Am. J.*, XI, 399. It will be recalled that the President, in June, 1916, summoned the entire National Guard of the United States to the Mexican border in order to protect American territory from invasion.

<sup>19</sup> The American Commissioners were Messrs. George Gray, Franklin K. Lane, and John R. Mott. Prof. Leo S. Rowe was Secretary of the American Commission. The Mexican Commissioners were Messrs. Luis Cabrera, Ignacio Bonillas, and Alberto J. Pani.

<sup>20</sup> On signing the protocol the American Commissioners informed their Mexican colleagues that, as a matter of national necessity, the policy of the Government must be to reserve the right to pursue marauders coming from Mexico into the United States, so long as conditions in northern Mexico were in their existing abnormal state. It was added that such a pursuit should not, however, be regarded by Mexico as in any way hostile to the Carranza Government, for those marauders were the common enemies of the two countries.

See Report of the Secretary of the American Section of the American and Mexican Joint Commission, of April 26, 1917, For. Rel. 1917, 916.

force. The argument of Secretary Lansing was based upon facts which offered no alternative. At no time did the United States admit that it lacked the right under the circumstances to penetrate Mexican territory. No political end was sought to be accomplished.<sup>21</sup>

c

§ 68. **Acts on the High Seas. The Case of the *Virginus*.** What may be done on the high seas is illustrated by the case of the *Virginus*. That vessel, the property of Cuban insurgents, and employed in aid of an existing insurrection in Cuba, was registered in the United States, and carried its flag. Upon later investigation it appeared that such registry was fraudulently secured by imposition on the American authorities, and that the vessel was not entitled to fly the American flag. On October 31, 1873, the *Virginus* was captured on the high seas by the Spanish cruiser *Tornado*, taken to Santiago de Cuba, where fifty-three of the persons on board, American, British and Cuban, were charged with piracy, tried by court martial, and shot.<sup>1</sup> The case raised two distinct legal questions: first, the right to capture the vessel; and secondly, the right to deal summarily with persons found on board.<sup>2</sup> Concerning the right of capture the discussion between the United States and Spain proceeded on unsatisfactory lines. The latter pleaded in defense that the *Virginus* was engaged in a piratical expedition; also that her fraudulent registry deprived her of the right to claim protection of the American flag.<sup>3</sup> It was agreed by a protocol of November 29, 1873, that Spain should restore the vessel, and the survivors of the passengers and crew, and salute the American flag on a specified date, unless Spain could prove to the satisfaction of the United States that the *Virginus*, at the time of her capture, was not entitled to carry the flag of the latter. In such case the salute was to be dispensed with, although a disclaimer of intent of indignity to its flag was to be expected by the United States.<sup>4</sup> Mr. Williams, Attorney-General, in an opinion of December 19, 1873, found that the vessel was not entitled to fly the American flag, by reason of her unlawful registry in the United States.

<sup>21</sup> Declared President Wilson in the course of an address at Long Branch, Sept. 2, 1916: "We ventured to enter Mexican territory only because there were no military forces in Mexico that could protect our border from hostile attack and our own people from violence, and we have committed there no single act of hostility or interference even with the sovereign authority of the Republic of Mexico herself. It was a plain case of the violation of our own sovereignty which could not wait to be vindicated by damages and for which there was no other remedy. The authorities of Mexico were powerless to prevent it." President Wilson's State Papers and Addresses, edited by Albert Shaw, New York, 1917, 311. Concerning the brief movement of American troops into Mexico June 15, 1919, in consequence of the wounding of persons in El Paso, Texas, by forces of Villa in conflict with the troops of Gen. Carranza at Juarez, see documents in For. Rel. 1919, II, 557-561, especially Mr. Lansing, Secy. of State, to the Mexican Ambassador, Aug. 26, 1919, *id.*, 560.

§ 68. <sup>1</sup> Concerning the *Virginus* see statement in Moore, Dig., II, 895, citing H. Ex. Doc. 30, 43 Cong., 1 Sess., 29, and 73, For. Rel. 1874, 923-1117; President Grant, special message, Jan. 5, 1874, H. Ex. Doc. 30, 43 Cong., 1 Sess., 1, Moore, Dig., II, 900; For. Rel. 1875, II, 1250; Mr. Fish, Secy. of State, to the Spanish Minister, April 18, 1874, For. Rel. 1875, II, 1178, 1192, Moore, Dig., II, 980.

<sup>2</sup> Concerning this question, see *infra*, § 232. It is to be observed that the British Government made no objection to the seizure of the vessel or to the detention of British persons on board. It did protest, however, against the treatment to which they were subjected.

<sup>3</sup> For. Rel. 1874, 923-1117. See, also, Moore, Dig., II, 967-968.

<sup>4</sup> H. Ex. Doc. 43 Cong., 1 Sess., 81, Moore, Dig., II, 896.

He was of opinion, however, that the fact that she had violated the municipal laws of the United States did not in itself give to Spain the right to capture the *Virginus* on the high seas.<sup>5</sup> On the other hand, President Woolsey of Yale took what Mr. Dana regarded as "an unassailable position," that ownership of the *Virginus* by Spanish subjects gave to Spain "jurisdiction" over the vessel.<sup>6</sup>

It is believed that justification for the seizure of the *Virginus* was not to be determined by reference to the right of the ship to fly the flag under which she sailed. The nationality of a vessel is not always decisive of the legality of measures to be directed against her. On grounds of self-defense an aggrieved State may subject a foreign ship to restraint on the high seas and in times of peace, if the conduct of those controlling the vessel is such as to render the seizure of her the necessary mode of warding off threatened and instant danger. Circumstances may in fact rarely combine to warrant such preventive action. In the case of the *Virginus* they appear to have been such as to impose no duty on the Spanish authorities to refrain from seizing the vessel until she entered Cuban waters.

When a foreign vessel, after having violated the municipal laws of a State within the territorial waters thereof, puts to sea to avoid detention, conditions justifying capture on the high seas on grounds of self-defense are rarely present. The prior misconduct of the ship does not necessarily indicate present danger of a repetition of similar wrongful conduct. The purpose of those controlling the vessel is usually to enable her to escape, rather than to cause her to resume locally offensive activities. The object, moreover, of pursuit and seizure is primarily to inflict a penalty rather than to prevent the recurrence of wrong-doing. Unless the vessel, at the time of capture, threatens to violate anew the rights of the offended State within its own waters, and unless the State to which the vessel belongs is then powerless to check further her hostile progress, requiring immediate restraint as a necessary deterrent, there are lacking the elements necessary to excuse interference with the further movements of the ship on grounds of self-defense.<sup>7</sup>

## 6

## INTERVENTION

## a

§ 69. **In General.** In a broad sense any form of external interference with the exercise by a State of its normal rights of any kind, whether pertaining to the control of territory or ships at sea, or to the enjoyment of political independence, may be deemed to constitute intervention. The various forms of interference are, however, so diverse in kind, and vary so greatly in the relative

<sup>5</sup> 14 Ops. Attys.-Gen., 340, Moore, Dig., II, 898.

<sup>6</sup> R. H. Dana, Jr., in communication to a Boston journal, Jan. 6, 1874, cited by Woolsey, 6 ed., 366. See, also, Scott's Cases, 320-322, note, in which Dr. Scott observes: "The *Virginus* was rightly captured by the Spanish authorities, provided it was, and such was the fact, in the employ of the Cuban insurgents. The jurisdiction is, therefore, twofold: piracy and self-defense, which latter, if it exists at all, exists as well on sea as on land."

<sup>7</sup> See Rights of Jurisdiction, The High Seas, Hot Pursuit, *infra*, § 236.

frequency with which in practice they recur, as to demand, for sake of clearness of thought, distinct and appropriate appellations.<sup>1</sup>

The term intervention is, therefore, here given a somewhat narrow and technical signification. It is not employed to refer to those cases where, for example, territory is temporarily invaded on grounds of self-defense, or for the protection of nationals resident therein, and with no further object or result. There are also eliminated the numerous instances of essentially non-political interference in which a State interposes in behalf of nationals deemed to have suffered wrong at the hands of another, and merely seeks to obtain compensatory damages in their behalf.<sup>2</sup> Nor is there included the demand for redress of a public wrong where the form of reparation involves no impairment of political independence or sacrifice of territory in opposition to the will of the sovereign.

The term intervention is here used simply to refer to the interference by a State in the domestic or foreign affairs of another in opposition to its will and serving by design or implication to impair its political independence.<sup>3</sup> Such

§ 69.<sup>1</sup> See, generally, Fauchille, 8 ed., §§ 300-320 (with bibliography); Calvo, 5 ed., I, 266-355; Arrigo Cavaglieri, *L'Intervento*, Bologna, 1913; Dana's Wheaton, §§ 63-72; W. M. Farag, *L'Intervention devant la cour permanente de Justice Internationale*, Paris, 1927; A. de Floeckher, *De l'Intervention*, Paris, 1896; Hall, Higgins' 8 ed., §§ 88-95; Hershey, revised ed., §§ 136-145; Henry G. Hodges, *The Doctrine of Intervention*, Princeton, 1915 (with bibliography in Appendix III); Lawrence, 115-135; Charles E. Martin, *The Policy of the United States as regards Intervention*, New York, 1921; Charles de Morillon, *Du Principe d'Intervention*, Dijon, 1904; Lauterpacht's 5 ed. of Oppenheim, I, §§ 134-140, with bibliography; Phillimore, 3 ed., I, 553-638; Pradier-Fodéré, I, 546-678; Rivier, I, 389-407; A. G. Stapleton, *Intervention and Non-Intervention, or The Foreign Policy of Great Britain from 1790-1865*, London, 1866; Ellery C. Stowell, *Intervention in International Law*, Washington, 1921 (with bibliography); Westlake, 2 ed., I, 317-321; P. H. Winfield, "The History of Intervention in International Law," *Brit. Y B*, 1922-1923, 130; Woolsey, 6 ed., 43-52. Also, see Moore, Dig., VI, 1-247; and documents there cited; Memorandum by J. R. Clark, Jr., Solicitor, Dept. of State, on Right to Protect Citizens in Foreign Countries by Landing Forces, 3 ed., 1934, I, 25.

<sup>2</sup> "The difference between intervention and interposition is most clearly drawn in the principles which have governed and the practice which has been followed by this country [the United States], for while it has been the studied policy most rigidly adhered to (with one or two isolated exceptions — for example, our political intervention in Cuba and perhaps Samoa) to refrain from interfering in the purely political affairs of other countries (but see Monroe Doctrine), yet no nation, it would seem, has with more frequency than this Government used its military forces for the purpose of occupying temporarily parts of foreign countries in order to secure adequate safety and protection for its citizens and their property.

"The United States has, either alone or jointly with other powers, many times interposed for the protection of American interests and American property, an action classified by Mr. Moore as non-political intervention in the affairs of foreign countries. While this action has at times resulted in a real interference in the political affairs of a foreign country, either with or without the request of a foreign government, at other times the interference in political affairs has been merely incidental — indeed, accidental — and not the main purpose of the action taken." (Memorandum by J. R. Clark, Solicitor of Dept. of State, on Right to Protect Citizens in Foreign Countries by Landing Forces, 3 ed., 1934, 33.)

See Proposals at Sixth International Conference of American States, *infra*, § 72A.

<sup>3</sup> Intervention takes place, declares Hall: "When a State interferes in the relations of two other States without the consent of both or either of them or when it interferes in the domestic affairs of another State irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it." Higgins' 8 ed., § 88. The same writer adds: "The right of independence is so fundamental a part of international law, and respect for it is so essential to the existence of legal restraint, that any action tending to place it in a subordinate position must be looked upon with disfavour, and any general grounds of intervention pretending to be sufficient, no less than their application in particular cases, may properly be judged with an adverse bias." (Higgins' 8 ed., § 89.)

The term intervention is not employed in the text to describe the interference or interposition by an independent State in the affairs of another, which by treaty or otherwise is de-

action may or may not be lawful. The gravity of what takes place whenever an act of intervention is committed is, however, such as to require, by way of justification, the presence of unusual if not extraordinary circumstances. Moreover, the legal value of these for such purpose is not to be derived from the power of the intervening State, but rather from the sinister and lawless conduct of that other whose freedom of will is opposed.

Unless a State is guilty of, or threatens to be guilty of wrongful conduct towards the outside world, whether directed generally against the family of nations, or in opposition to one of its members, there seems to be no just ground for interference.<sup>4</sup> It is the absence of internationally illegal conduct which in such case removes the possibility of lawful intervention.<sup>5</sup> Accordingly, President Roosevelt voiced his indignation in declaring on October 5, 1937, that "nations are fomenting and taking sides in civil warfare in nations that have never done them any harm. Nations claiming freedom for themselves deny it to others."<sup>6</sup> Whether a State is entitled to freedom from external interference by reason of the character of its conduct must be ascertained by reference to the requirements of the system of law that has been designed to promote international justice. Those requirements doubtless vary from time to time; but the principle upon which they rest is unchanging. Deference for it ought to grow as civilization advances. At the present time, however, and notably within the past decade, contempt for it has marked the conduct of some States in various quarters, especially outside of the Western Hemisphere, where intervening action has been the fruit of a policy that was seemingly unconcerned with the deterrents of law. While excuses for intervention have thus oftentimes been colorable, betraying unconcern for the blamelessness of the victim of interference, the American Republics have simultaneously taken a better stand, and have acquiesced in schemes of abstention that were respectful of the underlying principle.<sup>7</sup>

## b

§ 70. **Self-Defense.** It is subversive of justice among nations that any State should, in the exercise of its own freedom of action, directly endanger the peace and safety of any other which has done no wrong. Upon such an occurrence the State which is menaced is free to act. For the moment, it is justified in disre-

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pendent upon the former as a protector. Where such a relationship exists, interference does not, on account of the status of the ward, interfere with any right of independence.

*Cf.* Relationships Established between the United States and Certain Neighboring States, *supra*, §§ 19-24.

<sup>4</sup> Hall, Higgins' 8 ed., §§ 90 and 92.

<sup>5</sup> It should be observed that the wrong with which a State may be chargeable may be attributable to its impotence to maintain its supremacy in fact over its own domain or its own property, and thereby permit their use in such a way by a foreign power as to cause injury to a third State.

<sup>6</sup> Address at Chicago, Dept. of State Press Releases, Oct. 9, 1937, 275, 276. The President added: "It ought to be inconceivable that in this modern era, and in the face of experience, any nation could be so foolish and ruthless as to run the risk of plunging the whole world into war by invading and violating in contravention of solemn treaties the territory of other nations that have done them no real harm and which are too weak to protect themselves adequately. Yet the peace of the world and the welfare and security of every nation is today being threatened by that very thing." (*Id.*, 279.)

<sup>7</sup> See *infra*, § 83B.



garding the political independence of the aggressor and in so doing may be guided by the requirements of its own defense.<sup>1</sup> This freedom of action is due not merely to the circumstance that the continuance of the life of the State demands extraordinary measures, but rather to the fact that its safety is jeopardized by the essentially wrongful conduct of another.<sup>2</sup> It is not, therefore, the broad ground of self-preservation, but the narrower yet firmer basis of one form of self-preservation, that of self-defense, on which justification rests.

The nature of the conduct which menaces the safety of a foreign State is perhaps unimportant in determining the right of the latter to have recourse to intervention. It has been already observed, however, that an aggrieved State, although compelled on grounds of self-defense to resort to extraordinary measures, involving even the despatch of armed forces to foreign territory, may neither design nor effect interference with the political independence of the sovereign thereof, and may not in fact intervene.<sup>3</sup> It suffices to note that if interference constituting intervention is reasonably deemed to be required for the defense of the State whose safety is menaced, such action is not unlawful, and may be anticipated.<sup>4</sup>

### c

§ 71. **Prevention of Unlawful Intervention by Another State.** To prevent the illegal interference by one State with the political independence of another, a third State may doubtless on principle lawfully intervene, even though its own safety is not endangered by the action to which it is opposed. Justification rests upon the fact that any member of the family of nations is authorized to oppose so grave a violation of international law as the unwarranted interference with the political independence of one of their number.<sup>1</sup> It may prove to be extremely difficult, however, to establish that the original interference was internationally illegal, and sufficed to excuse the interference that followed. The propriety of such preventive action would be safeguarded were the inter-

§ 70. <sup>1</sup> Intervention to preserve rights of succession, as Professor Moore declares, "has never been exemplified in America." Dig., VI, 2. For that reason it is not discussed. That it lacks justification in law, is the opinion of Hall, who points out that: "International Law no longer recognises a patrimonial State. A country is not identified with its sovereign. He is merely its organ for certain purposes, and it has no right to interfere for an object which is personal to him" (Higgins' 8 ed., § 91.)

<sup>2</sup> Westlake, 2 ed., I, 309-312. See Charles E. Hughes, "Observations on the Monroe Doctrine," *Am. J.*, XVII, 611, 618-620; same author, *Our Relations to the Nations of the Western Hemisphere*, Princeton, 1928, 81-84.

It was on grounds of self-defense that Japan sought primarily to excuse its intervention in Manchuria in 1931-1932.

<sup>3</sup> *Cf.* The Pursuit of Villa, *supra*, § 67.

<sup>4</sup> States have not hesitated to act upon this principle. It has been invoked by the United States. See *infra*, § 83C.

§ 71. <sup>1</sup> The successful, though tardy effort of the United States to check the French intervention in Mexico, 1862-1867, was an application of this principle. Mr. Seward justified the opposition of his government on the ground that the wrongful treatment of Mexico "could not but be regarded by the people of the United States as injurious and menacing to their own chosen and endeared republican institutions." Mr. Seward, Secy. of State, to the French Minister, Dec. 6, 1865, H. Ex. Doc. 73, 39 Cong., 1 Sess., II, 347, Moore, Dig., VI, 501. *Cf.* interference of Great Britain in Portugal in 1826, to thwart Spanish aid to Don Miguel, the pretender to the Portuguese crown. *Cf.* Dana's Wheaton, § 68.

See in this connection, Oppenheim, *Lauterpacht's* 5 ed., I, § 135 (4), p. 252.

national society disposed by any process to proscribe particular acts or forms of conduct, and the circumstances when they are not to be tolerated.<sup>2</sup> Until it is prepared to do so, divergence of opinion is bound to recur concerning the reasonableness of acts of intervention which outside States may themselves justly endeavor to thwart.

When the third State intervenes under a treaty guaranteeing protection to another against foreign interference with its territorial integrity or political independence, the situation is the same. The treaty merely imposes a legal duty upon the guarantor to take certain action, which, in the absence of agreement, might also not unlawfully be taken. The intervention is in such case justified not by reason of the treaty, but on account of the illegal character of the conduct which it is sought to check.<sup>3</sup>

## d

### Domestic Affairs

#### (1)

§ 72. **Harsh Treatment of Nationals.** The nature and extent of the latitude accorded a State in the treatment of its own nationals has been observed elsewhere.<sup>1</sup> It has been seen that certain forms or degrees of harsh treatment of such individuals may be deemed to attain an international significance because of their direct and adverse effect upon the rights and interests of the outside world. For that reason it would be unscientific to declare at this day that tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of them.<sup>2</sup> If it can be shown that such acts are immediately and necessarily injurious to the nationals of a particular foreign State, grounds for interference by it may be acknowledged. Again, the society of nations, acting collectively, may not unrea-

<sup>2</sup> This again is a difficult task, the useful performance of which calls for the prohibition of particular acts rather than of conduct described in terms that are themselves expressive of complicated conclusions. Furthermore, it calls also for precision of thought and statement as to the circumstances when disregard of the prohibition is not to be deemed excusable.

<sup>3</sup> A treaty purporting to bind the parties to assist each other in case of a war in which either may become engaged, may embrace an undertaking to come to the aid of a ruthless intervening State even in case of just resistance against its operations. Such an alliance in so far as it is designed to strengthen a wrong-doer in its opposition to measures lawfully directed against it, is detrimental to the welfare of the family of nations because necessarily at variance with the principles of international justice.

§ 72. <sup>1</sup> Treatment of Nationals, *supra*, § 55.

<sup>2</sup> Cf. Hall, Higgins' 8 ed., § 92. According to the preamble of the treaty of July 6, 1827, concluded by Great Britain, France and Russia with reference to the intervention of those powers in the struggle of the Greeks for independence, sentiments of humanity, the tranquillity of Europe, a condition of anarchy causing impediments to foreign commerce, and giving opportunity for acts of piracy, and also compliance with the invitation of the Greeks, were referred to in justification of the stand to be taken. *Nouv. Rec.* VII, 282-283. See, also, Dana's Wheaton, § 69; Abdy's Kent (1878), 50, quoted in Moore, Dig., VI, 4-5.

"As an example of intervention to put an end to abhorrent conditions, the case of Bulgaria in 1876 may be taken." Moore, Dig., VI, 3, note. See, also, Final Act of the Congress of Berlin, July 13, 1878. *Nouv. Rec. Gén.*, 2 Sér., III, 449.

Cf. Mr. Wilson, Acting Secy. of State, to Mr. W. S. Bennett, June 28, 1909, relative to the massacre of Armenians in Asia Minor, For. Rel. 1909, 557.

sonably maintain that a State yielding to such excesses renders itself unfit to perform its international obligations, especially in so far as they pertain to the protection of foreign life and property within its domain.<sup>3</sup> The propriety of interference obviously demands in every case a convincing showing that there is in fact a causal connection between the harsh treatment complained of, and the outside State that essays to thwart it.

The significant fact of recent years has been the reluctance of States generally, embracing the United States, to do more than give expression to their shocked sensibilities on occasions when harsh treatment has seemingly been flagrant and inhuman. Massacres of Armenians in Turkey in 1915-1916,<sup>4</sup> and those attending the period of terror in Russia in 1918,<sup>5</sup> failed to arouse assertions, by the United States that such conduct on the part of either of those States violated international law. Nor was that conduct productive of intervention within the meaning of that term as here employed.<sup>6</sup>

<sup>3</sup> Since the World War of 1914-1918, there has developed in many quarters evidence of what might be called an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual State; and with that interest there has been manifest also an increasing readiness to seek and find a connection between domestic abuses and the maintenance of the general peace. See, Art. XI of the Covenant of the League of Nations, U. S. Treaty Vol. III, 3339.

<sup>4</sup> On Oct. 4, 1915, Mr. Lansing, Secy. of State, instructed the American Ambassador, Mr. Morgenthau, to use his good offices for the "amelioration of condition of the Armenians, informing Turkish Government that this persecution is destroying the feeling of good will which the people of the United States have always held towards Turkey." For. Rel. 1915, *Supp.*, 988; also same to Mr. Philip, American Chargé d'Affaires, Feb. 12, 1916, For. Rel. 1916, *Supp.*, 847.

<sup>5</sup> For. Rel. 1918, Russia, I, 683-719.

<sup>6</sup> By a circular telegram of Sept. 20, 1918, addressed to all American diplomatic missions, Mr. Lansing, Secy. of State, stated that the Government was in receipt of information from reliable sources that "the peaceable Russian citizens of Moscow, Petrograd and other cities" were suffering from "an openly avowed campaign of mass terrorism" and were "subject to wholesale executions." He said that "thousands of persons have been shot without even a form of trial; ill-administered prisons are filled beyond capacity and every night scores of Russian citizens are recklessly put to death; and irresponsible bands are venting their brutal passions in the daily massacre of untold innocents." He stated that in view of the earnest desire of the people of the United States to befriend the Russian people and lend them all possible assistance in their struggle to reconstruct their nation upon principles of democracy and self-government, and acting therefore solely in the interest of the Russian people themselves, his Government felt "that it cannot be silent or refrain from expressing its horror at this existing state of terrorism," and believed that in order successfully to check the further increase of the indiscriminate slaughter of Russian citizens "all civilized nations should register their abhorrence of such barbarism." The head of each American diplomatic mission was instructed to inquire, therefore, whether the Government to which he was accredited would be disposed to take some immediate action, "which," it was said, "is entirely divorced from the atmosphere of belligerency and the conduct of war, to impress upon the perpetrators of these crimes the aversion with which civilization regards their present wanton acts." (For. Rel. 1918, Russia, I, 687-688.) A series of generally sympathetic responses was received. *Id.*, 688-719.

On Sept. 5, 1918, the Swiss, Danish and Netherland Ministers at Petrograd, together with the Swedish, Norwegian, Spanish and Persian Chargés, and the German Consul General at that capital, addressed to the Soviet Commissar of the Northern Commune (Zinoviev) a communication expressing in the name of their governments "their profound indignation at the reign of terror instituted in the cities of Petrograd, Moscow, etc." After adverting to, and specifying the acts of violence which had been committed, and which were declared to be "incomprehensible on the part of men who profess their wish to promote the happiness of mankind" and to "call forth the indignation of the civilized world," it was said that the diplomatic corps considered it its duty "to inform Commissar Zinoviev of the feelings of reprobation" which animated it, and made "protest energetically against the arbitrary acts" which were being committed every day. The representatives of the powers also made "all

In relation to the course pursued by the Government of Mexico towards religious activities in that country in 1935, President Roosevelt declared, in a communication which was made public on November 18, 1935: "In respect to the rights enjoyed by Mexican citizens living in Mexico, it has been the policy of this administration to refrain from intervening in such direct concerns of the Mexican Government. That policy of non-intervention I shall continue to pursue. . . . While this Government does not assume any accurate determination of what the facts in such domestic concerns of other governments may be, this policy of non-intervention, however, can in no sense be construed as indifference on our part."<sup>7</sup>

## (2)

§ 72A. **Proposals at Sixth International Conference of American States, 1928.** At the Sixth International Conference of American States held at Habana, January 16 to February 20, 1928, the report by Dr. Maúrtua of Peru, to the Second Committee on Public International Law and Frontier Police, concerning Project II from the Commission of Jurists (which had previously assembled at Rio de Janeiro for the purpose of undertaking the codification of international law) omitted Article 3 of that Project declaring that: "No State may intervene in the internal affairs of another."<sup>1</sup> Dr. Guerrero, of Salvador, Chairman of the Committee, on February 18, 1928, at the last plenary session of the Conference, offered the following resolution:

The Sixth International Conference of American States,

Considering that at this time the firm decision of every delegation has been expressed to the effect that the principles of non-intervention and of the absolute juridical equality of states be established in a categorical manner,

## RESOLVES:

That no state has the right to intervene in the internal affairs of another.<sup>2</sup>

Mr. Hughes, the head of the American Delegation, in order to make clear the position of his country in relation to the proposal, said in part:

Now what is the real difficulty? Let us face the facts. The difficulty, if there is any, in any one of the American Republics, is not of any external

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express reservations" as to the right of their governments to demand the satisfactions which might be considered necessary and "to render personally responsible before the courts all perpetrators of the criminal acts" which had been or might be committed in the future. (*Id.*, 697-698.) A reply from the Soviet Commissar for Foreign Affairs, M. Chicherin, branded the communication of Sept. 5, 1918, as "an act of grave interference in the internal affairs of Russia," and after an extended review of the Russian position, concluded with the following words: "We reject most energetically the interference of the neutral capitalistic powers in favor of the Russian *bourgeoisie* and declare that in every attempt on the part of the representatives of these powers to exceed the limits for the lawful protection of their citizens, we will see an attempt to support the Russian counter-revolution." (*Id.*, 705-708.)

<sup>7</sup> Communication to Mr. Martin H. Carmody, Supreme Knight, Knights of Columbus, New Haven, Conn., received, Nov. 14, 1935, *New York Times*, Nov. 18, 1935.

§ 72A. <sup>1</sup> Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, 8-12.

The Committee had unanimously adopted the report by Dr. Maúrtua, *id.*, 12.

<sup>2</sup> *Id.*, 13.

aggression. It is an internal difficulty, if it exists at all. From time to time there arises a situation most deplorable and regrettable in which sovereignty is not at work, in which for a time in certain areas there is no government at all, in which for a time and within a limited sphere there is no possibility of performing the functions of sovereignty and independence. Those are the conditions that create the difficulty with which at times we find ourselves confronted. What are we to do when government breaks down and American citizens are in danger of their lives? Are we to stand by and see them killed because a government in circumstances which it cannot control and for which it may not be responsible can no longer afford reasonable protection? I am not speaking of sporadic acts of violence, or of the rising of mobs, or of those distressing incidents which may occur in any country however well administered. I am speaking of the occasions where government itself is unable to function for a time because of difficulties which confront it and which it is impossible for it to surmount.

Now it is a principle of international law that in such a case a government is fully justified in taking action — I would call it interposition of a temporary character — for the purpose of protecting the lives and property of its nationals. I could say that that is not intervention. One can read in text books that that is not intervention. But if I should subscribe to a formula which others thought might prevent the action which a nation is entitled to take in these circumstances, there might come later the charge of bad faith because of acceptance of a formula with one interpretation in my mind while another interpretation of it is in the mind of those proposing the formula. So it was necessary to have a fair understanding. Of course the United States cannot forego its right to protect its citizens. No country should forego its right to protect its citizens. International law cannot be changed by the resolutions of this Conference. International law remains. The rights of nations remain, but nations have duties as well as rights. We all recognize that. This very formula, here proposed, is a proposal of duty on the part of a nation. But it is not the only duty. There are other obligations which courts, and tribunals declaring international law, have frequently set forth; and we cannot codify international law and ignore the duties of states, by setting up the impossible reign of self-will without any recognition upon the part of a state of its obligations to its neighbors.<sup>3</sup>

On April 26, 1928, in the course of his presidential address before the American Society of International Law, on the Outlook for Pan Americanism, Mr. Hughes referred to the project mentioned as containing a "fragmentary and inadequate declaration on the subject of intervention," reducing the problem of the codification of the law on that subject "to an engaging and delusive simplicity." He added that there was no definition of "intervention" and none of "internal affairs," that no distinction between action that was justified in certain exigencies, and action that was not justified was attempted, that the learning, and the discriminating postulates of international law found no place in

<sup>3</sup> *Id.*, 13, 14-15.

the text, and that the manifest defect of the project lay in its failure to set forth the rights and duties of States in any manner that could be regarded as satisfactory and thus provide an appropriate context.<sup>4</sup>

The foregoing strictures accentuate the distinction noted elsewhere, between intervention and non-political acts of interposition, as well as the importance, for sake of clearness of thought, of attaching to the former term the relatively narrow and technical signification hereinabove given it.<sup>5</sup> Those strictures do not, however, intimate that the conduct of a State normally pertaining to its domestic affairs may not be productive of, and fairly deemed to justify conduct to which the term intervention is a reasonable and perhaps necessary description.<sup>6</sup>

### (3)

§ 73. **Revolution.** A revolution or a civil war within the domain of a particular State may be a source of grave concern to a neighboring power. Its commerce may be adversely affected; its obligations as a neutral (in case the insurgents are recognized as belligerents) may prove to be exacting and onerous. Nevertheless, the fight for the reins of government is not in itself internationally wrongful. Until the conduct of hostilities, by reason of the mode or place of operations, or through some other circumstance, menaces the safety of the outside State, or otherwise directly interferes with the exercise by it of some definite right which should be respected, no ground for intervention is apparent. Prior, therefore, to such a time, intervention to assist in suppressing or aiding the revolution must, on principle, lack justification.<sup>1</sup> For these reasons, as has been observed elsewhere, acts on the part of an outside State in the form of military or other aid given to an existing government to enable it to overcome an insurgent movement of large proportions within its territory, in so far as they constitute intervention may prove to be difficult to excuse save on the grounds here noted.<sup>2</sup>

Nor is the situation legally altered by reason of the fact that intervention occurs in pursuance of a treaty of guaranty, or that such action is in response to an invitation from either party to the conflict.<sup>3</sup> Foreign interference, howsoever invoked, is necessarily directed against a portion of the population of a

<sup>4</sup> *Proceedings, Am. Soc. Int. Law*, 1928, 1, 9.

<sup>5</sup> See Intervention, In General, *supra*, § 69.

<sup>6</sup> See Intervention, Chronic Disregard of International Obligations, *infra*, § 75.

See also Non-intervention in the Western Hemisphere, *infra*, § 83B.

§ 73. <sup>1</sup> Pradier-Fodéré, I, 378; Fauchille, 8 ed., §§ 310-312. See documents in Moore, Dig., VI, 6-10, showing the attitude of the United States respecting the possible intervention of certain European powers during the War of the Rebellion, particularly Circular of Mr. Seward, Secy. of State, March 9, 1863, Dip. Cor. 1863, II, 812-814; communication of Mr. Seward, Secy. of State, to Mr. Dayton, Minister to France, No. 278, Dec. 29, 1862, Dip. Cor. 1863, I, 639, 640-641. For an illuminating commentary on the attitude of the British Government towards the Confederacy, see *The Education of Henry Adams*, by himself, Boston, 1918, Chap. X.

<sup>2</sup> See Recognition of New Governments, Some Conclusions, *supra*, § 45D.

<sup>3</sup> But see case of Belgium, 1830, set forth in Wheaton, *Hist. Law of Nations*, Part 4, sec. 26. Cf. earlier "Instances of interference for or against revolutions," in Woolsey, 6 ed., 49-53. The intervention of Great Britain, France and Russia in the Greek insurrection against Turkey in 1827 was in compliance with the request of the Greeks. Cf. Treaty of July 6, 1827, concluded by France, Great Britain and Russia. *Nouv. Rec.*, VII, 282-283.

foreign State, and is thus a denial of its right to engage in or suppress a revolution, or of employing its own resources to retain or acquire control over the government of its own country.<sup>4</sup>

It must be acknowledged that the normal obligation of outside States not to intervene may be regarded as inapplicable by those whose territory is in close proximity to the area of hostilities, especially if the conflict be prolonged and ruthlessly waged with contempt for the dictates of humanity. In such case, however, it is not the bare fact of revolution, but rather its causal connection with the impairment of definite rights possessed by the aggrieved States, which must be relied upon to excuse interference. Unfortunately there has been a tendency to imply such a consequence when the interests rather than the legal rights of foreign States have suffered from the prolongation of the conflict. Nor has there been alertness to distinguish between the two, or to respect the distinction when the reason for it was obvious.

It is not here sought to discuss the extent to which the international non-intervention system applied by certain European States in the course of the civil strife that prevailed in Spain, 1936–1939, was a deterrent of intervention in that conflict.<sup>5</sup> Of equal, if not greater significance to the international society is the fact that the intervention of certain interested powers not only took place, but also facilitated the effort of the insurgent movement under General Franco to attain complete success.<sup>6</sup> It may be observed that the Department of State found occasion to declare late in August, 1936: "The American Government has stressed the complete impartiality of its attitude and has publicly stated that, in conformity with its well-established policy of non-interference with internal affairs in other countries, either in time of peace or in the event of civil strife, it will, of course, scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation."<sup>7</sup>

e

§ 74. **Intervention by a Body of States.** On principle, a group of States acting in concert has no broader right of intervention than that possessed by a single State. Clean motives may inspire their operations. Unless, however, such a group is fairly representative of the entire family of nations, so as to be

<sup>4</sup> Declared Lawrence: "Any intervention in an internal struggle is an attempt to prevent the people of a State from settling their own affairs in their own way, and, as such, a gross violation of national independence. The request of one of the parties cannot alter the quality of the act, and render legal that which without it would be contrary to the fundamental principles of the law. It makes no difference whether the invitation comes from the established authorities or from rebels. In neither case can an incitement to do wrong render the act done in consequence of it lawful and right." *Int. Law*, 3 ed., 126. *Cf.* 6 ed. of same work, 134–135.

<sup>5</sup> See discussion in Padelford, *Civil Strife in Spain*, Chap. III, also documents in *Appendices I–VIII*.

<sup>6</sup> See White Book published by the Spanish Government and presented to the Council of the League of Nations on May 28, 1937, *League of Nations, Official Journal*, Special Supplement No. 165, Geneva, 1937. Also Spanish White Book, *The Italian Invasion of Spain* (*Official Documents and Papers seized from Italian Units in Action at Guadalajara*), Spanish Embassy, Washington, 1937.

<sup>7</sup> Dept. of State, Press Releases, Aug. 29, 1936, 193.

capable of establishing rules of conduct to be observed by each of its members, it cannot create new grounds to justify interference with the political independence of a sovereign State.<sup>1</sup>

It must be obvious, however, that the terms of a multi-partite treaty may be such as to demand from each party thereto acknowledgment of the right of the other parties, possibly acting collectively, to interfere with such conduct on the part of each signatory as may be contemptuous of the general arrangement. The appropriate exercise of that right, as by collective interference, thus stands on a special footing and in no wise resembles the bare intervention by a body of States not so bound to each other.<sup>2</sup>

## f

§ 75. **Chronic Disregard of International Obligations.** A State through neglect, or design, may continuously and increasingly fail to respond to its several international obligations. It may cease to be capable of maintaining an adequate government within its territory; it may be persistently guilty of tortious conduct for which no means of redress through any domestic channels are available; it may flout its fiscal or other contractual undertakings and invite national bankruptcy. In a word, it may relapse into a condition of chronic impotence to perform the common duties of a member of the family of nations. Under such circumstances there is small reason for complaint if a foreign power or group of powers which have suffered direct injury resort to intervention.<sup>1</sup> Nor is their freedom of action necessarily limited by the nature of the wrongs which they have sustained. These may arise from tort or contract; and they may or may not involve moral turpitude.<sup>2</sup> It is the condition into which the

§ 74. <sup>1</sup> Declares Hall: "There is fair reason consequently for hoping that intervention by, or under the sanction of, the body of States on grounds forbidden to single States, may be useful and even beneficent. Still, from the point of view of law, it is always to be remembered that States so intervening are going beyond their legal powers. Their excuse or their justification can only be a moral one" Higgins' 8 ed., § 95. In his article entitled "*La question d'Orient en 1885*," *Rev. Droit Int.*, 1 sér., XVIII, 591, 603. Mr. Rolin-Jacquemyns declared that there was "collective authority historically and judicially established by the Great Powers of Europe over affairs of the Turkish Empire." In 1897 the Great Powers intervened in affairs in Crete. Streit, "*La question crétoise*," in *Rev. Gén.*, I, IV, VI, VII and X; E. Nys, "*Le concert européen et la notion du droit international*," *Rev. Droit Int.*, 2 sér., I, 273.

Concerning the action of the Powers in causing Montenegro to evacuate Scutari in 1913, cf. Fauchille, 8 ed., § 301.

Concerning the pressure exerted by Russia, Germany and France to cause Japan to relinquish the cession to it of the Liao-tung Peninsula, including Port Arthur, yielded by China in the treaty of Shimonoseki of April, 1895, see Hall, Higgins' 8 ed., § 95.

The provisions of the treaty of Versailles with Germany of June 28, 1919, contemplating the renunciation by Germany of its several rights, titles and privileges in the Province of Shantung [Arts. 156-158], manifested intervention by the group of Powers responsible for the terms of the treaty as against China, the territorial sovereign, whose opposition as such was unavailing. U. S. Treaty Vol. III, 3398.

<sup>2</sup> The scheme of the Covenant of the League of Nations is illustrative.

§ 75. <sup>1</sup> See President Roosevelt, Annual Message, Dec. 6, 1904, *For. Rel.* 1904, xli, Moore, *Dig.*, VI, 596. Also Westlake, 2 ed., I, 318, 319-320.

<sup>2</sup> See, in this connection, the Hague Convention of 1907, *Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, Malloy's Treaties, II, 2248; also *The Collection of Public Debts by Force*, *The Hague Convention respecting the Limitation of the Employment of Force*, *infra*, § 309; and *The Monroe Doctrine, Preventive Measures*, *infra*, § 95.



State has relapsed and from which no means of recovery is otherwise apparent which is believed to sustain the right to interfere.

An aggrieved State may in fact resort to various measures short of intervention in order to cause the abatement of even chronic conditions of disorder within the territory of a neighbor. There may be vigorous diplomatic interposition. Even force may be temporarily employed without, however, any actual interference with the political independence of the State against which it is directed.<sup>3</sup> Such methods may not, however, suffice; and when they do not, intervention is to be anticipated. As a result of such action, the delinquent State may be placed for the time being under the protection of that which it has wronged or of some other foreign power, thereby losing during the period of protection the condition and privileges of independence.

## g

### The Conduct of the United States

#### (1)

§ 76. **The Policy of Non-Intervention.** In so far as the United States observed a policy of non-intervention with respect to the affairs of European States, its conduct was attributable in large degree to respect for the views of President Washington as expressed in his farewell address of September, 1796. He there said in part:

Europe has a set of primary interests which to us have none or a very remote relation. Hence, she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships or enmities. Our detached and distant situation invites and enables us to pursue a different course.<sup>1</sup>

Throughout the nineteenth century and well into the twentieth, American statesmen responsible for the foreign relations of the United States were re-

<sup>3</sup> Cf. The Pursuit of Villa, *supra*, § 67; The Landing of Foreign Forces, *infra*, § 202; Retorsion, Retaliation, *infra*, § 588.

Also Proposals at Sixth International Conference of American States, 1928, *supra*, § 72A. § 76. <sup>1</sup> Writings of Washington, by Ford, XIII, 277, 316, Moore, Dig., VI, 12. With reference to the conduct thus advised, Mr. Seward, Secretary of State, declared in the course of a despatch to Mr. Riotte, Minister to Costa Rica, July 7, 1862: "It may well be said that Washington did not enjoin it upon us as a perpetual policy. On the contrary he inculcated it as the policy to be pursued until the union of the States, which is only another form of expressing the idea of the integrity of the nation, should be established, its resources should be developed and its strength, adequate to the chances of national life, should be matured and perfected." MS. Inst. Am. States, XVI, 225, Moore, Dig., VI, 18. Again, in addressing Mr. Dayton, Minister to France, May 11, 1863, Mr. Seward declared: "It is true that Washington thought a time might come when, our institutions being firmly consolidated and working with complete success, we might safely and perhaps beneficially take part in the consultations held by foreign States for the common advantage of the nations." Dip. Cor., 1863, I, 667, 668, Moore, Dig., VI, 22, 23.

See also Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, Boston, 1941, Chap. I.

See *infra*, § 83B.

luctant to encourage intervention with respect to conduct having no immediate connection with the affairs of the American continents. Nor was there a disposition to place the United States in such a relation to the affairs of other continents as to increase the likelihood of its being called upon to intervene for the preservation of its rights therein.<sup>2</sup>

With respect to events in the Western Hemisphere it will be observed that Washington's injunction did not appear to be applicable. Nevertheless, with respect to events therein, the United States generally evinced no alertness to avail itself of the right to intervene wherever circumstances appeared to warrant or excuse such action.<sup>3</sup>

## (2)

§ 77. **Departure from the Policy of Non-Intervention.** Since its participation as a belligerent in World War I, both in the conduct of hostilities and in the formulation of terms of peace,<sup>1</sup> the United States appears to acknowledge such an interest in the affairs of European and Asiatic States as to manifest concern therein, even to the extent of intervention, should there be adequate legal excuse for such action, and when, in its judgment, failure to interfere would tend to establish a condition of things at variance with the requirements of international justice.<sup>2</sup> This was never more obvious than when, as a result

<sup>2</sup> See a series of declarations of policy respecting non-intervention expressed in documents in Moore, Dig., VI, 11-32. See attitude of President Cleveland respecting the position taken by the United States relative to the General Act of the Berlin Conference of Feb. 26, 1885, in his Annual Message, Dec. 8, 1885, For. Rel. 1885, viii-ix.

Concerning the participation by the United States in the Conference at Algieras in 1906, dealing with Moroccan affairs, see instruction of Mr. Root, Secy. of State, to Ambassador White and Minister Gummeré, For. Rel. 1905, 678. In advising and consenting to the ratification by the United States of the General Act and an additional protocol of the Algieras Conference, signed April 7, 1906, the Senate resolved that as a part of the act of ratification, it understood that the participation of the United States in the Conference and in the formation and adoption of the General Act and protocol was for the sole purpose of preserving and increasing its commerce in Morocco, the protection as to life, liberty, and property of its citizens residing or traveling therein, and of aiding by its friendly offices and efforts, in removing friction and controversy which seemed to menace the peace between powers signatory with the United States to the treaty of 1880, all of which were on terms of amity with its government; "and without purpose to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope." Malloy's Treaties, II, 2183.

Cf. reservation under which the American plenipotentiaries signed the Hague Convention of 1899, for the Pacific Settlement of International Disputes, Malloy's Treaties, II, 2032; also resolution of ratification by the Senate of the Hague Convention of 1907, for the Settlement of International Disputes, *id.*, II, 2247. Also J. B. Moore, Principles of American Diplomacy, New York, 1918, Chap. VI, "Non-Intervention and the Monroe Doctrine."

<sup>3</sup> See, for example, Senate Resolution of April 20, 1911, to the effect that intervention by the United States in the existing revolution in Mexico would be without justification. Senate Document No. 25, 62 Cong., 1 Sess., with brief in support of the resolution.

§ 77. <sup>1</sup> See correspondence between the United States and Germany regarding an armistice, Oct. 6, 1918, to Nov. 5, 1918, *Am. J.*, XIII, *Supplement*, 85-96, and especially communication of Mr. Lansing, Secy. of State, to Mr. Sulzer, Swiss Minister at Washington, Nov. 5, 1918, indicating the willingness of the Allied Governments, subject to specified qualifications, to make peace with the Government of Germany according to the terms laid down in President Wilson's address to Congress of January 8, 1918, and the principles enunciated in his subsequent addresses, Official Bulletin, Nov. 6, 1918, Vol. II, No. 456, p. 1.

<sup>2</sup> Cf., for example, statement by President Wilson, April 23, 1919, relative to the conflicting claims of the Italians and the Yugoslavs with respect to Fiume, *Current Hist. Magazine*, X, June, 1919, 405.

of the European war initiated in 1939, the Government of the United States concluded that the upholding of Britain was sufficiently entwined with the defense of America to justify intervention in behalf of that country.<sup>3</sup>

It should be observed that it is a matter of American policy rather than of law which has undergone a change. That change seems to be due to a widening perception of the fact that American interests are bound up with, and are, to a certain degree, inseparable from those of States of other continents, and that, therefore, the commission in any one of them of internationally illegal acts provocative of war may, in a particular case, prove to be as highly detrimental to the United States as to other members of the family of nations. It is not acknowledged, however, that such conduct is always to be regarded as productive of such an effect, or that the concern of the United States may not be dependent upon the geographical relationship of the place where the disturbance occurs to American territory, or upon other considerations.

(3)

§ 78. **Instances of Intervention in Various Quarters.** The grounds on which the United States has relied in justification of intervention or contemplated intervention are to be observed by reference to certain cases which at various times have confronted the nation.

(a)

CUBA

(i)

§ 79. **Transfer to a Third State.** While Cuba remained under the dominion of Spain it was frequently declared that the United States would regard as dangerous to its peace and safety, and hence as an unfriendly act, the cession of that island to a third State. Such a transfer the United States, for that reason, asserted the right to oppose.<sup>1</sup>

(ii)

§ 80. **Revolution, 1868–1878.** During the Cuban Revolution of 1868–1878, President Grant declared that the United States would be justified in intervening to bring hostilities to an end, on account of the disregard of the laws of

<sup>3</sup> See *The Transfer of Destroyers to Britain in 1940*, Kindred Acts, *infra*, § 83C.

§ 79. <sup>1</sup> See Mr. Adams, Secy. of State, to Mr. Nelson, Minister to Spain, April 28, 1823, H. Ex. Doc., 121, 31 Cong., 1 Sess., 6, Moore, Dig., VI, 380, 383; Mr. Jefferson to President Monroe, Oct. 24, 1823, S. Ex. Doc., 26, 57 Cong., 1 Sess., Moore, Dig., VI, 394, 395; Mr. Webster, Secy. of State, to Mr. Barringer, Nov. 26, 1851, Webster's Works, 513, 514, Moore, Dig., VI, 57; Mr. Seward, Secy. of State, to Mr. Bancroft, Minister to Prussia, Oct. 28, 1867, MS. Inst. Prussia, XIV, 486; Speech of Senator Calhoun in U. S. Senate, May, 1848, Calhoun's Works, IV, 457 *et seq.*, Moore, Dig., VI, 424, 426.

Said President Grant in his Annual Message, December 6, 1869: "The United States has no disposition to interfere with the existing relations of Spain to her colonial possessions on this continent. They believe that in due time Spain and other European powers will find their interest in terminating those relations and establishing their present dependencies as independent powers—members of the family of nations. These dependencies are no longer regarded as subject to transfer from one European power to another. When the present rela-

civilized warfare, the injury to commercial interests of the United States, as well as to property of American citizens in Cuba, and by reason of the close proximity of the Island to the United States. He added that the interests of humanity demanded the cessation of hostilities before the whole island should be laid waste and larger sacrifices of life be made. The President did not, however, recommend intervention.<sup>1</sup>

## (iii)

§ 81. **Revolution, 1895–1898.** President McKinley in his special message of April 11, 1898, declared that intervention by the United States in the existing Cuban Insurrection would be justified for the following reasons:

First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and therefore none of our business. It is specially our duty, for it is right at our door.

Second. We owe it to our citizens in Cuba to afford them that protection and indemnity for life and property which no government there can or will afford, and to that end to terminate the conditions that deprive them of legal protection.

Third. The right to intervene may be justified by the very serious injury to commerce, trade, and business of our people, and by the wanton destruction of property and devastation of the island.

Fourth, and which is of the utmost importance. The present condition of affairs in Cuba is a constant menace to our peace, and entails upon this government an enormous expense. With such a conflict waged for years in an island so near us and with which our people have such trade and business relations; when the lives and liberty of our citizens are in constant danger and their property destroyed and themselves ruined; where our trading vessels are liable to seizure and are seized at our very door by war-ships of a foreign nation, the expeditions of filibustering that we are powerless to prevent altogether, and the irritating questions and entanglements thus arising — all these and others that I need not mention, with the resulting strained relations, are a constant menace to our peace, and compel us to keep on a semi-war footing with a nation with which we are at peace.<sup>1</sup>

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tion of colonies ceases, they are to become independent powers, exercising the right of choice and of self-control in the determination of their future condition and relations with other powers." (Richardson's Messages, VII, 31, Moore, Dig., VI, 61.)

The Monroe Doctrine, *infra*, § 90.

§ 80. <sup>1</sup> President Grant, Annual Message, Dec. 7, 1875, For. Rel. 1875, vi, Moore, Dig., VI, 94–97. *Cf.*, also, Mr. Fish, Secy. of State, to Mr. Cushing, No. 266, Nov. 5, 1875, H. Ex. Doc. 90, 44 Cong., 1 Sess., 3, Moore, Dig., VI, 85, 87.

§ 81. <sup>1</sup> For. Rel. 1898, 750, 757–758.

By a Joint Resolution of the Congress, approved April 20, 1898, the United States recognized the independence of the people of Cuba, demanded that the Government of Spain relinquish its authority and government over that island, and withdraw its land and naval forces therefrom, and also directed the President to use the military and naval forces of the United

## (b)

§ 82. **Panama.** In November, 1903, the United States intervened to prevent the suppression by Colombia of the revolution of Panama.<sup>1</sup> The acts of intervention took the form of the prevention of the landing of armed forces on the Isthmus, the bombardment of the town of Panama, and the recognition of Panama as a State.<sup>2</sup> Justification was declared by President Roosevelt to be found in: first, our treaty rights; second, our national interests and safety; and, third, the interests of collective civilization.<sup>3</sup>

It was contended that by virtue of Article XXXV of the treaty of December 12, 1846, between the United States and New Granada (the predecessor of Colombia), the former not only assumed the duty to guarantee the constant "neutrality" of the Isthmus, but also acquired the right to maintain the free and open transit thereof, and incidentally the further right to prevent the commission of any warlike acts in the Isthmian Zone by whomsoever committed.<sup>4</sup>

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States to carry the resolution into effect. For. Rel. 1898, 763. On April 22, the President proclaimed a blockade of certain portions of the coast of Cuba, *Id.*, 769. An Act of Congress approved April 25, declared the existence of war with Spain from and including April 21. *Id.*, 772. Cf. President McKinley, Annual Message, Dec. 5, 1898, *id.*, lv. See, also, President Cleveland, Annual Message, Dec. 7, 1896, For. Rel. 1896, xxix, Moore, Dig., VI, 124, 129; Mr. Sherman, Secy. of State, to General Woodford, Minister to Spain, July 16, 1897, For. Rel. 1898, 558, Moore, Dig., VI, 139, 142. Cf. Señor Gullon, Minister of State, to General Woodford, American Minister, Feb. 1, 1898, For. Rel. 1898, 658, Moore, Dig., VI, 166, 167-168.

Declares Professor Moore, in his work on American Diplomacy (edition of 1918), p. 208: "The destruction of the *Maine* doubtless kindled the intense popular feeling without which wars are seldom entered upon; but the government of the United States never charged — on the contrary, it refrained from charging — that the catastrophe was to be attributed to 'the direct act of a Spanish official.' Its intervention rested upon the ground that there existed in Cuba conditions so injurious to the United States, as a neighboring nation, that they could no longer be endured. Its action was analogous to what is known in private law as the abatement of a nuisance."

§ 82. <sup>1</sup>See instructions to Naval Officers of the United States, Nov. 2-5, 1903, For. Rel. 1903, 247-248, Moore, Dig., III, 46.

<sup>2</sup>President Roosevelt, special message, Jan. 4, 1904, For. Rel. 1903, 260, 272, Moore, Dig., III, 56, 71.

<sup>3</sup>For. Rel. 1903, 273, Moore, Dig., III, 71.

<sup>4</sup>Art. XXXV of the treaty of 1846 is in part as follows: "The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures or merchandise, of lawful commerce, belonging to the citizens of the United States; . . . And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages, and for the favors they have acquired by the 4th, 5th, and 6th Articles of this treaty, the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantees, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory." (Malloy's Treaties, I, 312.)

With reference to the divergent interpretations of the treaty on the part of Colombia and the United States, see President Roosevelt, special message, Jan. 4, 1904, For. Rel. 1904, 260-278, Moore, Dig., III, 56; also correspondence between Mr. Hay, Secy. of State, and Gen. Reyes, Colombian Envoy on special mission, December, 1903, and January, 1904, For. Rel. 1903, 283-314, Moore, Dig., III, 78-113. Also, Dr. Antonio José Uribe, *Colombia y los Estados Unidos de America*, Bogotá, 1931, Chap. V; Tyler Dennett, John Hay, New York, 1933, Chap. XXX.

## (c)

§ 82A. **Haiti, 1915.** It is extremely difficult to reach an unbiased conclusion concerning the propriety of acts committed in behalf of the United States in Haiti in 1915, as they progressed from efforts to protect foreign life and property to a successful attempt to transform the political institutions of an independent State and to demote it in rank.<sup>1</sup>

Events of that year marked the climax of an appalling condition of misrule, turmoil and danger to external interests on Haitian soil. The killing of some 200 political prisoners, the forcible removal of President Sam from the French Legation, where he had sought asylum, and the dismemberment of his body in the streets of Port-au-Prince,<sup>2</sup> were merely dramatic and shocking incidents of a demoralized condition of affairs that led to the landing of an American military force under Admiral Caperton of the United States Navy in July.<sup>3</sup> Protection was, moreover, also sought for British and French interests; and the United States was given reason to anticipate that failure on its part to effect occupation might lead to such action by Germany or France.<sup>4</sup> These and other factors, embracing the safeguarding of American financial interests, sufficed to justify the initial steps that were taken. They were not inexplicable or unique in character. Nor did they necessarily amount to intervention.

On August 5, Admiral Caperton advised the Secretary of the Navy of the prospective election of a new president by the Haitian Congress adverting to M. Dartiguenave, President of the Haitian Senate, as a desirable candidate for that office who realized that Haiti "must agree to any terms laid down by the United States," who professed "to believe any terms demanded will be for Haiti's benefit," and who said that he would "use all his influence with Haitian Congress to have such terms agreed upon by Haiti."<sup>5</sup> On August 10, 1915, Secretary Lansing informed the American Minister to Haiti that "it should be made perfectly clear to candidates, as soon as possible, and in advance of their election, that the United States expects to be entrusted with the practical control of the customs and such financial control over the affairs of the Republic

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INTERVENTION OF THE UNITED STATES IN WORLD WAR I IN 1917. Concerning the causes which led the United States to become a belligerent on the side of the Allied Powers, see Maritime War, Submarine Craft, The Controversy with Germany, *infra*, §§ 747-749.

§ 82A. <sup>1</sup> See generally, Inquiry into Occupation and Administration of Haiti and the Dominican Republic, Report of Senate Investigating Committee, Senate Doc. No. 794, 67 Cong., 2 Sess. Also, Commander R. B. Coffey, U. S. N., A Brief History of the Intervention in Haiti, 1915, Proceedings, U. S. Naval Institute, XLVIII, 1325.

<sup>2</sup> Memorandum on Summary of Conditions, accompanying note of Mr. Davis, Secretary of the American Legation, to the Secy. of State, Jan. 12, 1916, For. Rel. 1916, 311-320.

<sup>3</sup> Mr. Davis, American Chargé d'Affaires, to the Secy. of State, July 29, 1915, For. Rel. 1915, 476.

<sup>4</sup> Mr. Lansing, Secy. of State, to the American Chargé d'Affaires, July 28, 1915, For. Rel. 1915, 476.

See Dexter Perkins, *Hands Off, a History of the Monroe Doctrine*, 1941, 260, 269 and 271.

<sup>5</sup> Senate Document, No. 794, cited above, 312. On Aug. 10, 1915, the Navy Department informed Admiral Caperton that "The United States prefers election of Dartiguenave. Has no other motive than that of establishment of firm and lasting government by Haitian people and to assist them now and at all times in future to maintain their political independence and territorial integrity." (*Id.*, 315.)

of Haiti as the United States may deem necessary for efficient administration.”<sup>6</sup> On August 12, M. Dartiguenave was elected President by the National Assembly, upon a majority of whose members, American officials exerted an influence.<sup>7</sup> Shortly thereafter, on August 14, Admiral Caperton was instructed to submit to the new Haitian régime a treaty which, during the period of its operation, would subject Haiti to the wardship of the United States.<sup>8</sup> The treaty contemplated an American control of Haitian finances, and a constabulary under American officers. On August 19, Admiral Caperton was ordered to assume charge of the custom houses at ten places, employ the funds therefrom for the organization and maintenance of an efficient constabulary and other specified purposes, and also to endeavor with the aid of the American Chargé d’Affaires to have President Dartiguenave “solicit” such action.<sup>9</sup> On September 2, Admiral Caperton took charge of the Custom House at Port-au-Prince,<sup>10</sup> and on the following day proclaimed a state of marital law.<sup>11</sup> On September 8, he telegraphed the commanding officer of the U.S.S. *Connecticut* that: “Successful negotiation of treaty is predominant part present mission. After encountering many difficulties treaty situation at present looks more favorable than usual. This has been effected by exercising military pressure at propitious moments in negotiation.”<sup>12</sup> The treaty was signed on September 16.<sup>13</sup> A few days later, Admiral Caperton was ordered to hold, subject to instructions from Washington, a shipment of unsigned banknotes to the amount of 500,000 gourdes consigned to the Haitian Government and arriving on the steamer *Fauna* at Port-au-Prince on September 24.<sup>14</sup> The instruction was obeyed.<sup>15</sup> The Haitian Government, eager

<sup>6</sup> *Id.*, 315. He added: “The Government of the United States considers it its duty to support a constitutional government. It seeks to assist in the establishment of such a government and to support it as long as necessity may require. It has no design upon the political or territorial integrity of Haiti. On the contrary what has been done, as well as what will be done, is conceived in an effort to aid the people of Haiti in establishing a stable government and maintaining domestic peace throughout the Republic.”

<sup>7</sup> Such at least was the conclusion of the United States Senate Committee that made investigation of the matter. Senate Report, Doc. 794, above cited, p. 7; also R. L. Buell, *The American Occupation of Haiti*, Foreign Policy Association, Information Service, Vol. V, Nos. 19–20, p. 345.

<sup>8</sup> Senate Doc. No. 794, cited above, 327–328.

<sup>9</sup> *Id.*, 333.

<sup>10</sup> *Id.*, 346.

<sup>11</sup> *Id.*, 348.

On Aug. 19, 1915, Admiral Caperton informed the Secretary of the Navy: “United States has now actually accomplished a military intervention in affairs of another nation. Hostility exists now in Haiti and has existed a number of years against such action. Serious hostile contacts have only been avoided by prompt and rapid military action which has given United States control before resistance has had time to organize. We now hold capital of country and two other important seaports. Total force at my disposal one armored cruiser, two gunboats, one converted yacht, and 1,500 marines.” He asked for additional forces in order to effect the occupation of the custom houses in seven additional places, as desired by the Department, and he declared it to be imperative that these contemplated operations “be kept for the present secret.” (*Id.*, 335.)

<sup>12</sup> *Id.*, 353. At the Senate Hearing on Nov. 20, 1921, Admiral Caperton declared with reference to this despatch: “The only pressure I can think of or consider was the fact of bringing pressure to bear, in order, if possible, to quiet the Cacos and keep them from intimidating the members of Congress and the Senate who were in favor of the treaty as has been previously stated in my testimony. The pressure, I should say, was more moral than military.” (*Id.*)

<sup>13</sup> U. S. Treaty Vol. III, 2673.

<sup>14</sup> *Id.*, 378.

<sup>15</sup> *Id.*, 379.

to issue the notes that were thus withheld from it, and being in straitened circumstances, pleaded with the American authorities for financial aid. On October 2, the American chargé d'affaires informed President Dartiguenave that "funds would be immediately available upon the ratification of the treaty."<sup>16</sup> On October 3 he advised his own Government that it was desirable to assist financially the existing Haitian régime which otherwise might fall, declaring that although the funds collected from customs had been expended according to instructions "not one cent has been turned over to the Haitian Government for living expenses."<sup>17</sup> Admiral Caperton joined in this recommendation, and he was duly authorized to furnish some assistance. This was done.<sup>18</sup> Still, the treaty remained unapproved. On November 3, Admiral Caperton announced to President Dartiguenave that the former had given orders to his senior captain "to do everything in his power to get the treaty ratified," suggesting that the President of Haiti coöperate unofficially in assisting that officer.<sup>19</sup> Pursuant to orders from the Secretary of the Navy, Admiral Caperton on November 11, asked for and obtained an audience before the Haitian President and his cabinet and delivered the following statement:

I have the honor to inform the President of Haiti and the members of the cabinet that I am personally gratified that public sentiment continues favorable to the treaty; that there is a strong demand from all classes for immediate ratification and for the belief that the treaty will be ratified to-day.

I am sure that you gentlemen will understand my sentiment in this matter, and I am confident if the treaty fails of ratification that my Government has the intention to retain control in Haiti until the desired end is accomplished, and that it will forthwith proceed to the complete pacification of Haiti so as to insure internal tranquillity necessary to such development of the country and its industry as will afford relief to the starving populace now unemployed. Meanwhile the present Government will be supported in the effort to secure stable conditions and lasting peace in Haiti, whereas those offering opposition can only expect such treatment as their conduct merits.

The United States Government is particularly anxious for immediate ratification by the present Senate of this treaty, which was drawn up with the full intention of employing as many Haitians as possible to aid in giving effect to its provisions, so that suffering may be relieved at the earliest possible date.

Rumors of bribery to defeat the treaty are rife, but are not believed. However, should they prove true, those who accept or give bribes will be vigorously prosecuted.<sup>20</sup>

<sup>16</sup> *Id.*, 381.

<sup>17</sup> *Id.*, 382.

<sup>18</sup> *Id.*, 381 and 383; also 383-386.

<sup>19</sup> *Id.*, 391.

<sup>20</sup> *Id.*, 394. The instruction from the Secretary of the Navy to Admiral Caperton of Nov. 10, containing the statement quoted concluded with the words: "It is expected that you will be able to make this sufficiently clear to remove all opposition and to secure immediate ratification." (*Id.*)



The treaty received the approval of the Haitian Senate on November 11,<sup>21</sup> and on November 12, the Secretary of the United States Navy warmly commended Admiral Caperton on the able manner in which he had handled the matter, and on the ability he had shown in "directing the affairs of Haiti."<sup>22</sup>

By the process noted the United States caused a weaker neighbor to become its ward. The former manifested no sense of legal obligation to refrain from acting as it did. Nor did it acknowledge any right on the part of Haiti to be free from interference, or to be free to decline without penalization the treaty proffered to it. The unusual conditions prevailing within Haitian territory, the nature of the revolutionary conflict there being waged, the presence of European interests calling for protection, together with the geographical and strategic relationship of Haiti to the Caribbean and the Panama Canal, as well as complications and fears arising from the existing World War at a time when the United States was remaining a neutral, doubtless united to produce a unique situation. On the record as it stood, the United States made it clear that it did not regard a weaker American State, circumstanced as was Haiti, and under conditions such as there prevailed, to be entitled to freedom from external control in what pertained to political independence. To express it differently, the United States proclaimed in substance that continued enjoyment by such a State of the full privileges of independent statehood was dependent upon the maintenance in fact of a stability of government such as Haiti appeared to be unable to afford; and also that the United States might essay to judge for itself whether in a particular case the requisite ability existed, and when convinced that it did not, to proceed itself to demand and gain, if need be by force, the technical acquiescence of the territorial sovereign as a mode of acquiring fullest privileges of protection.

(d)

§ 82B. **Archangel, 1918–1919.** Russia, upon its signature of a treaty of peace with Germany at Brest-Litovsk on March 3, 1918, ceased to be an effective co-belligerent of the Allied Powers.<sup>1</sup> Bereft of Russian aid, the latter found themselves, nevertheless, still at war with a resolute foe capable of subjecting at will to its own control certain portions of Russian territory, with slight prospect of interference on the part of Bolshevik authority that had seized the reins of government therein and professed to be the master of it.<sup>2</sup> Yet that mastery did not fully extend to the territory bordering the White Sea or the Arctic, where German submarine operations continued to menace the safety of even the Russian inhabitants of the adjacent areas.<sup>3</sup> A Russian régime or entity opposed

<sup>21</sup> *Id.*, 394.

<sup>22</sup> *Id.*, 395. See discussion of the negotiations by R. L. Buell, in "The American Occupation of Haiti," Foreign Policy Association, Information Service, Vol. V, Nos. 19–20, 345–346. § 82B. <sup>1</sup> For the text of the treaty, see For. Rel. 1918, Russia, I, 442; also in this connection, documents, *id.*, Chap. VIII, 404–476.

<sup>2</sup> See Mr. Francis, American Ambassador to Russia, to the Secy. of State, No. 194, May 23, 1918, For. Rel. 1918, Russia, I, 538; Mr. Poole, American Consul at Moscow, to the Secy. of State, May 9, 1918, *id.*, Russia, II, 473.

<sup>3</sup> Mr. Poole, American Consul at Moscow, to the Secy. of State, June 7, 1918, *id.*, I, 553. Germany was, moreover, pressing the Soviet authority to bring about an evacuation by

to Soviet authority, and also to Germany, nevertheless, gained the ascendancy at Murmansk and Archangel, and, despite various vicissitudes managed to attain *de facto* control over a substantial area.<sup>4</sup> Obviously, a passive Bolshevik attitude towards Germany could not transform the relation of Russian soil to the prevailing world conflict in areas that were, or were likely to become, scenes of military operations.

In order to safeguard from German seizure large amounts of war material at Archangel, to salvage others which Russian Soviet authorities had previously taken inland, and with a view also of forming a junction with a Czecho-Slovak force to the southward,<sup>5</sup> an American armed force was landed at Archangel early in September, 1918, and formed a part of a military expedition which under British command was sent inland.<sup>6</sup> The expedition, simple enough in conception, encountered, however, constant Russian opposition of Bolshevik origin, a circumstance that transformed its mission into one principally concerned with maintaining its own communications with Archangel, and with shielding that place itself from Bolshevik aggression. To that end the assumption of Allied control over a substantial area became necessary.<sup>7</sup> No German force was encountered. Before the close of September, 1918, the United States refused to yield to the suggestion from France that the American forces at Archangel be increased and their operations extended. Secretary Lansing announced that his Government would "insist with the other governments, so far as our coöperation is concerned, that all military effort in northern Russia be given up except the guarding of the ports themselves and as much of the country round about them as may develop threatening conditions."<sup>8</sup> It is not understood that there was any deviation from the policy so announced, and of which the significance must be obvious.

After the signature of the Armistice with Germany of November 11, 1918, the work of the Allied expedition, until its final withdrawal in 1919, was confined to an effort to safeguard both itself and the anti-Bolshevik authority at Archangel from annihilation.<sup>9</sup> Notwithstanding the sympathy of American au-

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British and French troops of the Murman Peninsula where they had effected a lodgement. See same to same, May 8, 1919, *id.*, II, 472; also Mr. Francis, American Ambassador, to the Secy. of State, May 8, 1918, *id.*, II, 473.

<sup>4</sup> Mr. Francis, American Ambassador, to the Secy. of State, Aug. 3, 1918, *id.*, II, 506, reporting also the landing at Archangel on that date of Allied forces other than American, which were "welcomed by people with flowers and cheers." See also documents, *id.*, 507-544.

<sup>5</sup> See in this connection, Mr. Cole, American Consul at Archangel, to Mr. Francis, American Ambassador, June 1, 1918, For. Rel. 1918, Russia, II, 477; Admiral Sims to the Secy. of the Navy, April 13, 1918, *id.*, 488; Mr. Cole, American Consul, to the Secy. of State, July 20, 1918, *id.*, 499, 500; Mr. Francis, American Ambassador, to the Secy. of State, Aug. 27, 1918, *id.*, 515; Mr. Polk, Acting Secy. of State, to Mr. Poole, American Chargé d'Affaires in Russia, Dec. 4, 1918, *id.*, 574.

<sup>6</sup> Mr. Francis, American Ambassador, to the Secy. of State, Sept. 4, 1918, reporting the arrival on that date at Archangel of 4800 American troops on three transports, *id.*, II, 519.

On Aug. 23, 1918, Mr. Francis, American Ambassador, reported that "of 50 American blue-jackets [from the U.S.S. *Olympia*] 25 were sent up the Dvina in a party of 300, August 13," in one of the Allied expeditions under the British General Poole. *Id.*, II, 513.

<sup>7</sup> Mr. Francis, American Ambassador, to the Secy. of State, Sept. 8, 1918, *id.*, II, 523, 524.

<sup>8</sup> Telegram to Mr. Francis, American Ambassador, Sept. 26, 1918, *id.*, II, 546. Cf. Mr. Jusserand, French Ambassador at Washington, to the Secy. of State, Sept. 25, 1918, *id.*, 544.

<sup>9</sup> "The Government of the United States has never recognized the Bolshevik authorities

thority for any Russian governmental power that gave promise of remaining steadfast in opposition to the Bolshevik régime, the presence of American troops near Archangel had been essentially a part of a belligerent movement against an enemy of the United States that was not Russia.<sup>10</sup> After the Armistice, the character of the mission of those troops underwent no change, despite the opposition encountered from Russian soldiery.<sup>11</sup> If, finally, they were to be a temporary buffer between the Bolshevik forces and anti-Bolshevik authority at Archangel, it was a mere response to a sense of moral obligation to shield so long as possible from an increasing danger of destruction an entity which while in *de facto* control of a particular zone, had stood fairly faithful in the effort to oppose the extension of German belligerent power. If, therefore, there was through American military force technical interference with the political aspirations of a particular régime that finally attained the ascendancy in northern Russia, it was an incident of a definite belligerent struggle against Germany, which under the circumstances was not without justification. For that reason the United States would not be prepared to admit that American participation in the Allied expedition, whether to be regarded as an instance of intervention or otherwise, constituted conduct for which a solid excuse was not to be found.<sup>12</sup>

(e)

§ 82C. **Siberia, 1918.** With the beginning of 1918, the United States, in response to inquiries from various quarters, made it clear that it did not regard with sympathy or approval suggestions for the occupation of Vladivostok by Japan,<sup>1</sup> or for the penetration by French with possibly Chinese troops, of eastern Siberia, as far as Irkutsk, for the purpose of safeguarding the lives of nationals and of suppressing the growth of anarchy.<sup>2</sup> It likewise opposed a suggestion from

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and does not consider that its efforts to safeguard supplies at Archangel or to help the Czechs in Siberia have created a state of war with the Bolsheviks." Mr. Lansing, Secy. of State to Mr. Francis, American Ambassador to Russia, Sept. 27, 1918, *id.*, II, 548.

<sup>10</sup> That sympathy, although candidly expressed, and serving to nurture an American delusion as to the frailty of the Bolshevik régime (see Mr. Francis, American Ambassador, to the Secy. of State, June 3, 1918, *id.*, I, 550) did not suffice to cause the United States to endeavor to employ armed force for the direct purpose of opposing the success of that régime as such. From American readiness to coöperate with a Russian government disposed to continue the conflict with Germany, it is not to be inferred that there was a readiness also to oppose by force any other government that lacked such a disposition, so long as it did not in fact become the ally of Germany.

<sup>11</sup> See in this connection, Mr. Poole, American Chargé d'Affaires, to the Secy. of State, Dec. 12, 1918, quoting declaration of that date by the Allied Embassies at Archangel. *Id.*, II, 576.

<sup>12</sup> It is unfortunate that in the course of their correspondence with the Department of State, in 1918, American officials abroad, heedless of its technical signification in international law, frequently employed the term "intervention" in loose fashion, and oftentimes for the purpose of referring to acts not necessarily calling for those special grounds of justification that conduct properly described as that of intervention always demands. See, for example, Mr. Francis, American Ambassador, to the Secy. of State, May 2, 1918, For. Rel. 1918, Russia, I, 517. In determining, therefore, whether the action of American authority in or about Archangel in 1918-1919, constituted intervention, at least as that term is employed in this work, close heed must be paid to the character of the series of acts committed under American authority rather than to any other circumstance.

§ 82C.<sup>1</sup> Memorandum of the Secy. of State of interview with the Japanese Ambassador, Dec. 27, 1917, For. Rel. 1918, Russia, II, 13.

<sup>2</sup> See M. Jusserand, French Ambassador at Washington, to the Secy. of State, Jan. 8, 1918,

Great Britain that the Japanese be invited as mandatories of the Allied Powers, to give assistance along the line of the Siberian Railway to various Cossack organizations, as a means of preventing Russia from falling immediately and completely under the control of Germany.<sup>3</sup> Again, in March, 1918, the United States informed Japan that "the wisdom of intervention" seemed most questionable; that it was assumed that if such action were undertaken by Japan "the most explicit assurances would be given that it was undertaken by Japan as an ally of Russia, in Russia's interest, and with the sole view of holding it safe against Germany and at the absolute disposal of the final peace conference."<sup>4</sup>

Both France<sup>5</sup> and Great Britain were pressing the United States for the approval of Japanese intervention, the British Government suggesting that it and the Government of the United States "make a simultaneous proposal to the Bolshevik Government for intervention by the Allies" on lines which were specified. These contemplated an advance through Siberia "by a force predominantly Japanese and American," yet representative of the several Allied Powers.<sup>6</sup> Finally, in July, the Supreme War Council declared that Allied intervention in Russia and Siberia had become "an urgent and imperative necessity," that Japan had agreed to send an expedition into Siberia if assured of the approval and active support of the United States; and that the addition of American and Allied detachments would create a force "really Allied in character and acceptable to both Russian and Allied occupants."<sup>7</sup> Allied armed assistance to Russia was said to be "imperatively necessary" for the following reasons:

(a) To assist the Russian nation to throw off their German oppressors and to prevent the unlimited military and economic domination of Russia by Germany in her own interests.

(b) For the decisive military reason given by General Foch in his telegram to President Wilson; i.e., that the Germans have already called back from Russia a number of divisions and sent them to the western front. Allied intervention will be the first step in stimulating the national uprising in Russia against German domination which will have an immediate effect in renewing German anxiety in regard to the east and compelling her to refrain from removing further troops westward and perhaps to move troops back to the east.

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*id.*, 20; Mr. Lansing, Secy. of State, to M. Jusserand, Jan. 16, 1918, *id.*, 28; Mr. Polk, Acting Secy. of State, to Mr. Morris, American Ambassador to Japan, Jan. 20, 1918, *id.*, 31.

<sup>3</sup> See Memorandum, British Embassy to Dept. of State, Jan. 28, 1918, *id.*, 35; same to same, Feb. 6, 1918, *id.*, 38; Memorandum, Dept. of State, to British Embassy, Feb. 8, 1918, *id.*, 41; also Mr. Lansing, Secy. of State, to Mr. Page, American Ambassador at London, Feb. 13, 1918, *id.*, 45; Mr. Frazier, Diplomatic Liaison Officer, Supreme War Council, to the Secy. of State, Feb. 19, 1918, *id.*, 49.

<sup>4</sup> Mr. Polk, Acting Secy. of State, to Mr. Morris, American Ambassador to Japan, March 5, 1918, *id.*, 67.

<sup>5</sup> M. Jusserand, French Ambassador, to the Secy. of State, March 12, 1918, *id.*, 75, same to same, April 8, 1918, *id.*, 109; same to same, April 21, 1918, *id.*, 128; same to same, April 23, 1918, *id.*, 132.

<sup>6</sup> Lord Reading, British Ambassador at Washington, to the Secy. of State, April 25, 1918, *id.*, 135; British Embassy to Dept. of State, April 27, 1918, *id.*, 140.

<sup>7</sup> Mr. Frazier, Diplomatic Liaison Officer, Supreme War Council, to the Secy. of State, July 2, 1918, *id.*, 241.

(c) To shorten the war by the reconstitution of the Russian front.

(d) To prevent the isolation of Russia from western Europe. They are advised that if action is not taken in Siberia the existing Allied forces in northern Russia may have to be withdrawn and Russia will be completely cut off from the Allies.

(e) To deny to Germany the supplies of western Siberia and the important military stores at Vladivostok and to render these available for the Russian population.

(f) To bring assistance to the Czecho-Slovak forces which have made great sacrifices to the cause for which we are fighting.<sup>8</sup>

It should be noted that at this time a Czecho-Slovak army, some 50,000 strong, was stretched along over the vast expanse between the Volga and Vladivostok, proceeding generally in an easterly direction and frequently in conflict with larger numbers of armed enemy prisoners from German and Austrian detachments, as well as at times with Bolshevik forces. Some 10,000 Czechs were reported at Vladivostok in May, 1918;<sup>9</sup> yet in June, Irkutsk was in the hands of 3,000 armed Austrian and German prisoners.<sup>10</sup> The Czecho-Slovaks that had reached the Pacific were disposed to return westward to assist their comrades in their struggle eastward and save them from possible destruction. The Allied Powers were quick to see in the Czecho-Slovak Army, circumstanced as it was, a unique instrument of great and timely value if supplemented by Japanese and American troops. If sent back on its tracks and through the Urals into European Russia, it meant the establishment of a new "eastern front" in the conflict with Germany, and it might mean also the cutting off of Siberia from the Bolshevik régime.<sup>11</sup> That a westward movement might injure rather than aid the Czecho-Slovaks, was not acknowledged. Their possible victory to the west rather than their extrication at the Pacific was stressed.<sup>12</sup>

On July 17, 1918, Secretary Lansing gave to the Allied Ambassadors the response of his country to the suggestions of the Supreme War Council in terms that deserve scrutiny. He said in part:

It is the clear and fixed judgment of the Government of the United States, arrived at after repeated and very searching reconsiderations of the whole situation in Russia, that military intervention there would add to the present sad confusion in Russia rather than cure it, injure her rather than help her, and that it would be of no advantage in the prosecution of our main design, to win the war against Germany. It can not, therefore, take part in such intervention or sanction it in principle. Military intervention would, in its judgment, even supposing it to be efficacious in its immediate avowed

<sup>8</sup> *Id.*, 245-246.

<sup>9</sup> Admiral Knight, to the Secy. of the Navy, May 27, 1918, *id.*, 174.

<sup>10</sup> Mr. Harris, American Consul General at Irkutsk, to the Secy. of State, June 15, 1918, *id.*, 212.

<sup>11</sup> According to the views of the Supreme War Council as reported by the American Diplomatic Liaison Officer, July 2, 1918; "Intervention in Siberia, therefore, is an urgent necessity both to save the Czecho-Slovaks and to take advantage of an opportunity of gaining control of Siberia for the Allies which may never return." (*Id.*, 242.)

<sup>12</sup> By June 27, 1918, 15,000 Czecho-Slovak troops were reported at Vladivostok, *id.*, 234. Two days later they ousted by force the Soviets from control and seized the town. Admiral Knight landed a small detachment of marines from the U.S.S. *Brooklyn*, to guard the American Consulate, *id.*, 235.

object of delivering an attack upon Germany from the east, be merely a method of making use of Russia, not a method of serving her. Her people could not profit by it, if they profited by it at all, in time to save them from their present distresses, and their substance would be used to maintain foreign armies, not to reconstitute their own. Military action is admissible in Russia, as the Government of the United States sees the circumstances, only to help the Czecho-Slovaks consolidate their forces and get into successful coöperation with their Slavic kinsmen and to steady any efforts at self-government or self-defense in which the Russians themselves may be willing to accept assistance.

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It [the Government of the United States] hopes to carry out the plans for safeguarding the rear of the Czecho-Slovaks operating from Vladivostok in a way that will place it and keep it in close coöperation with a small military force like its own from Japan, and if necessary from the other Allies, and that will assure it of the cordial accord of all the Allied powers; and it proposes to ask all associated in this course of action to unite in assuring the people of Russia in the most public and solemn manner that none of the governments uniting in action either in Siberia or in northern Russia contemplates any interference of any kind with the political sovereignty of Russia, any intervention in her internal affairs, or any impairment of her territorial integrity either now or hereafter, but that each of the associated powers has the single object of affording such aid as shall be acceptable, and only such aid as shall be acceptable, to the Russia people in their endeavor to regain control of their own affairs, their own territory, and their own destiny.<sup>13</sup>

From the policy thus enunciated the United States did not see fit to depart.<sup>14</sup> Moreover, it expressed itself in favor of the retirement of the Czecho-Slovaks

<sup>13</sup> *Id.*, 287, 288, 289-290. The Secretary added: "Whether from Vladivostok or from Murmansk and Archangel, the only legitimate object for which American or Allied troops can be employed, it submits, is to guard military stores which may subsequently be needed by Russian forces and to render such aid as may be acceptable to the Russians in the organization of their own self-defense. For helping the Czecho-Slovaks there is immediate necessity and sufficient justification. Recent developments have made it evident that that is in the interest of what the Russian people themselves desire, and the Government of the United States is glad to contribute the small force at its disposal for that purpose. It yields, also, to the judgment of the Supreme Command in the matter of establishing a small force at Murmansk, to guard the military stores at Kola, and to make it safe for Russian forces to come together in organized bodies in the north. But it owes it to frank counsel to say that it can go no further than these modest and experimental plans. It is not in a position, and has no expectation of being in a position, to take part in organized intervention in adequate force from either Vladivostok or Murmansk and Archangel.

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"It is the hope and purpose of the Government of the United States to take advantage of the earliest opportunity to send to Siberia a commission of merchants, agricultural experts, labor advisers, Red Cross representatives, and agents of the Young Men's Christian Association accustomed to organizing the best methods of spreading useful information and rendering educational help of a modest sort, in order in some systematic manner to relieve the immediate economic necessities of the people there in every way for which opportunity may open. The execution of this plan will follow and will not be permitted to embarrass the military assistance rendered in the rear of the westward-moving forces of the Czecho-Slovaks." (*Id.*, 288-290.)

<sup>14</sup> Memorandum of Mr. Lansing, Secy. of State, of a Conference at the White House, July 6, 1918, *id.*, 262.

For the views of the British Imperial War Cabinet of July 29, 1918, on the American *aide-memoire* of July 17, 1918, see *id.*, 315.

eastward from western Siberia as rapidly as safety would permit and the concentration of all troops in eastern Siberia.<sup>15</sup> The United States did, in coöperation with Japan, land an American force, 8,700 strong,<sup>16</sup> under General Graves at Vladivostok,<sup>17</sup> and endeavored to safeguard the rear of the Czecho-Slovaks, at the same time resisting the suggestions of even American military and naval authorities to permit that force to push inland and establish a winter base near Omsk in western Siberia.<sup>18</sup> The restricted use of the United States army on Russian Asiatic soil marked a resolute effort to refrain from intervention as by strengthening particular Russian entities or groups which were endeavoring to wrest Siberia from the Soviet régime.<sup>19</sup> That army was employed with no design of interfering with the political independence of the territorial sovereign, and solely to protect the Czecho-Slovak forces in the final stages of their progress towards the Pacific, and in safeguarding their lodgment upon reaching their destination. Such control as was temporarily exercised by the American military force on Asiatic soil, as at Vladivostok, in coöperation with Japan and other Allied Powers, was merely incidental to such an end.<sup>20</sup> If this action constituted intervention in a technical sense, it was at least free from the sinister aspects of the grave interference which the United States had been strongly urged to offer and which it had resisted the temptation to make.

The strength of the American position appears to have been acknowledged by the Russian Government when Mr. Litvinoff, People's Commissar for Foreign Affairs, announced in a communication to President Roosevelt, on November 16, 1933, that his Government agreed to waive any and all claims arising out of the activities of American military forces in Siberia, subsequent to January 1, 1918.<sup>21</sup>

<sup>15</sup> Memorandum of the Secretary of State on Siberian Policy after Conference with the President, Aug. 20, 1918, *id.*, 351.

<sup>16</sup> Mr. Lansing, Secy. of State, to the Japanese Ambassador at Washington, Aug. 15, 1918, *id.*, 346.

<sup>17</sup> See, in this connection, Memorandum, from the Japanese Ambassador at Washington, to the Acting Secy. of State, Aug. 2, 1918, *id.*, 324; the Acting Secy. of State to the President, Aug. 3, 1918, *id.*, 325; Mr. Polk, Acting Secy. of State, to Mr. Morris, Ambassador to Japan, Aug. 3, 1918, *id.*, 328; Mr. Lansing, Secy. of State, to the British Chargé d'Affaires at Washington, Aug. 14, 1918, *id.*, 344.

<sup>18</sup> Mr. Morris, Ambassador to Japan, to the Secy. of State, Sept. 23, 1918, setting forth the views of Admiral Knight, General Graves and himself, *id.*, 387; Mr. Lansing, Secy. of State, to Mr. Morris, Sept. 26, 1918, *id.*, 392. Also in this connection, Mr. Balfour, British For. Secy. to the British Chargé d'Affaires at Washington, Oct. 2, 1918, *id.*, 404.

Also Mr. Morris, Ambassador to Japan, to the Secy. of State, Oct. 27, 1918, relative to the refusal by Japan to accede to a British request to send additional forces into Siberia to support the Czechs in the Volga region, *id.*, 418.

<sup>19</sup> Mr. Polk, Acting Secy. of State, to Mr. Caldwell, American Consul at Vladivostok, Aug. 2, 1918, *id.*, 323; Mr. Lansing, Secy. of State, to Mr. Harris, Consul General at Irkutsk, Oct. 23, 1918, *id.*, 417.

<sup>20</sup> Mr. Lansing, Secy. of State, to Mr. Morris, Ambassador to Japan, July 6, 1918, *id.*, 263; Proclamation by Commanders of Allied and Associated forces at Vladivostok, July 6, 1918, *id.*, 271.

<sup>21</sup> Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1, p. 5.

See, also, message of President Wilson to the Senate, of July 22, 1919, concerning American Troops in Siberia, For. Rel. 1919, Russia, 391.

## (f)

§ 82D. **Nicaragua, 1926–1927.** The Civil War in Nicaragua in 1926–1927, led to the establishment of neutral zones by American armed forces on a considerable scale for the protection of American and other foreign lives and property without, however, indicating any design of interference with the political independence of the Republic except in so far as there was involved a curtailment of military freedom to either or both sides.<sup>1</sup> This action enured to the benefit of the existing Government; and its adversary vigorously protested when it assumed the form of the naval occupation of Puerto Cabezas in December, 1926.<sup>2</sup>

In February, 1927, the Government of the United States entered into a contract for the sale of a substantial amount of rifles, machine guns, and ammunition to the existing government, relaxing also the operation of an embargo of arms to Nicaragua, so as to permit the shipment of arms by private persons for the use of that Government.<sup>3</sup>

Early in 1927, President Coolidge appointed General Henry L. Stimson (who subsequently became Secretary of State, and still later, Secretary of War), as his personal representative to proceed to Nicaragua, confer with leaders of both contestants and endeavor to find a solution of the grave problems which the continuance of the conflict was serving to press upon the Republic and to reduce it to a condition of anarchy and financial ruin.<sup>4</sup> His conferences with leaders

§82D.<sup>1</sup> See The United States and Nicaragua: A Survey of the Relations from 1909 to 1932, Dept. of State, Latin American Series, No. 6, relative to the zone at Bluefields in August, 1926 (60), at Rio Grande and Puerto Cabezas in December, 1926 (68), as well as at Pearl Lagoon, Prinzapolca and Rama (68).

"Because of the fighting at Chinandega, the railway service between Corinto and Managua was interrupted. As a means of insuring the maintenance of communications between the Legation and the Legation guard at Managua and the seacoast, United States naval forces declared neutral the zone along the Pacific Railway, including the cities through which the railway passed, and prohibited fighting in that zone. . . . Early in March, 1927, the United States naval forces extended their protection of the Pacific Railway as far as Granada. After an attack by unknown parties on the American Consular Agent at Matagalpa, that city was declared a neutral zone and American marines stationed there. By March 15 a total of 2,000 naval and military forces had been landed in Nicaragua to maintain the neutral zones and protect American and other foreign lives and property. At the request of President Diaz, the American forces at Managua occupied the Loma Fortress." (*Id.*, 71–72.)

See message of President Coolidge to the Congress, Jan. 10, 1927, *Id.*, 67. It should be observed that requests for protection of their respective interests were made by the Governments of Belgium, Great Britain, China and Italy, *Id.*, 68.

See also documents, Hackworth, Dig., I, § 47.

<sup>2</sup> See protest of Dr. Vaca, "confidential agent of the Constitutional Government," to the Secy. of State, published in *New York Times*, Dec. 29, 1926.

*Cf.* statement of Secy. Stimson, of April 18, 1931, in which he said: "In 1926, two armies, consisting of two or three thousand men each, were fighting in Nicaragua on the east coast. Both armies professed to be carrying out the rules of warfare and to be protecting neutrals and neutral property. So the problem of this Government was solved by establishing neutral zones in which, by agreement with both armies at that time, hostilities did not enter. These neutral zones, as I recall it, were established with the consent of both the Liberal and Conservative commanders of the contending armies. There was no organized attempt to murder private citizens of any country. The problem was only to protect them from the inevitable catastrophes of war." (The United States and Nicaragua: A Survey of the Relations from 1909 to 1932, Dept. of State, Latin American Series, No. 6, 105.)

<sup>3</sup> *Id.*, 68–69, adverting to the authority of the Act of June 5, 1920, 44 Stat. 2625.

See The Recognition of New Governments, Conclusions, *supra*, § 45C.

<sup>4</sup> The United States and Nicaragua, State Dept. Survey, 1909–1932, 71.



on both sides made clear to General Stimson the absolute necessity, acknowledged by both contestants, of the supervision of the elections of 1928 by the United States.<sup>5</sup> To that end he insisted that the revolutionary forces, despite the opposition of their leader Dr. Sacasa,<sup>6</sup> accept the retention of the then existing President Diaz during the remainder of his term of office, as essential to the success of an election under American supervision.<sup>7</sup> He also demanded a general disarmament as necessary for the proper conduct of such an election, announcing that "American forces would be authorized to accept the custody of the arms of the Government and those others willing to lay them down, and to disarm the rest."<sup>8</sup> The Liberal or revolutionary party, when informed that the United States would employ military force to secure compliance with its demand as to the retention of President Diaz and a general disarmament, accepted the terms imposed upon them.<sup>9</sup> Accordingly, President Diaz was retained in office, a general disarmament effected,<sup>10</sup> and the 1928 election duly held under the supervision of the United States.<sup>11</sup>

Through the series of acts mentioned the United States interfered with the political independence of a Central American Republic. The acquiescence, however, on the part of both contestants in relation to much that was done and was sought to be accomplished, robbed the affair, in a technical sense, of a sinister quality which otherwise it might have been difficult to excuse.<sup>12</sup> It marked the initiation of a plan<sup>13</sup> that rendered feasible and successful a series of general elections under the supervision of the United States.<sup>14</sup> By accepting that supervision and the decision of the United States which demanded it, the Republic appeared to accept also a relationship towards the latter that no existing treaty required, and which, as long as it lasted, revealed Nicaragua as under the protection of its northern neighbor.<sup>15</sup> While the result was highly beneficial to the economic and possibly also the political life of the former, the method by which it was wrought served as a warning to every Central American Republic that it was not regarded by the United States as free to put its house in order entirely according to ways of its own devising.

<sup>5</sup> *Id.*, 72.

<sup>6</sup> *Id.*, 73.

<sup>7</sup> *Id.*, 74.

<sup>8</sup> *Id.*, 74.

<sup>9</sup> *Id.*, 74-75; also *id.*, 75-77.

<sup>10</sup> *Id.*, 77-78.

<sup>11</sup> *Id.*, 82-92.

<sup>12</sup> It should be observed, however, that on the one hand the United States threatened to employ force in order to exact compliance with its demands, and that on the other, there was slight evidence of protest against its taking such a stand. Nevertheless, the acceptance of its terms could, under the circumstances, hardly be regarded as voluntary.

<sup>13</sup> See State Dept. Survey, United States and Nicaragua, 1909-1932, *Id.*, 85-86.

<sup>14</sup> *Id.*, 115-119. The presidential election of 1932, was held under the direct supervision of Rear Admiral C. H. Woodward, U.S.N., as Chairman of the National Board of Elections, and resulted in the election of Dr. Juan B. Sacasa. See *id.*, 117-118. See statement of Dept. of State, Jan. 1, 1933, relative to the withdrawal of American forces on the following day, Dept. of State, Press Releases, Jan. 7, 1933, 3-5.

<sup>15</sup> See Nicaragua, *supra*, §23A; also, The Recognition of New Governments, The Position of the United States, *supra*, § 45B.

(g)

§ 83. **Certain Minor Instances.** In the course of the Chile-Peruvian war in 1881, Mr. Blaine, Secretary of State, fearful lest Chilean demands for Peruvian territory as a condition of peace might prove destructive of Peruvian nationality, instructed Mr. Trescot, special envoy to the belligerent States, to lodge such a protest and take such a stand as might have been fairly looked upon as amounting to intervention.<sup>1</sup> The instruction was, however, a few weeks later modified by Secretary Frelinghuysen (Mr. Blaine's immediate successor), and the United States did not in fact, in its subsequent conduct, have recourse to such interference.<sup>2</sup>

In the process of its acquisition of rights of sovereignty over the Island of Tutuila and adjacent islands in the Samoan group the United States seems to have had recourse to intervention, in so far as it caused the Samoans to accept

§ 83.<sup>1</sup> Mr. Blaine expressed surprise and regret at the treatment accorded the Calderon government of Peru by Chile, which had forbidden that government to exercise its functions within territory occupied by the Chilean army, and which had arrested President Calderon. The Secretary declared that if it should be avowed that the motive for such action was resentment by Chilean authorities on account of the continued recognition by the United States of the Calderon government, the proceeding would be regarded by the President "as an intentional and unwarranted offense" and regarded by the Government of the United States "as an act of such unfriendly import as to require the immediate suspension of all diplomatic intercourse." Mr. Blaine added that should the Chilean government, while disclaiming any intention of offense, maintain its right to settle its difficulties with Peru without the friendly intervention of other powers, and refuse to allow the formation of any government in Peru which did not pledge its consent to the cession of Peruvian territory, it would be Mr. Trescot's duty in language as strong as was consistent with the respect due an independent power, to express the disappointment and dissatisfaction felt by the United States at such a deplorable policy. He admitted that if Peru was unable or unwilling to furnish adequate indemnities for specified purposes, the right of conquest put it in the power of Chile to satisfy itself, and that the reasonable exercise of that right, however to be regretted, was not a legitimate ground of foreign complaint. He declared, however, that the Government of the United States felt that the exercise of the right of absolute conquest was dangerous to the best interests of all republics of the American continents, and that from it were certain to spring other wars and political disturbances. He maintained that Peru had the right to demand that opportunity be allowed her to find the requisite indemnity and guarantee, and he announced that the United States could not admit that a section of territory could be properly exacted far exceeding in value the amplest estimate of a reasonable indemnity. He declared that if the good offices of the United States were rejected and the policy of absorption of an independent State were persisted in, the United States would consider itself discharged from any further obligation to be influenced in its action by the position which Chile had assumed, and would hold itself free to appeal to the other American republics to join it in an effort to avert consequences which could not be confined to Chile and Peru, but which threatened with extremest danger the political institutions, the peaceful progress, and the liberal civilization of all America. Mr. Blaine, Secy. of State, to Mr. Trescot, No. 2, Dec. 1, 1881, For. Rel. 1881, 143, Moore, Dig., VI, 39.

<sup>2</sup> Mr. Frelinghuysen, Secy. of State, to Mr. Trescot, No. 6, Jan. 9, 1882, For. Rel. 1882, 57, Moore, Dig., VI, 40. Also Same to Mr. Phelps, Minister to Peru, No. 6, July 26, 1883, For. Rel. 1883, 709, Moore, Dig., VI, 42; Same to Same, No. 8, Aug. 25, 1883, For. Rel. 1883, 711, Moore, Dig., VI, 42.

In 1913, President Wilson not only declined to recognize the Mexican Government of General Huerta, but also, as has been noted (*supra*, § 44), made known to certain foreign powers his sense of duty to require Huerta's retirement, and his opinion that the United States should proceed to employ such means as might be necessary in order to produce that result. Those powers were, accordingly, called upon to exert their influence to impress upon Huerta the wisdom of retiring in the interest of peace and constitutional government in Mexico. See Mr. Bryan, to certain American diplomatic officers, Nov. 7, 1913, For. Rel. 1913, 856. Also Same, to Chargé O'Shaughnessy, at Mexico City, Nov. 24, 1913, For. Rel. 1914, 443.

Also statement of President Wilson, June 2, 1915, For. Rel. 1915, 694.

the form of government prescribed by the General Act of the Conference at Berlin in 1889,<sup>3</sup> to yield to a cessation of hostilities in the fight for the kingship, and to bow to the tri-partite agreement of 1899, concluded by the United States with Great Britain and Germany.<sup>4</sup> It was by virtue of British and German renunciations therein of territorial pretensions, rather than by any other means, that the United States appears to have perfected its rights. No native government in those islands seems to have been regarded at that time as possessed of rights of political independence or of property and control which the parties to the arrangement regarded themselves as obliged to respect.<sup>5</sup>

(h)

§ 83A. **The Establishment of Neutral Zones in the Course of Revolutionary Movements in Parts of Latin America.** The United States has not infrequently, in the course of revolutionary movements in parts of Latin America, made special effort to protect the lives and property of its nationals in existing or prospective areas of conflict.<sup>1</sup> To that end, it has at times, through military or naval forces, established so-called neutral zones in areas sought to be rendered immune from the commission of hostilities. By this process the territorial sovereign has been denied the right either through its existing government or through insurgent forces opposed thereto, regardless of their mag-

<sup>3</sup> President Cleveland, Annual Message, Dec. 3, 1894, For. Rel. 1894, xv-xvi, Moore, Dig., 1, 548. For the text of the General Act for the Neutrality and Autonomous Government of the Samoan Islands, concluded June 14, 1889, by the United States, Great Britain and Germany, see Malloy's Treaties II, 1576.

<sup>4</sup> Malloy's Treaties, II, 1595.

<sup>5</sup> See, generally, documents in Moore, Dig., I, 536-554.

DEMANDS OF THE ALLIED POWERS ON CHINA FOLLOWING THE BOXER TROUBLES OF 1900. Following the military operations of the allied expedition in China in 1900, to raise the siege of the legations at Peking, the United States in conjunction with Austria-Hungary, Belgium, France, Great Britain, Germany, Italy, Japan, Russia and Spain, compelled China to yield to heavy demands. These embraced not only various forms of reparation for wrongs sustained in the course of the so-called "Boxer" troubles, but also measures specially designed to prevent a recurrence of acts such as had been committed. These measures, which were embodied in the final protocol of Sept. 7, 1901, Malloy's Treaties, II, 2006, involved the relinquishment by China of certain important rights. Thus it was obliged to yield the special reservation of the so-called Legation quarter in Peking, together with exclusive control thereof, embracing the fullest right of defense, to the interested Powers. Art. VII. It was forced to consent to the razing of the forts at Taku and those which might impede free communication between Peking and the sea, Art. VIII, and the occupation by the Powers of certain points for the maintenance of communication between the capital and the sea. Art. IX. It was compelled to agree to prohibit the importation of arms and ammunition, as well as materials used exclusively in their manufacture. Art. V. It was obliged also to transform the Office of Foreign Affairs (Tsungli Yamen) into a Ministry of Foreign Affairs on lines indicated by the Powers, and to give it precedence over the other six Ministries of State, and simultaneously to modify the existing ceremonial respecting the reception of foreign diplomatic representatives. Art. XII. Save for these and kindred concessions, the United States had, however, no design which was at variance with the policy announced by Secretary Hay in July, 1900, and which aimed to "preserve Chinese territorial and administrative entity." For. Rel. 1900, 299. The interference with the political independence of China, manifested in the demands noted, was a natural incident or consequence of the military expedition of the Powers to relieve the legations, and was necessitated by the nature and extent of the disturbances which led to that expedition. Concerning events which preceded the raising of the siege of the legations, see Landing of Foreign Forces, *infra*, § 202.

§ 83A. <sup>1</sup> See Eleanor Woolley, *The Regulation by the United States of Revolutions in the Caribbean, and Historical Appendices thereto*, prepared in manuscript at Columbia University, in 1936.

nitude or potentialities, to wage a conflict in localities where military operations might be expected greatly to endanger, or to be destructive of, American life or property. Such interference, constituting participation in a political contest, has served to restrain the exercise of political independence, and to affect the result of the conflict being waged.

It has been observed elsewhere that international law fails to sanction interference with a foreign State that has done no wrong to any other.<sup>2</sup> Incidental destruction of foreign life and property in the progress of a revolutionary movement of large dimensions is not necessarily to be identified with internationally illegal conduct unless the presence of such life and property in a disaffected area is to be deemed to check the normal freedom to commit hostile acts therein. The practice of States fails to reveal a common acknowledgment of such a restriction. For that reason, it is believed that the United States in thwarting through the establishment of neutral zones military action which in the circumstances of the particular case was not internationally illegal, has itself at times been guilty of conduct that lacked justification.<sup>3</sup> There have been instances, however, when the establishment of a neutral zone by the United States appeared to be excusable. This has been the case where both contestants acquiesced in such action,<sup>4</sup> or where the measure was a reasonable, and perhaps necessary, means of checking internationally illegal action manifested in interference with a legation or with access thereto,<sup>5</sup> or where the provisions of a treaty yielded such freedom.<sup>6</sup>

It may be observed that the United States has not sought to establish neutral zones in areas outside of the western hemisphere, and has made use of them chiefly in territory adjacent to the Caribbean Sea.

(4)

§ 83B. **Non-Intervention in the Western Hemisphere.** Declared President Franklin D. Roosevelt on December 28, 1933:

The maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States alone. The maintenance

<sup>2</sup> See Intervention, Self-Defense, *supra*, § 70.

<sup>3</sup> The action of American and British naval commanders at Puerto Cortes, Honduras, in January, 1911, is believed to be illustrative. See documents in For. Rel. 1911, 291-298; also, J. Reuben Clark, Memorandum on Right to Protect Citizens in Foreign Countries by Landing Forces, 3 ed., 1934, 77-78. It may be observed in this connection that President Davila of Honduras complained on January 29, 1911, that the orders of the commanders of the English and American naval vessels in Puerto Cortes to restrict government troops to a neutral zone separated from its bases, placed the troops at a great disadvantage. For. Rel. 1911, 297.

<sup>4</sup> Such was the case with respect to certain zones established by the United States in Nicaragua in 1927. See Nicaragua, *supra*, § 82D.

<sup>5</sup> See J. Reuben Clark, Memorandum on Right to Protect Citizens in Foreign Countries by Landing Forces, 3 ed., 1934, 115-117, in relation to the revolution in Honduras in 1924, and the landing of American military forces.

<sup>6</sup> See Mr. Bryan, Secy. of State, to Mr. Sullivan, American Minister to the Dominican Republic, June 29, 1914, For. Rel. 1914, 241, adverting to the convention between the United States and the Dominican Republic of 1907, as a ground of interference with the bombardment of Puerto Plata. See, also, Mr. White, American Chargé d'Affaires at Santo Domingo, to the Secy. of State, July 14, 1914, *id.*, 245.

See, also, Panama, *supra*, § 82.

of law and the orderly processes of government in this hemisphere is the concern of each individual nation within its own borders first of all. It is only if and when the failure of orderly processes affects the other nations of the continent that it becomes their concern; and the point to stress is that in such an event it becomes the joint concern of a whole continent in which we are all neighbors.<sup>1</sup>

In the passage quoted the President was far from intimating when the failure of orderly processes might so affect the other nations of the continent as to justify their interference in the conduct of a neighbor, or to create joint privileges to pursue such a course. The President was seemingly making endeavor to point to the undesirability of intervention in the Western Hemisphere under conditions when the States interfered with had not violated their international obligations towards any others, and thereby to assure the other American Republics of the desire of the United States to refrain from interference in any case in which such action would not reasonably commend itself to the American international community.<sup>2</sup> In the course of the same address the President made reference also to his proposals "to every nation in the world" looking to disarmament and non-aggression, in which he had included "a simple declaration that no nation will permit any of its armed forces to cross its own borders into the territory of another nation."<sup>3</sup>

The United States accepted, under reservations, Article 8 of the convention on Rights and Duties of States, concluded December 26, 1933, at the Seventh International Conference of American States, which proclaimed that "no State has the right to intervene in the internal or external affairs of another."<sup>4</sup>

§ 83B.<sup>1</sup> Address before the Woodrow Wilson Foundation, Washington, D. C., Dept. of State, Press Releases, Dec. 30, 1933, 380, 381. The President did not hesitate to say, in this connection: "if I had been engaged in a political campaign as a citizen of some other American republic I might have been strongly tempted to play upon the fears of my compatriots of that republic by charging the United States of North America with some form of imperialistic desire for selfish aggrandizement. As a citizen of some other republic I might have found it difficult to believe fully in the altruism of the richest American republic. In particular, as a citizen of some other republic, I might have found it hard to approve of the occupation of the territory of other republics, even as a temporary measure."

It is not known whether, in making this utterance, the President had in mind the action of his country in 1915 when it intervened in Haiti. Inasmuch, however, as the President was endeavoring to "implement the declaration of President Wilson" delivered at Mobile in 1913, in which it was said: "comprehension must be the soil in which shall grow all the fruits of friendship," it may be doubted whether the former was aware of the fact that the policy which he enunciated was not in harmony with that of his distinguished predecessor in relation to Haiti.

See, also, message of President Roosevelt to the Senate, of May 29, 1934, to accompany treaty of that date between the United States and Cuba, designed to supersede the treaty between those States signed at Havana May 22, 1903, Dept. of State, Press Releases, June 2, 1934, 339. See Cuba, Acquisition of Independent Statehood, *supra*, § 19B.

<sup>2</sup> Concerning the reluctance of the President to intervene in Cuba in the Autumn of 1933, under circumstances when conditions of turmoil therein might have been deemed to warrant recourse to such action in virtue of Article III of the treaty between the United States and Cuba of May 22, 1903, see Cuba, *supra*, § 19A.

<sup>3</sup> He said, in this connection: "Such an act would be regarded by humanity as an act of aggression and as an act, therefore, that would call for condemnation by humanity." (Dept. of State Press Releases, Dec. 30, 1933, 383.)

<sup>4</sup> U. S. Treaty Vol. IV, 4807, 4809.

The reservation, embodied in a statement made by Secretary Hull, Head of the Delegation of the United States, on Dec. 19, 1933, and presented to the Plenary Session of the Con-

Again, the United States accepted the Additional Protocol Relative to Non-Intervention concluded at the Inter-American Conference for the Maintenance of Peace at Buenos Aires, December 23, 1936, in article I of which "the high contracting parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the parties."<sup>5</sup>

This action on the part of the United States was of great significance. With its American neighbors it went far to relinquish a procedure or step which experience had shown was oftentimes taken without justification. It was a vivid token of deference for a principle on which even in the Western Hemisphere the weaker Republics had at times found inadequate recognition. Without attempting to interpret the scope of what was relinquished through the convention, one may fairly raise the inquiry whether it was the design of the contracting parties, including the United States, to abandon the right to intervene for cause, as for example, under circumstances when failure to oppose internationally illegal conduct on the part of an American State would subject a non-interfering neigh-

ference by that Delegation, in signing the convention on Dec. 22, 1933, was as follows: "The Delegation of the United States, in voting 'yes' on the final vote on this committee recommendation and proposal, makes the same reservation to the eleven articles of the project or proposal that the United States Delegation made to the first ten articles during the final vote in the full Commission, which reservation is in words as follows:

"The policy and attitude of the United States Government toward every important phase of international relationships in this hemisphere could scarcely be made more clear and definite than they have been made by both word and action especially since March 4. I have no disposition therefore to indulge in any repetition or rehearsal of these acts and utterances and shall not do so. Every observing person must by this time thoroughly understand that under the Roosevelt Administration the United States Government is as much opposed as any other government to interference with the freedom, the sovereignty, or other internal affairs or processes of the governments of other nations.

"In addition to numerous acts and utterances in connection with the carrying out of these doctrines and policies, President Roosevelt, during recent weeks, gave out a public statement expressing his disposition to open negotiations with the Cuban Government for the purpose of dealing with the treaty which has existed since 1903. I feel safe in undertaking to say that under our support of the general principle of non-intervention as has been suggested, no government need fear any intervention on the part of the United States under the Roosevelt Administration. I think it unfortunate that during the brief period of this Conference there is apparently not time within which to prepare interpretations and definitions of these fundamental terms that are embraced in the report. Such definitions and interpretations would enable every government to proceed in a uniform way without any difference of opinion or of interpretations. I hope that at the earliest possible date such very important work will be done. In the meantime in case of differences of interpretation and also until they (the proposed doctrines and principles) can be worked out and codified for the common use of every government, I desire to say that the United States Government in all of its international associations and relationships and conduct will follow scrupulously the doctrines and policies which it has pursued since March 4 which are embodied in the different addresses of President Roosevelt since that time and in the recent peace address of myself on the 15th day of December before this Conference and in the law of nations as generally recognized and accepted." (*Id.*, 4810.)

<sup>5</sup> U. S. Treaty Vol. IV, 4821.

Declared Secretary Hull in a statement issued on Oct. 6, 1937: "Among the principles which in the opinion of the Government of the United States should govern international relationships, if peace is to be maintained, are abstinence by all nations from use of force in the pursuit of policy and from interference in the internal affairs of other nations; adjustment of problems in international relations by process of peaceful negotiation and agreement; respect by all nations for the rights of others and observance by all nations of established obligations; and the upholding of the principle of the sanctity of treaties." (Dept. of State Press Releases, Oct. 9, 1937, 285.)

See Adolph Berle, Jr., Assist. Secy. of State, "The Policy of the United States in Latin America," May 3, 1939, Dept. of State, Press Releases, May 6, 1939, 375.

bor to irreparable harm that served to jeopardize its safety as against a foe from another continent.<sup>6</sup>

(5)

§ 83C. **The Transfer of Destroyers to Britain in 1940. Kindred Acts.** As is noted elsewhere, the Government of the United States, by executive agreement of September 2, 1940, undertook to transfer a number of over-age destroyers to that of the United Kingdom in return for the right to lease naval and air bases on British possessions within the western hemisphere.<sup>1</sup> This action by or on behalf of the United States marked American participation in the war, the value of which it may be unnecessary to discuss.<sup>2</sup> It constituted an American contribution designed in part to uphold the British cause as against its enemy; and to that extent it revealed a sense of freedom on the part of the American Government from the legal duty which normally obliges the Government of a State professing to be neutral to abstain from participation in an existing war between others.<sup>3</sup> This participatory action must, in legal contemplation be regarded as constituting an instance of intervention.<sup>4</sup>

The propriety of intervention which assumes the form of interference with the conduct of a foreign belligerent must of course be based upon the fact that the objectives sought to be obtained by it are wrongful as well as harmful to the intervening State, as by impairing its defenses under conditions when such action is reprehensible.<sup>5</sup> With such a conclusion the opposed belligerent may, in the particular case, be far from prepared to agree; and it may stoutly maintain that, for example, the endeavor to cause the downfall of its enemy does not constitute the violation of a legal duty towards the neutral State which both deplores such an achievement and seeks to thwart it. Nevertheless, the view of the non-belligerent State may be correct and impregnable. When in point of fact it is, the belligerent country is not in a position to deny that in the attainment of its objective it violates a duty to the State which seeks to hold it in leash, or that the latter may fairly invoke the doctrine of self-defense in support of its interference. In practice, the chief difficulty which presents itself grows out of the fact that the conduct of the interfering State may inspire belief that its decision to intervene, being responsive to the dictates of policy, is not to be regarded as manifesting also the exercise of a legal right to be appraised and dealt with as such, but rather marks the fruition of a plan attributable to the sheer power of the intervener and to its estimate of what it may achieve by the use of it. Doubtless there may arise situations where such a view is justified.

<sup>6</sup> See The Panama Canal Doctrine, *infra*, § 97B.

§ 83C.<sup>1</sup> See *infra*, § 848A, and documents there cited.

<sup>2</sup> It may be observed, however, that the legal aspect of the transfer of the ships which was duly effected pursuant to the arrangement, was not dependent upon the military importance to Britain of what was yielded, or upon any lack of substantial detriment sustained by Germany in consequence of the transfer.

<sup>3</sup> See Governmental Abstention from Direct Participation, *infra*, § 848.

<sup>4</sup> The right of a State to intervene is obviously unaffected by the circumstance that that other whose conduct is opposed happens to be at war, or by the possible effect of such action upon the conduct of the opposed belligerent.

<sup>5</sup> See Self-Defense, *supra*, § 70.

That circumstance does not, however, warrant the conclusion that there is not ample room for intervention on strictly legal grounds in situations where interference is perhaps the only means of defending the safety of the intervener.

In American contemplation, the German effort in September 1940, by aerial bombardment and other means to effect the conquest of England and break down its resistance was, in the light of the then existing circumstances, an impairment of the defenses of the United States which the latter could reasonably oppose without violating any legal duty to Germany, on the special ground that Germany was not in a position to maintain that the attainment of its particular objective was not wrongful to the United States.

In the months and year following, the United States made bold and candid effort to uphold the cause of Britain by various contributions of military aid, and enacted legislation designed to facilitate such action.<sup>6</sup> Before the Summer of 1941, the nation had in fact become a vigorous participant in a war with respect to which it still remained a non-belligerent. In American contemplation the propriety of what was being done needed no assumption of belligerency by the intervener, and rested upon the character of German activities which were regarded as wrongfully undermining certain bulwarks of defense.<sup>7</sup> Other kindred reasons in support of the American position were also advanced. It was declared that Germany, together with Italy and Japan, had become aggressors, contemptuous, in their treatment of other countries which they made their victims, of the injunctions of international customary and conventional law (embracing the Briand-Kellogg Pact).<sup>8</sup> Hence, it was implied that American interference with those aggressors was excusable on the ground that it constituted opposition to international lawlessness, and so marked a vindication of the rights of the aggrieved States. Here was the application of an underlying principle, which however rarely invoked by the individual State, stood available to fortify its course provided the factual situation supported it.<sup>9</sup>

<sup>6</sup> See An Act to Promote the Defense of the United States, of March 11, 1941 (55 Stat. 31). This enactment was known as the Lend-Lease Act. By virtue of it provision was made whereby the President might, among other things, sell, transfer title to, exchange, lease, lend, or otherwise dispose of, to the Government of any foreign country whose defense he deemed vital to the defense of the United States so-called defense articles under conditions set forth in the law.

<sup>7</sup> See President Roosevelt, Address of Dec. 29, 1940, Dept. of State Bulletin, Jan. 4, 1941, 3, 4. Also Mr. Hull, Secy. of State, in statement before the House Committee on Foreign Affairs, Jan. 15, 1941, in which he said: "On no other question of public policy are the people of this country so nearly unanimous and so emphatic today as they are on that of the imperative need, in our own most vital interest, to give Great Britain and other victims of attack the maximum of material aid in the shortest possible space of time. This is so because it is now altogether clear that such assistance to those who resist attack is a vital part of our national self-defense. In the face of the forces of conquest now on the march across the earth, self-defense is and must be the compelling consideration in the determination of wise and prudent national policy." (*Id.*, Jan. 18, 1941, 85, 88.)

<sup>8</sup> Secy. Hull added: "The protagonists of the forces against which we are today forging the instrumentalities of self-defense have repudiated in every essential respect the long-accepted principles of peaceful and orderly international relations. They have disregarded every right of neutral nations, even of those to which they themselves had given solemn pledges of inviolability. Their constantly employed weapons for the government of their unfortunate victims are unrestricted terrorization, firing squads, deceit, forced labor, confiscation of property, concentration camps, and deprivations of every sort." (*Id.*)

<sup>9</sup> See Prevention of Unlawful Intervention by another State, *supra*, 71.



Again, in the summer of 1941, for reasons of defense, Iceland was occupied by forces of the United States. In his announcement of the fact on July 7, 1941, President Roosevelt declared that the occupation of that Island by Germany would constitute a serious threat in three dimensions — one against Greenland and the northern portion of the North American continent, including the islands which lie off it, another against all shipping in the North Atlantic, and still another against the steady flow of munitions to Britain, which, he said, was a "matter of broad policy clearly approved by the Congress."<sup>10</sup>

## h

**§ 84. The League of Nations and Intervention.** The Covenant of the League of Nations, in so far as it established a right of interference in case of a breach of the agreement by a member of the League, as manifested, for example, in aggression against the territorial integrity or political independence of a member,<sup>1</sup> or in disregard of the undertaking not to resort to war save under specified conditions,<sup>2</sup> was not at variance with any principle of international law pertaining to intervention. The consent to interference under the contingencies set forth in the compact prevented such action when taken against any member proving to be a covenant-breaker from resembling the case where external opposition was in plain defiance of the will of the State which might be thwarted.

A different situation was, however, contemplated through provisions designed to compel a State which had not accepted the Covenant to refrain from action which as an independent sovereign it might see fit to take. According to Article XVII, in the event of a dispute between a member of the League and a State which was not a member, if the latter refused the invitation (which was to be made to it upon such conditions as the Council of the League might deem just) to accept the obligations of membership in the League for the purposes of adjusting the dispute, and resorted to war against a member of the League, the war-waging State exposed itself to the application of measures that might be applied as against a covenant-breaker under Article XVI.<sup>3</sup> In a word, the States constituting and adhering to the League asserted the right through that agency to interfere with and prevent the making of war by an outside power upon one of their members save under contingencies which they prescribed. It was the right of an outside State, when at variance with a State belonging to the League, to refuse to submit to such procedure or to the mode of amicable adjustment prescribed by the Covenant, which the members of that body appeared to challenge. Technically such interference with such outside State

<sup>10</sup> Dept. of State Bulletin, July 12, 1941, p. 15.

§ 84.<sup>1</sup> Art. X. The text of the Covenant is published in U. S. Treaty Vol. III, 3336-3345.

<sup>2</sup> Arts. XII and XV.

<sup>3</sup> Art. XVI. Art. XVII also provides that if both parties to a dispute, when so invited, refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute. This provision has reference to the situation when neither party to a controversy is a member of the League, a contingency expressly referred to in the Article.

See also Articles XII, XIII, XIV and XV.

seemingly amounted to intervention,<sup>4</sup> the propriety of which would on principle depend upon the merits of the particular case, unless it were admitted that the States constituting the League could by virtue of their organization alter the principles of international law. The views expressed by a majority of the Permanent Court of International Justice in the case concerning Eastern Carelia, fortified opposition to such an admission,<sup>5</sup> which the United States never appeared to be ready to make.

## 7

## THE MONROE DOCTRINE

## a

§ 85. **Preliminary.** In examining the practice of the United States in attempting to check the conduct of foreign powers by reason of its special relation to States or territory situated in the Western Hemisphere, the attempt is here made primarily to observe the precise character of acts which have been thwarted, the grounds relied upon in justification of interference, and the mode by which such action has been taken.<sup>1</sup> It is not sought to trace the development of a na-

<sup>4</sup> In a resolution adopted by the Assembly of the League of Nations Sept. 26, 1928, "on the Submission and Recommendation of a General Act and of three Model Bilateral Conventions in regard to Conciliation, Arbitration and Judicial Settlement," it was declared that "such undertakings are not to be interpreted as restricting the duty of the League of Nations to take at any time whatever action may be deemed wise and effectual to safeguard the peace of the world; or as impeding its intervention in virtue of Articles 15 and 17 of the Covenant, where a dispute cannot be submitted to arbitral or judicial procedure or cannot be settled by such procedure or where the conciliation proceedings have failed." (League of Nations, *Official Journal*, 9th Year, 1928, 1669-1670.)

<sup>5</sup> Fifth Advisory Opinion, Publications, Permanent Court of International Justice, Series B, No. 5, p. 27.

*Cf.* Declaration of the Council of the League of Nations, Sept. 27, 1923, League of Nations Document, C. 642 (1), 1927. V., quoted by Manley O. Hudson, in "The Second Year of the Permanent Court of International Justice," *Am. J.*, XVIII, 1, 7-10; Same writer, *id.*, XIX, 48, 69; also, T. Kalijarvi, "The Question of Eastern Carelia," *id.*, XVIII, 93.

See, Hugo Fortuin, *La question carélienne*, Gravenhage, 1925.

§ 85.<sup>1</sup> For bibliographies of the extensive literature dealing with the Monroe Doctrine, see Library of Congress, List of References on the Monroe Doctrine, compiled under direction of Herman H. B. Meyer, Chief Bibliographer, Washington, 1919; also Albert Bushnell Hart, *The Monroe Doctrine: An Interpretation*, Boston, 1916, 405-421; Herbert Kraus, *Die Monroedoktrin*, Berlin, 1913, 19-36; Edith M. Phelps, *Selected Articles on the Monroe Doctrine*, 2 ed., New York, 1916, XVII-XXXIII. These bibliographies are mentioned in the Library of Congress, List of References.

See also Phillips Bradley, *Bibliography of the Monroe Doctrine, 1919-1929*, London School of Economics and Political Science, 1929; bibliographical notes by Dexter Perkins, in his *Monroe Doctrine, 1823-1826*, Cambridge, Massachusetts, 1927, in his *Monroe Doctrine, 1826-1867*, Baltimore, 1933, and in his "Hands Off, a History of the Monroe Doctrine," Boston, 1941.

For documents relative to the origin of the Monroe Doctrine, see collection by Worthington C. Ford from among the papers of John Quincy Adams and from the Department of State, published in *Proceedings of Massachusetts Hist. Soc.*, XV, 373-429; also Moore, Dig., VI, 369-412; *Memoirs of John Quincy Adams*, comprising portions of his diary from 1795-1848, edited by Charles Francis Adams, Philadelphia, 1875, Vol. VI. The messages and addresses of the Presidents and the diplomatic correspondence of the United States contain the views of responsible American statesmen.

Among the numerous works touching the subject, the few following, which reveal a diversity of views, may be noted: Archibald Cary Coolidge, *The United States as a World Power*, New York, 1908 (reprinted 1919), 95-120; Thomas Benton Edgington, *The Monroe*

tional policy, or to emphasize the extent of the divergence between current interpretations of it and those of 1823. The purpose is rather to take full note of the magnitude of the claim of the United States, however much it may differ from what was once put forward in its behalf, and to perceive the legal theory on which it rests.

It has seemed important to observe also the deference paid by non-America to the claim of the United States, as well as the relationship of that claim to the conduct of other American countries.

## b

§ 86. **Prior Events.** Some time before President Monroe gave utterance to the policy expressed in his message of December 2, 1823, American statesmen had not infrequently declared that the United States could not, for reasons of self-defense, look with indifference upon certain action of European States with reference to the American continents. It was the possible transfer of American colonial possessions by one European power to another, which seems to have been a cause of special anxiety.<sup>1</sup>

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Doctrine, Boston, 1905; John W. Foster, *A Century of American Diplomacy*, Boston, 1900, 438-478; Albert Bushnell Hart, *The Monroe Doctrine: An Interpretation*, Boston, 1916; William Isaac Hull, *The Monroe Doctrine: National or International?* New York, 1915; Herbert Kraus, *Die Monroe Doktrin in ihren Beziehungen zur amerikanischen Diplomatie und zum Völkerrecht*, Berlin, 1913; John Bassett Moore, *Principles of American Diplomacy*, New York, 1918, Chap. VI; Hector Pétin, *Les États-Unis et la doctrine de Monroe*, Paris, 1900; William F. Reddaway, *The Monroe Doctrine*, 2 ed., New York, 1905; Charles H. Sherrill, *Modernizing the Monroe Doctrine*, Boston, 1916; George F. Tucker, *The Monroe Doctrine*, Boston, 1885; Hiram Bingham, *The Monroe Doctrine: An Obsolete Shibboleth*, New Haven, 1915. See, also, series of papers concerning the Monroe Doctrine in *Annals of American Academy of Pol. and Soc. Science*, entitled "International Relations of the United States," July, 1914, LIV, Part 1; also another series in *Proceedings, Am. Soc. Int. Law*, 1914, Vol. VIII.

Also, J. Reuben Clark (Undersecretary of State), Memorandum on the Monroe Doctrine, Dec. 17, 1928, Dept. of State Publication, No. 37, 1930; Charles E. Hughes, "Observations on the Monroe Doctrine," Aug. 30, 1923, Reports, American Bar Association, 1923, XLVIII, 243; published in *Am. J.*, XVII, 611; Same writer, "The Monroe Doctrine—a Review: its Relation to American Foreign Policy in the Twentieth Century," Nov. 30, 1923; same writer, "Latin-American Relations," a radio address delivered Jan. 20, 1925. These three addresses are published in a volume of essays by Charles E. Hughes, entitled, *The Pathway of Peace*, New York, 1925, at pages 113, 142, and 164, respectively; same writer, *Our Relations to the Nations of the Western Hemisphere*, Princeton, N. J., 1928, 11-20; William R. Castle, Jr., "Aspects of The Monroe Doctrine," Dept. of State, Press Release, July 4, 1931.

Also, Alejandro Alvarez, *The Monroe Doctrine: its Importance in the International Life of the States of the New World*, New York: 1924; R. G. Cleland, *One Hundred Years of The Monroe Doctrine*, Los Angeles, 1923; Willard B. Cowles, "International Law and the Monroe Doctrine" (Ross Prize Essay), *Am. Bar Ass. Journal*, XXVII, June, 1941, 342; W. P. Cresson, *The Holy Alliance: The European Background of the Monroe Doctrine*, New York, 1922; Charles G. Fenwick, "The Monroe Doctrine and the Declaration of Lima," *Am. J.*, XXXIII, 257; W. T. Manning, *Early Diplomatic Relations between the United States and Mexico*, Baltimore, 1916; S. E. Morison, "*Les origines de la doctrine de Monroe*," *Rev. de Sciences Politiques*, XLVII, 52; William S. Robertson, *Hispano-American Relations with the United States*, New York, 1923, Chap. IV; Dexter Perkins, *The Monroe Doctrine, 1823-1826*, Cambridge, Massachusetts, 1927; same author, *The Monroe Doctrine, 1826-1867*, Baltimore, 1933; same author, *The Monroe Doctrine, 1867-1907*, Baltimore, 1937; same author, *Hands Off, A History of the Monroe Doctrine*, Boston, 1941; Elihu Root, "The Real Monroe Doctrine," *Am. J.*, VIII, 427; William R. Shepherd, "The Monroe Doctrine Reconsidered," *Political Science Quarterly*, XXXIX, 35; Simon Planas-Suarez, *L'Extension de la Doctrine de Monroe en Amérique du Sud, Académie de Droit International, Recueil des Cours*, 1924, IV, 271, 360; H. W. V. Temperley, "Documents Illustrating the Reception and Interpretation of the Monroe Doctrine in Europe," *English Hist. Rev.* XXXIX, 590; C. Barcia Trelles, *Doctrina de Monroe*, Madrid, 1931.

§ 86.<sup>1</sup> Mr. King, Minister to Great Britain, to the Secy. of State, June 1, 1801, *Am. St.*

Before the close of the year 1823, the United States had witnessed a series of events in Europe which were productive of grave alarm. As a result of the Holy Alliance of September 26, 1815,<sup>2</sup> and of the subsequent Conferences of Aix-la-Chapelle, Troppau and Laybach,<sup>3</sup> the Allied Powers of Europe had not only declared themselves possessed of the right to overthrow governments founded on revolution, but had also proceeded to act upon that principle. In 1822 revolutions in Naples and Piedmont had been suppressed. The following year, in pursuance of an understanding agreed upon at the Congress of Verona in 1822, France had overthrown the constitutional government in Spain, and had reëstablished the Monarchy of Ferdinand VII.<sup>4</sup> It had, furthermore, been made known to the United States by Mr. Canning, the British Foreign Secretary, that upon the achievement of military objects in Spain, proposal would be made for a consultation of the Allies concerning affairs in Spanish-America, and that the complications to which such a proposal might lead needed not to be pointed out.<sup>5</sup> Mr. Canning had also suggested united action on the part of his Government and that of the United States to oppose the European design.<sup>6</sup>

Between the United States and Russia there had been diplomatic discussions relating to the neutrality of both States in the conflict between Spain and its American colonies,<sup>7</sup> and also to the extent of Russian possessions on the north-west coast of America. Mr. Adams, Secretary of State, had vigorously opposed

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Pap., For. Rel., II, 509, Moore, Dig., VI, 370; President Jefferson to the Governor of Louisiana, Oct. 29, 1808, Ford's Writings of Jefferson, IX, 212, Moore, Dig., VI, 371.

In pursuance of a recommendation of President Madison, Congress resolved January 15, 1811, that by reason of "the influence which the destiny of the territory adjoining the southern border of the United States may have upon their security, tranquillity and commerce," the United States could not "without serious inquietude, see any part of the said territory pass into the hands of any foreign power," and that regard for the safety of the United States compelled provision under certain contingencies for the temporary occupation of East Florida by the United States. The President was, therefore, authorized to take possession of East Florida in case an arrangement had been made for the transfer of its possession, or in the event of its occupation by a foreign State. His employment of the army and navy of the United States was further authorized, and \$100,000 was appropriated to defray expenses. 3 Stat. 471; Am. St. Pap., For. Rel., III, 571; Moore, Dig., VI, 372.

<sup>2</sup> Brit. and For. State Papers, III, 211.

<sup>3</sup> Concerning the Congress of Aix-la-Chapelle, which was held in 1818, see *Nouv. Rec.*, IV, 549-566. The Conference at Troppau convened in October, 1820, and was removed later to Laybach. See, in this connection, Woolsey, 6 ed., § 47; also Mr. Adams, Secy. of State, to Mr. Thompson, Secy. of Navy, May 20, 1819, 17 MS. Dom. Let. 304, Moore, Dig., VI, 375; Same to Mr. Middleton, American Minister to Russia, No. 1, July 5, 1820, MS. Inst. to U. S. Ministers, IX, 18, Moore, Dig., VI, 376. Also W. P. Cresson, *The Holy Alliance: The European Background of the Monroe Doctrine*, New York, 1922.

<sup>4</sup> The Congress of Verona occurred in the autumn of 1822.

<sup>5</sup> Mr. Canning, to Mr. Rush, "private and confidential," Aug. 23, 1823, Moore, Dig., VI, 392.

<sup>6</sup> For the Canning-Rush negotiations, see Moore, Dig., VI, 386-392, and documents there cited; also Worthington C. Ford's texts of original documents on the genesis of the Monroe Doctrine contained in *Proceedings*, Massachusetts Hist. Soc., XV, 412-434. For the text of the Monroe-Jefferson-Madison correspondence in 1823, see Moore, Dig., VI, 393-397, and documents there cited.

"It is possible, then, to state with definiteness and with assurance that the powers of the Holy Alliance had no designs against the liberties of the New World at the moment when Monroe launched his famous declaration. . . . The cabinet discussions make it clear that whether or not a serious danger existed, Monroe *thought* it existed. So, too, with the exception of Adams, did his advisers." (Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, 54 and 60.)

<sup>7</sup> Memorandum of Mr. Adams, Secy. of State, 1823, giving account of his communications with Baron Tuyl, the Russian Minister at Washington, as given by Worthington C. Ford

the claim of Russia to rights of sovereignty as far south as the fifty-first degree of latitude.<sup>8</sup> This issue was quite distinct from that pertaining to the relationship which Russia or any other European power might assume with respect to the revolutionary movement in Spanish America. The difference between these two problems, the one concerning the acquisition of rights of sovereignty over American territory, the other concerning interference or non-interference with struggles therein for political independence, was not lost sight of in the United States.<sup>9</sup>

## c

§ 87. **President Monroe's Message.** Such briefly, was the situation when President Monroe declared in his annual message of December 2, 1823:

At the proposal of the Russian Imperial Government, made through the minister of the Emperor residing here, a full power and instruction have been transmitted to the minister of the United States at St. Petersburg, to arrange, by amicable negotiation, the respective rights and interests of the two nations on the northwest coast of this continent. A similar proposal has been made by his Imperial Majesty to the Government of Great Britain, which has likewise been acceded to. The Government of the United States has been desirous, by this friendly proceeding, of manifesting the great value which they have invariably attached to the friendship of the Emperor, and their solicitude to cultivate the best understanding with his Government. In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion has been judged proper for asserting as a principle in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers. [Paragraph 7, message of December 2, 1823.]

It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appeared to be conducted with extraordinary moderation. It need scarcely be remarked that the result has been, so far, very different from what was then anticipated. Of events in that quarter of the globe with which we have so much intercourse, and from which we derive our origin, we have always been anxious and interested

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in *Proceedings*, Massachusetts Hist. Soc., XV, 394; Moore, Dig., VI, 397, citing MS. Inst. Special Missions, I, 1. See note of Baron Tuyl to Mr. Adams, Oct. 4/16, 1823, Adams MSS., *Proceedings*, Massachusetts Hist. Soc., XV, 400. Also observations of Mr. Adams with respect to communications from the Russian Minister, Nov. 27, 1823, *id.*, 405.

<sup>8</sup> Mr. Adams, Secy. of State, to Mr. Middleton, No. 16, July 22, 1823, American State Papers, For. Rel., V, 436.

<sup>9</sup> Concerning discussions in President Monroe's Cabinet in November, 1823, see statement in Moore, Dig., VI, 399-401, citing *Memoirs of J. Q. Adams*, VI, 177, 185, 186, 192, 194, 199, 200, 205 and 206. See, also, documents published by Worthington C. Ford in *Proceedings*, Massachusetts Hist. Soc., XV, 408-412; "John Quincy Adams and The Monroe Doctrine" (by the same author), *Am. Hist. Rev.*, VIII, 28, in which is published (p. 46) communication of Mr. Adams to Mr. Rush, American Minister at London, Nov. 30, 1823 (citing the Adams MSS.).

spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are, of necessity, more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments. And to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence, and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States. In the war between these new Governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security.

The late events in Spain and Portugal show that Europe is still unsettled. Of this important fact no stronger proof can be adduced than that the allied powers should have thought it proper, on any principle satisfactory to themselves, to have interposed, by force, in the internal concerns of Spain. To what extent such interposition may be carried, on the same principle, is a question in which all independent powers whose governments differ from theirs are interested, even those most remote, and surely none more so than the United States. Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is, not to interfere in the internal concerns of any of its powers; to consider the government *de facto* as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy, meeting, in all instances, the just claims of every power; submitting to injuries from none. But in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our southern brethren, if left to themselves, would adopt it of their own accord.

It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference. If we look to the comparative strength and resources of Spain and those new governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves, in the hope that other powers will pursue the same course. [Paragraphs 48 and 49, message of December 2, 1823.]<sup>1</sup>

d

§ 88. **The Non-Colonization Principle.** The declaration concerning non-colonization (as expressed in paragraph 7 of the message), and which was attributable to Mr. Adams, Secretary of State,<sup>1</sup> was made with a view to checking the advance of Russian colonial establishments on the northwest coast of America.<sup>2</sup> It was based, moreover, on the assumption that, with the exception of the then existing colonial possessions of European powers, independent States possessed rights of sovereignty, and hence of property and control, over the entire area of the two American continents, and that there remained, therefore, no territory therein still open to acquisition by means of occupation.<sup>3</sup> This claim doubtless did not rest upon any contention that there were no lands within those continents which were in fact unoccupied or over which existing States were in reality not in possession, but rather upon the theory that the several American territorial sovereigns enjoyed by virtue of constructive occupation, exclusive rights of sovereignty which should be respected.<sup>4</sup> It should be observed that it was not asserted that a European power might not reasonably, by some process other than colonization or occupation, acquire lawful title to American soil.

§ 87.<sup>1</sup> Am. State Pap., For. Rel., V, 246 and 250, Moore, Dig., VI, 401-403.

§ 88.<sup>1</sup> See Memoirs of John Quincy Adams, edited by Charles Francis Adams, XII, 218, with reference to a conversation with Mr. Bancroft, Dec. 6, 1845, Moore, Dig., VI, 422. See, also, speech of Mr. John C. Calhoun, in the Senate, May 15, 1848, Calhoun's Works, IV, 454, 457, and following, Moore, Dig., VI, 424.

<sup>2</sup> See Mr. Adams, Secy. of State, to Mr. Rush, American Minister at London, No. 70, July 22, 1823, Am. State Pap., For. Rel., V, 446, 447, Moore, Dig., VI, 412; also observations of Mr. Adams, Secy. of State, communicated with his letter to Mr. Middleton of July 22, 1823, Am. State Pap., For. Rel., V, 443, 445, Moore, Dig., VI, 414.

<sup>3</sup> The principle, declared Mr. Adams, when President in 1826, "rested upon a course of reasoning, equally simply and conclusive. With the exception of the existing European colonies, which it was in nowise intended to disturb, the two continents consisted of several sovereign and independent nations, whose territories covered their whole surface. By this, their independent condition, the United States enjoyed the right of commercial intercourse with every part of their possessions. To attempt the establishment of a colony in those possessions, would be to usurp to the exclusion of others a commercial intercourse which was the common possession of all. It could not be done without encroaching upon existing rights of the United States." Richardson's Messages, II, 334, Moore, Dig., VI, 417.

<sup>4</sup> Writes Prof. Moore: "It has sometimes been remarked that if Mr. Adams intended to do no more than announce that territory already occupied by civilized powers was not subject to future colonization, he merely stated a truism. But in its application to the American continents at that time the announcement was far from being a truism. It was by no means generally admitted that the American continents were then wholly occupied by civilized nations. There were vast regions of territory not actually settled by the subjects of civilized powers." Dig., VI, 414, note. See, also, in this connection, Dana's Wheaton, Dana's Note No. 36.

Cf. Dexter Perkins, *The Monroe Doctrine, 1823-1826*, Cambridge, Massachusetts, 1927, Chap. I.

## e

§ 89. **The Non-Intervention Principle.** With respect to the latter portion of the message (paragraphs 48 and 49), it should be observed that the declarations were directed against possible attempts of the Allied European powers to reëstablish monarchical government in Latin America. Because European interposition encroaching upon the political independence of American States was regarded as dangerous to the safety of the United States, such conduct was referred to accordingly, and, therefore, as something not to be looked upon with indifference.

## f

## Scope of Opposition to Foreign Territorial Aggrandizement

## (1)

§ 90. **The General Claim.** The United States appears to assert the right to oppose the acquisition by any non-American power of any territorial control over American soil by any process.<sup>1</sup> "Properly understood," declared Secretary Hughes on August 30, 1923, "it [the Monroe Doctrine] is opposed . . . to the acquisition in any manner of the control of additional territory in this hemisphere by any non-American power."<sup>2</sup> Objection seems to be made and is likely to be anticipated, whether such control be effected through the voluntary transfer by an existing territorial sovereign, republican or monarchical in its government,<sup>3</sup>

§ 90.<sup>1</sup> President Polk, Annual Message, Dec. 2, 1845, S. Doc. No. 1, 29 Cong., 1 Sess., 14, Moore, Dig., VI, 420; Report of Mr. Fish, Secy. of State, to the President, July 14, 1870, S. Ex. Doc. No. 112, 41 Cong., 2 Sess., 1, 3, Moore, Dig., VI, 429, 431; Mr. Cass, Secy. of State, to Mr. Faulkner, Minister to France, No. 27, Aug. 31, 1860, MS. Inst. France, XV, 481, Moore, Dig., VI, 480; Mr. Seward, Secy. of State, to Mr. Hale, Minister to Spain, No. 35 (confidential), July 16, 1866, MS. Inst. Spain, XV, 568, Moore, Dig., VI, 507-508; Mr. Hay, Secy. of State, to Mr. Jackson, Chargé at Berlin, No. 1186, April 10, 1901, MS. Inst. Germany, XXI, 283, Moore, Dig., VI, 583; President Roosevelt, Annual Message, Dec. 3, 1901, For. Rel. 1901, xxxvi, Moore, Dig., VI, 595.

<sup>2</sup> "Observations on The Monroe Doctrine," *Am. J.*, XVII, 611, 615.

<sup>3</sup> President Polk, special message, April 29, 1848, concerning the offer of Yucatan to transfer the "dominion and sovereignty" of that country to certain States, Cong. Globe, 30 Cong., 1 Sess., 709, Moore, Dig., VI, 423; Mr. Fish, Secy. of State, to Count Lewenhaupt, Swedish and Norwegian Minister, Feb. 14, 1870, concerning the possible acceptance by Norway and Sweden of an offer from Italy for the purchase of the Island of St. Bartholomew, MS. Notes to Sweden, VI, 221, Moore, Dig., VI, 428; President Grant, Annual Message, Dec. 6, 1869, Richardson's Messages, VII, 32, Moore, Dig., VI, 429; President Grant, Message of May 31, 1870, Richardson's Messages, VII, 61; Mr. Evarts, Secy. of State, to Mr. Logan, Minister to Central America, No. 53 (confidential), Mar. 4, 1880, with reference to the possible transfer of the Bay Islands by Honduras to Great Britain, MS. Inst. Cent. Am. XVIII, 73, Moore, Dig., VI, 432; Mr. Frelinghuysen, Secy. of State, to Mr. Morton, Minister to France, No. 698, Feb. 28, 1885, concerning the possible transfer by Haiti of the Mole St. Nicholas or the whole Island of Tortuga to France, MS. Inst. France, XXI, 172, Moore, Dig., VI, 432; Mr. Adee, Acting Secy. of State, to Mr. Beaupré, Minister to Venezuela, telegram, Aug. 6, 1908, For. Rel. 1909, 632, concerning the Netherlands and Venezuela.

Concerning the possible transfer of Cuba by Spain to a foreign State, see Intervention, *supra*, § 79; also Mr. Van Buren, Secy. of State, to Mr. Van Ness, Minister to Spain, No. 2, Oct. 2, 1829, MS. Inst. U. S. Ministers, XIII, 19, Moore, Dig., VI, 448; Same to Same, Oct. 13, 1830, MS. Inst. U. S. Ministers, XIII, 184, Moore, Dig., VI, 449; Mr. Forsyth, Secy. of State, to Mr. Vail, Minister to Spain, No. 2, July 15, 1840, MS. Inst. Spain, XIV, 111, Moore, Dig., VI, 450; Mr. Clayton, Secy. of State, to Mr. Barringer, Minister to Spain,



or be attained in consequence of forcible encroachment upon it. In June, 1940, Secretary Hull informed the Governments of Germany and Italy, as well as those of France, Great Britain and the Netherlands, that "in accordance with its traditional policy relating to the Western Hemisphere, the United States would not recognize any transfer, and would not acquiesce in any attempt to transfer, any geographic region of the Western Hemisphere from one non-American power to another non-American power."<sup>4</sup> In a Joint Resolution approved April 10, 1941, it was resolved: "(1) That the United States would not recognize any transfer, and would not acquiesce in any attempt to transfer, any geographic region of this hemisphere from one non-American power to another non-American power; and (2) That if such transfer or attempt to transfer should appear likely, the United States shall, in addition to other measures, immediately consult with the other American republics to determine upon the steps which should be taken to safeguard their common interests."<sup>5</sup>

That Canadian territory is embraced within the claim of the United States under the Monroe Doctrine is believed to be obvious, and was seemingly acknowledged by President Franklin D. Roosevelt when, on August 18, 1938, he declared at Toronto: "I give to you assurance that the people of the United States will not stand idly by if domination of Canadian soil is threatened by any other empire."<sup>6</sup>

If confronted with the task of opposing a voluntary transfer by an American State of territory within the Western Hemisphere to a non-American power, the United States might be expected to evince indifference as to the relative proximity to, or remoteness from, its own domain of the particular area concerned. The basis of its claim would be that the proper defense of the nation is rendered difficult and its safety jeopardized by the transfer generally of American territory to non-American States, and to a degree which justifies objection to any acts which if tolerated would serve to diminish respect for, and so weaken the efficacy of this mode of safeguarding the nation.<sup>7</sup>

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No. 2, Aug. 2, 1849, MS. Inst. Spain, XIV, 295, Moore, Dig., VI, 452; Memorandum of Mr. Seward, Secy. of State, May 7, 1867, MS. Notes to Spanish Legation, IX, 398, Moore, Dig., VI, 456; Mr. Everett, Secy. of State, to the Count Sartiges, Dec. 1, 1852, S. Ex. Doc. 13, 32 Cong., 2 Sess., 15, Moore, Dig., VI, 460, 461.

<sup>4</sup> Dept. of State Bulletin, June 22, 1940, 681. It was doubtless found unnecessary at the time to advert to the broader field of opposition revealed in Secretary Hughes' statement of Aug. 30, 1923. See also statement by Secy. Hull, of July 5, 1940, on the German response to his note communicated to the German Foreign Office on June 18, 1940, Dept. of State Bulletin, July 6, 1940, 3.

<sup>5</sup> 55 Stat. 133.

<sup>6</sup> Dept. of State Press Releases, Aug. 20, 1938, 123.

See also in this connection, Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, 359-361, 376.

<sup>7</sup> See *Non-Interference with American States*, *infra*, § 95A; *The Relation of the Monroe Doctrine to International Law*, *infra*, § 96.

"Undoubtedly as one passes to the south and the distance from the Caribbean increases, the necessity of maintaining the rule of Monroe becomes less immediate and apparent. But who is competent to draw the line? Who will say, 'to this point the rule of Monroe should apply; beyond this point it should not'? Who will say that a new national force created beyond any line that he can draw will stay beyond it and will not in the long course of time extend itself indefinitely?" Elihu Root, "The Real Monroe Doctrine," *Proceedings Am. Soc. Int. L.*, 1914, VIII, 6, 20. See, also, Archibald C. Coolidge, *The United States as a*

The acquisition of any form of control established by any public agencies of non-American States would appear to be regarded as at variance with the foregoing requirements. In 1912 the Senate of the United States, whether or not sharing the fear that had been expressed lest Japan sought indirectly lodgment in territory adjacent to Magdalena Bay,<sup>8</sup> adopted a resolution declaring

That when any harbor or other place in the American continents is so situated that the occupation thereof for naval or military purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes.<sup>9</sup>

It is believed that this resolution gave expression to a moderate and reasonable enunciation of the principle of self-defense. While it was doubtless regarded in certain quarters as a novel application of the Monroe Doctrine on account of the warning sought to be given to an Asiatic State, the resolution by its comprehensive terms, embracing any foreign government "not American" did not advance any new legal theory. It must be recalled that it was against the territorial aggrandizement of Russia as an Asiatic power that the United States directed its earliest protest respecting colonization.

It seems important to observe that the opposition of the United States to territorial aggrandizement has long since ceased to be based on the theory that the American continents contain no lands not subjected to rights of sovereignty and so not open to occupation as a technical mode of creating or perfecting rights of property and control therein. For that reason the term "occupation" as employed by the United States in current diplomatic correspondence respecting the Monroe Doctrine, has merely its colloquial signification. Objections to ac-

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World Power, 112-113, *citing* an important paper by Capt. A. T. Mahan on the Monroe Doctrine, in *National Review*, 1903, Vol. XL, p. 871.

It may be observed that by a treaty concluded Aug. 10, 1877, Sweden ceded to France the Island of St. Bartholomew. For the text of the agreement, see *Nouv. Rec. Gén.*, 2 ser., IV, 366.

Concerning the Spanish re-occupation of Santo Domingo in 1861, and the protest of the United States, as set forth in an instruction of June 19, 1861, to the American Chargé d'Affaires at Madrid, see Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, 138-147.

<sup>8</sup> See, in this connection, message from President Taft to the Senate, May 23, 1912, transmitting in response to Senate Resolution of May 16, 1912, copies of correspondence relative to the American syndicate interested in lands on Magdalena Bay, Senate Doc. No. 694, 62 Cong., 2 Sess.

<sup>9</sup> Senate Resolution 371, adopted Aug. 2, 1912, Cong. Record, Vol. 48, Part 10, 10045-10046. In urging the adoption of the resolution, which he had introduced, Senator Lodge declared, Aug. 2, 1912: "This resolution rests on a generally accepted principle of the law of nations, older than the Monroe Doctrine. It rests on the principle that every nation has a right to protect its own safety, and that if it feels that the possession by a foreign power, for military or naval purposes, of any given harbor or place is prejudicial to its safety, it is its duty as well as its right to interfere. . . . The resolution is merely a statement of policy, allied to the Monroe Doctrine, of course, but not necessarily dependent upon it or growing out of it." *Id.*, 10045.

See in this connection, T. A. Bailey, "The Lodge Corollary to the Monroe Doctrine," *Political Science Quarterly*, XLVIII, 220, 235; Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, 271-275.

quisitions by non-American States rest simply upon the ground that they jeopardize the safety of the United States, or incidentally constitute an encroachment upon the rights of an existing territorial sovereign.<sup>10</sup>

(2)

§ 90A. **Application to Polar Areas.** The United States has not as yet invoked the Monroe Doctrine with respect to areas in the polar regions; it has concerned itself rather with the question whether the acts of other States of any continent in relation to those regions, have sufficed under the circumstances to produce rights of sovereignty worthy of respect as such.<sup>1</sup> When in its judgment they are insufficient in that regard, the United States may be expected to prefer not to fortify its objections by adverting also to implications from the Monroe Doctrine. Nevertheless, the relationship of that doctrine to non-American claims in the polar regions has not escaped attention, and may become the subject of diplomatic discussion.

The extension of Canadian assertions of dominion to adjacent polar areas however wide, if deemed to satisfy the normal requirements for the acquisition of rights of sovereignty over polar areas, may not be regarded by the United States as infringing upon the operation of the Monroe Doctrine, because of the American statehood of Canada. Notwithstanding its connection with the British Empire, the northward strides of Canada may not, therefore, be looked upon as those of a non-American power.<sup>2</sup>

Enunciations of the Monroe Doctrine have doubtless had reference to areas that were susceptible to settlement and occupation by peoples from the temperate zones. It may be contended, therefore, that as the United States has not sought to interfere under cover of that doctrine with the acquisition of rights of sovereignty over areas that were not at the time deemed to be capable of settlement by such peoples, it has left the problem pertaining to the polar regions untouched.<sup>3</sup> Again, it may be urged that the theory of self-defense — the mainstay of the Monroe Doctrine — is inapplicable or inept as a basis of opposition to the acquisition by non-American States of rights of sovereignty over areas not susceptible to occupation or settlement. Still again, it may be contended that the remoteness of polar areas in the western hemisphere from the territory of the United States (other than that of Alaska) gives additional reason to ex-

<sup>10</sup> "The Monroe Doctrine is not a policy of aggression; it is a policy of self-defense. . . . It still remains an assertion of the principle of national security." Charles E. Hughes, "Observations on the Monroe Doctrine," Aug. 30, 1923, *Am. J.*, XVII, 611, 615.

See also Mr. Hull, Secy. of State, statement of July 5, 1940, Dept. of State Bulletin, July 6, 1940, 3.

§ 90A. <sup>1</sup> See Acquisition of Rights of Sovereignty over Polar Areas, *infra*, §§ 104A-104C.

<sup>2</sup> See David Hunter Miller, "Political Rights in the Polar Regions," Problems of Polar Research, American Geographical Society, Special Publication, No. 7, 1928, 235, 239-240.

See also P. C. Jessup, "The Monroe Doctrine in 1940," *Am. J.*, XXXIV, 704.

<sup>3</sup> At the time of the signing of the Convention of August 4, 1916, relating to the cession to the United States of the Danish West Indian Islands, Secretary Lansing declared that "the Government of the United States of America will not object to the Danish Government extending their political and economic interests to the whole of Greenland." *For. Rel.* 1917, 700; also *id.*, 645-646.

See The Case Concerning the Status of Eastern Greenland, *infra*, § 101A.

clude them from those to which the Monroe Doctrine is applicable. The strength of these contentions will be weakened if the polar regions prove to be susceptible to control by means that fall short of occupation or settlement, and if such control is sought to be exerted by a non-American power. In such event the applicability of the Monroe Doctrine would more narrowly be tested by the response to the question whether the mere remoteness of those regions from the territory of the United States should be deemed to suffice to place them beyond the range of that doctrine. If the contentions of Messrs. Olney, Root and Hughes belittling the matter of geographical remoteness were retained, it might still be difficult to distinguish the effect of a non-American acquisition in the Antarctic regions from one in Southern Argentina, or to differentiate between the influence of either upon the assertion of the United States to check non-American acquisitions nearer home.

(3)

§ 91. **The British Guiana-Venezuelan Boundary Dispute.** Where any acts are deemed to amount to encroachment upon or interference with the territorial integrity of an American State against its will, the United States appears to be alert in making felt its opposition. The British Guiana-Venezuelan boundary dispute reached a stage in 1895, which offered occasion for the United States to proclaim its theory and act upon it.

Secretary Olney, in instructions of July 20, 1895, to Mr. Bayard, American Ambassador at London, adverted to the very large extent of the area in dispute, the disparity in the strength of the opposing claimants, the duration of the controversy for more than half a century, during which Venezuela had sought in vain to establish a boundary by agreement, the long and futile efforts of that State to secure an agreement to arbitrate, save upon condition that it renounce a substantial part of its claim, and to the fact that by the frequent interposition of its good offices to facilitate arbitration, and by other acts, the United States had made clear to Great Britain that the controversy was one in which both its honor and interests were involved, and the continuance of which it could not regard with indifference.<sup>1</sup> He declared that a State possessed a right of interposition in a controversy between two others, according to international law, when the contemplated action of either of them was a "serious and direct menace to its own integrity, tranquillity, or welfare." He maintained that the Venezuelan boundary controversy was within the scope and spirit of the rule laid down in the Monroe Doctrine. He emphasized a sharp differentiation between American and European interests.<sup>2</sup> He stated that the safety and wel-

§ 91.<sup>1</sup> Mr. Olney, Secy. of State, to Mr. Bayard, Ambassador to Great Britain, July 20, 1895, For. Rel. 1895, I, 545, Moore, Dig., VI, 535.

<sup>2</sup> In this connection he said: "That distance and three thousand miles of intervening ocean make any permanent political union between an European and an American State unnatural and inexpedient will hardly be denied." Lord Salisbury, British Foreign Secretary, declared in reply that Her Majesty's Government were prepared emphatically to deny this proposition on behalf of both the British and American people who were subject to the British Crown, and maintained "that the union between Great Britain and her territories in the Western Hemisphere is both natural and expedient." Communication to Sir Julian Pauncefote, Nov. 26, 1895, For. Rel. 1895, I, 567, Moore, Dig., VI, 559.

fare of the United States were so related to the maintenance of the independence of every American State as against European power, as to justify and require the interposition of the United States whenever that independence was endangered. He declared that the United States was practically sovereign on the American continent, and its fiat law upon the subjects to which it confined its interposition, and that because, in addition to all other grounds, its infinite resources combined with its isolated position rendered it master of the situation and practically invulnerable as against any or all other powers. The advantages of that superiority would, he contended, be at once imperiled if the principle were admitted that European powers might convert American States into colonies or provinces of their own.<sup>3</sup> He adverted to the loss of prestige, of authority and of weight in the councils of the family of nations, as among the consequences which the United States would thereby suffer. He contended that there was a doctrine of American public law, well founded in principle and abundantly sanctioned by precedent, which entitled and required the United States to treat as an injury to itself the forcible assumption by a European power of political control over an American State. Being entitled, he said, to resent and resist any sequestration of Venezuelan soil by Great Britain, the United States was, he added, necessarily entitled to know whether such sequestration had occurred or was then going on, and to have such fact ascertained by arbitration of the entire controversy, without the inequitable conditions demanded by Great Britain.<sup>4</sup>

Those conditions would amount in substance, he declared, to an invasion and conquest of Venezuelan territory, and ought not to be assented to by the United States. He concluded with the declaration that Great Britain's assertion of title to the disputed territory, together with her refusal to have that title investigated, constituted a substantial appropriation of the territory to her own use, and required that warning be given that the transaction would be regarded as injurious to the United States. The American Ambassador at London was instructed to ask for definite decision upon the point whether Great Britain would

<sup>3</sup> He said in this connection: "The principle would be eagerly availed of, and every power doing so would immediately acquire a base of military operations against us. What one power was permitted to do could not be denied to another, and it is not inconceivable that the struggle now going on for the acquisition of Africa might be transferred to South America. If it were, the weaker countries would unquestionably be soon absorbed, while the ultimate result might be the partition of all South America between the various European powers. The disastrous consequences to the United States of such a condition of things are obvious." *For. Rel.* 1895, I, 558.

<sup>4</sup> In an earlier portion of his communication, Mr. Olney quoted a note of Mr. Frelinghuysen, Secy. of State, to Mr. Baker, Minister to Venezuela, No. 203, Jan. 31, 1883, *MS. Inst. Venezuela*, III, 280, to the effect that the United States regarded such questions as the dispute relating to the boundary of Venezuela, "as essentially and distinctively American," and that it would always "prefer to see such contentions adjusted through the arbitrament of an American rather than an European power." He added later: "Another development of the rule, though apparently not necessarily required by either its letter or its spirit, is found in the objection to arbitration of South American controversies by an European power. American questions, it is said, are for American decision, and on that ground the United States went so far as to refuse to mediate in the war between Chile and Peru jointly with Great Britain and France." In his response of Nov. 26, 1895, Lord Salisbury declared that such a principle "even if it receive any countenance from the language of President Monroe (which it does not), cannot be sustained by any reasoning from the law of nations."

consent or would decline to submit the Venezuelan boundary question in its entirety to impartial arbitration.<sup>5</sup>

In his reply, Lord Salisbury, British Foreign Secretary, declared that he was not aware that the Monroe Doctrine had ever before been advanced on behalf of the United States in any written communication addressed to the Government of another nation.<sup>6</sup> Adverting to the real dangers against which President Monroe had thought it right to guard, he contended that they had no relation to the existing state of things. The controversy with Venezuela was one, he said, with which the United States had no apparent practical concern, and which had nothing to do with any of the questions dealt with by President Monroe.<sup>7</sup> He stated that if the Government of the United States would not control the conduct of the States of Central and South America, it could not undertake to protect them from the consequences attaching to any misconduct of which they might be guilty towards other nations. He dwelt upon the difficulties of arbitration as a mode of adjusting international disputes. Admitting the right of the United States to interpose in any controversy by which its own interests were affected, and to judge of whether those interests were touched and of the measure to which they should be sustained, he denied that the United States was entitled to affirm as a universal proposition, with reference to a number of independent States for whose conduct it assumed no responsibility, that its interests were necessarily concerned in whatever might befall those States simply because of their situation in the Western Hemisphere.

He declared that the British Government fully concurred with the view apparently entertained by President Monroe that any disturbance of the existing territorial distribution in the Western Hemisphere on the part of any European State would be a highly inexpedient change, but were not prepared to admit that the recognition of that expediency was clothed with the sanction which belongs to a doctrine of international law, or that the interests of the United States were necessarily concerned in every frontier dispute which might arise between any two of the States possessing dominion in the Western Hemisphere. Still less, he said, could his Government accept the doctrine that the United States was entitled to claim that the process of arbitration be applied to any demand for the surrender of territory which one of those States might make against another.<sup>8</sup>

The result was significant. President Cleveland, in a special message of December 17, 1895, expressing dissatisfaction with the British reply, recommended

<sup>5</sup> It was added that a decision to decline such arbitration would, in the judgment of the President, be calculated greatly to embarrass the future relations between the United States and Great Britain.

<sup>6</sup> Communication to Sir Julian Pauncefote, British Ambassador at Washington, Nov. 26, 1895, *For. Rel.* 1895, I, 563, *Moore, Dig.*, VI, 559.

<sup>7</sup> He said in this connection: "It is not a question of the colonization by a European power of any portion of America. It is not a question of the imposition upon the communities of South America of any system of government devised in Europe. It is simply the determination of the frontier of a British possession which belonged to the Throne of England long before the Republic of Venezuela came into existence."

<sup>8</sup> See, also, Lord Salisbury, British Foreign Secretary, to Sir Julian Pauncefote, Nov. 26, 1895, *For. Rel.* 1895, I, 567, *Moore, Dig.*, VI, 565, in which the technical and substantial aspects of the British claim against Venezuela were discussed.

the appropriation for the expenses of a commission to be appointed by the Executive, which should investigate and report upon the boundary dispute. He declared that when such report was made and accepted, it would, in his opinion, be the duty of the United States to resist by every means in its power as a willful aggression upon its rights and interests, the appropriation by Great Britain of any lands, or the exercise of governmental jurisdiction over any territory which after investigation the United States should have determined of right to belong to Venezuela.<sup>9</sup>

An appropriation was duly made, and a commission appointed, which entered upon the discharge of its duties.<sup>10</sup> It was saved, however, from the necessity of making a report by an agreement concluded between Great Britain and Venezuela, February 2, 1897, to arbitrate the whole controversy upon bases alike just and honorable to both the contestants, and, therefore, satisfactory to the United States.<sup>11</sup>

The most important political result of the controversy and of the mode of its adjustment was not "the decision upon the territorial question, but the official adoption of the Monroe Doctrine by the Congress of the United States, and its explicit acceptance by the principal maritime power of Europe."<sup>12</sup>

#### (4)

§ 92. **Certain Acts Involving or Threatening Permanent Occupation.** The United States has objected to acts by a non-American State which appeared to be of a character such as to involve or threaten permanent occupation of American soil. The establishment of a protectorate has been deemed to fall within such a category, and has, therefore, been looked upon with distinct disapproval.<sup>1</sup>

<sup>9</sup> For. Rel. 1895, I, 542, Moore, Dig., VI, 576. See, also, President Cleveland, Annual Message, Dec. 2, 1895, For. Rel. 1895, I, xxviii, Moore, Dig., VI, 575.

<sup>10</sup> Act of Dec. 21, 1895, 29 Stat. 1. Cf. also Report of Mr. Olney, Secy. of State, to the President, Dec. 7, 1896, For. Rel. 1896, lxxi, Moore, Dig., VI, 580.

<sup>11</sup> *Id.*; also For. Rel. 1896, 254-255.

The Court of Arbitration composed of Professor de Martens of Russia, as President, and Chief Justice Fuller, Mr. Justice Brewer, Lord Herschell and Sir Richard Collins, rendered a unanimous award Oct. 3, 1899. See President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, xxxii, Moore, Dig., VI, 583. Cf. also documents in Moore, Dig., VI, 581-583.

<sup>12</sup> J. B. Moore, *Principles of American Diplomacy*, 1918, 251; see, also, John W. Foster, *A Century of American Diplomacy*, 468-474; John H. Latané, *Proceedings*, Am. Soc. Int. Law (1914), VIII, 105, 111.

§ 92. <sup>1</sup> Mr. Forsyth, Secy. of State, to Mr. Barry, Minister to Spain, No. 2, June 30, 1835, MS. Inst. Spain, XIV, 70, Moore, Dig., VI, 442; Mr. Bayard, Secy. of State, to Mr. McLane, Minister to France, No. 414, Dec. 21, 1888, MS. Inst. France, XXI, 616, Moore, Dig., VI, 433; Mr. Cass, Secy. of State, to Mr. Lamar, Minister to Central America, July 25, 1858, MS. Inst. American States, XV, 321, Moore, Dig., VI, 443; Memorandum of Mr. Seward, Secy. of State, May 7, 1867, MS. Notes to Spanish Leg. IX, 398, Moore, Dig., VI, 456; Mr. Cass, Secy. of State, to Mr. Dodge, Minister to Spain, No. 66 (confidential), Oct. 21, 1858, MS. Inst. Spain, XV, 187, Moore, Dig., VI, 477; Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to Great Britain, Nov. 23, 1888, For. Rel. 1888, I, 759-767, Moore, Dig., III, 227, 236.

The outbreak of the Civil War, and the attitude of Spain "through the observance of our blockade and the closing of Spanish ports to the insurgent privateers," may be accountable for the fact that the United States remained content to lodge protests against the Spanish re-annexation of Santo Domingo, 1861-1865. Mr. Seward, Secy. of State, to Mr.

It is important to observe that the United States does not assert the right to interfere with attempts of non-American States to resort to coercive action against American States on account of their alleged contractual or tortious delinquencies, when the steps taken do not involve the occupation of territory or an interference with political independence.<sup>2</sup> Thus in 1901, upon the assurance of the German Government that it had no purpose or intention to make even the smallest acquisition of territory on the South American continent or islands adjacent thereto, in connection with a proposed use of force against Venezuela, as a means of securing the adjustment of claims, Secretary Hay offered no objection.<sup>3</sup> Likewise in 1908, in response to an inquiry from the Netherlands, the Department of State declared that the Government of the United States did not feel at liberty to object to coercive measures to be taken by the Netherlands in regard to Venezuela and which did not involve "occupation of territory either permanent or of such a character as to threaten permanency."<sup>4</sup>

It should be noted, however, that the gaining of actual control of the custom houses (and that possibly for an indefinite period of time) of certain insolvent American States, has appeared at times to offer the sole means of obtaining satisfaction of pecuniary claims of contractual origin. President Theodore Roosevelt, believing that interference with such action in the case of the Dominican Republic, would place foreign aggrieved States in a remediless condition, and also tend to deprive them of such rights of coercion as they might fairly be deemed to possess, logically proposed in 1905, as a feasible alternative, that the United States be itself allowed to collect the claims of European States as well as its own. Declared the President in a message of February 15, 1905:

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Schurz, Minister to Spain, No. 20 (confidential), Aug. 14, 1861, MS. Inst. Spain, XV, 287, Moore, Dig., VI, 517, note; also documents cited in Moore, Dig., VI, 515-518.

See also J. Reuben Clark, Memorandum on the Monroe Doctrine, Dec. 17, 1928, Dept. of State, Publication No. 37, 1930, XIX, *id.*, 230-235.

<sup>2</sup> "In popular discussions the position has sometimes been urged that it is a violation of the Monroe Doctrine for a European power to employ force against an American republic for the purpose of collecting a debt or satisfying a pecuniary demand, no matter what may have been its origin. For this supposition there appears to be no published official sanction." J. B. Moore, *Principles of American Diplomacy*, 1918, 255-256.

<sup>3</sup> See memorandum communicated by Mr. Hay, Secy. of State, to the German Embassy at Washington, Dec. 16, 1901, in response to the promemoria of that Embassy of Dec. 11, 1901, For. Rel. 1901, 195, Moore, Dig., VI, 589. For the text of the promemoria, see For. Rel. 1901, 192, Moore, Dig., VI, 586.

In December, 1902, Great Britain together with Italy and Germany blockaded certain Venezuelan ports as a means of enforcing claims. The previous month Lord Lansdowne, British Foreign Secretary, instructed Sir M. Herbert, British Ambassador at Washington, to inform Secretary Hay that if Venezuela persisted in its refusal to offer reparation for its wrongful treatment of British subjects and their property, coercive action against that State was to be anticipated. Brit. and For. State Papers, XCV, 1081. On November 13, this information was conveyed to Secretary Hay, who stated in reply, that the United States Government, although regretting that European powers should use force against Central and South American countries, could not object to the action of the former in taking steps to obtain redress for injuries suffered by their subjects, provided that no acquisition of territory was contemplated. *Id.*, 1084, containing report of Sir M. Herbert to Lord Lansdowne.

<sup>4</sup> Mr. Adee, Acting Secy. of State, to Mr. Beaupré, Minister to Venezuela, telegram, Aug. 6, 1908, For. Rel. 1909, 632.



An aggrieved nation can without interfering with the Monroe doctrine take what action it sees fit in the adjustment of its disputes with American States, provided that action does not take the shape of interference with their form of government or of the despoilment of their territory under any disguise. But, short of this, when the question is one of a money claim, the only way which remains, finally, to collect it is a blockade, or bombardment, or the seizure of the custom-houses, and this means, as has been said above, what is in effect a possession, even though only a temporary possession, of territory. The United States then becomes a party in interest, because under the Monroe doctrine it can not see any European power seize and permanently occupy the territory of one of these republics; and yet such seizure of territory, disguised or undisguised, may eventually offer the only way in which the power in question can collect any debts, unless there is interference on the part of the United States.<sup>5</sup>

The President thus gave utterance to what was thereafter to become known as the "Roosevelt corollary."<sup>6</sup> The application of his plan, through the establishment of a virtual receivership, proved to be of practical value as a means both of avoiding friction between the United States and European powers, and of conserving available assets for the benefit of all concerned.<sup>7</sup> The financial pro-

<sup>5</sup> For. Rel. 1905, 334-335.

<sup>6</sup> In his Annual Message of Dec. 5, 1905, President Roosevelt put the matter thus: "If a republic to the south of us commits a tort against a foreign nation, such as an outrage against a citizen of that nation, then the Monroe Doctrine does not force us to interfere to prevent punishment of the tort, save to see that the punishment does not assume the form of territorial occupation in any shape. The case is more difficult when it refers to a contractual obligation. Our own Government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wished that all foreign governments would take the same view. But they do not; and in consequence we are liable at any time to be brought face to face with disagreeable alternatives. On the one hand, this country would certainly decline to go to war to prevent a foreign government from collecting a just debt; on the other hand, it is very inadvisable to permit any foreign power to take possession, even temporarily, of the custom houses of an American Republic in order to enforce the payment of its obligations; for such temporary occupation might turn into a permanent occupation. The only escape from these alternatives may at any time be that we must ourselves undertake to bring about some arrangement by which so much as possible of a just obligation shall be paid. It is far better that this country should put through such an arrangement, rather than allow any foreign country to undertake it. To do so insures the defaulting republic from having to pay debts of an improper character under duress, while it also insures honest creditors of the republic from being passed by in the interest of dishonest or grasping creditors. Moreover, for the United States to take such a position offers the only possible way of insuring us against a clash with some foreign power. The position is, therefore, in the interest of peace as well as in the interest of justice." For. Rel. 1905, xxxiv-xxxv. See, also, *id.*, xxxvi-xxxvii.

<sup>7</sup> See convention between the United States and the Dominican Republic concluded Feb. 8, 1907, Malloy's Treaties, I, 418; and with respect to the convention, Jacob B. Hollander, in *Am. J.*, I, 287. Also President Roosevelt, message to the Senate, Feb. 15, 1905, Moore, Dig., VI, 518. See *supra*, § 21.

It should be observed that in the latter message, President Roosevelt adverted to the decision of the Tribunal at The Hague in the Venezuelan cases pursuant to conventions of 1903, Malloy's Treaties, II, 1872, whereby the powers which had blockaded Venezuela were acknowledged to have acquired by so doing, a preference in the payment of their claims over the non-blockading claimant powers, of which the United States was one. For the text of the award, see Malloy's Treaties, II, 1878.

In the judgment of the President, it evidently appeared to be difficult to draw an exact line between acts which, by virtue of the decision, a creditor State might reasonably commit without violating international law, and those which the United States, under the theory of the Monroe Doctrine, might feel itself obliged to oppose. He did not suggest that such opposition would, when reasonably applied, amount to internationally illegal conduct. But he perceived that it might be so regarded abroad, especially when the attempt to thwart acts

tection which the United States, pursuant to convention, established over Haiti as well as the Dominican Republic, may have served to avert controversies otherwise to have been anticipated, unless the United States was prepared to tolerate not merely the use of non-American force, but also those forms of it which involved acts threatening the permanent occupation of American soil.<sup>8</sup>

There is, however, a distinction between preventing an issue from coming into being, and meeting it squarely after it arises. Efforts on the part of the United States, through treaty or otherwise,<sup>9</sup> to exercise fiscal or other control within the territory of an American Republic for the purpose of reducing a factor which otherwise might be productive of grave controversy with non-American States are instances of the former. As Mr. J. Reuben Clark, Under Secretary of State, pointed out in an authoritative memorandum of December 17, 1928, they are not strictly applications of the Monroe Doctrine.<sup>10</sup> They are rather attempts to control and prevent the birth of a particular class of inter-continental problems. Regardless, therefore, of the efficacy of such operations, and of the reasons for them, they need to be seen in their true light, which the Department of State has not hesitated to reveal.<sup>11</sup> It has, moreover, accepted Mr. Clark's appraisal and been guided accordingly.<sup>12</sup>

It may be observed that the Government of the United States did not see a threat of permanent occupation or of other action violative of its assertions

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involving permanent occupation occurred at an early stage of the proceeding directed against the debtor State. His purpose was, therefore, to avoid such a dilemma by means of the proposal which he offered.

<sup>8</sup> See treaty between the United States and Haiti of Sept. 16, 1915, U. S. Treaty Vol. III, 2673.

Declared Mr. Root, Secy. of State, in an address before the New England Society in 1904: "If we are to maintain this doctrine [that of Monroe], which is vital to our national life and safety, at the same time, when we say to the other powers of the world, 'You shall not push your remedies for wrong against these republics to the point of occupying their territory,' we are bound to say that whenever the wrong cannot be otherwise redressed we ourselves will see that it is redressed." After quoting the foregoing utterance, Mr. Knox, Secy. of State, declared in January, 1912: "It appears to me evident that there is one certain deduction from the premises, and that is that the best way to avoid the difficulties occasionally arising out of any responsibilities which this doctrine in certain of its aspects may seem to impose, is to assist the less fortunate American Republics in conducting their own affairs in such a way that those difficulties should not be liable to arise. The most effective way to escape the logical consequences of the Monroe Doctrine is to help them to help themselves. Assuming the correctness of Mr. Root's corollary, it is our duty, to ourselves and to them, to coöperate in preventing, where possible, specific conditions where we might have to become in too great a measure accountable. We diminish our responsibilities in proportion as we bring about improved conditions. Like an insurance risk, our risk decreases as the conditions to which it pertains are improved." Address at New York, Jan. 19, 1912, before the New York State Bar Association, on "The Monroe Doctrine and Some Incidental Obligations in the Zone of the Caribbean."

<sup>9</sup> See, Intervention, Haiti, 1915, *supra*, § 82A; Nicaragua, 1926-1927, *supra*, § 82D.

<sup>10</sup> Department of State Publication No. 37, 1930, xix and xxii.

<sup>11</sup> See, Non-Interference with American States, *infra*, § 95A.

<sup>12</sup> "After some delay, the State Department made the Clark memorandum its own, and in identic notes to the governments of Latin America indicated that it would be guided by the principles therein laid down. In this sense, by June of 1930, the Roosevelt corollary had been definitely and specifically repudiated; and since that time there has been no scholarly foundation for the proposition that the Monroe Doctrine as officially interpreted either makes necessary or even tolerates interventions in the affairs of the other States of the New World. The United States had not renounced the right of intervention, but it gave notice that it no longer intended to rest this right upon the principles of 1823." (Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, 344.)

under the Monroe Doctrine when, on May 11, 1940, forces of the then Allied belligerent powers were landed upon the Netherland West Indian Islands of Curaçao and Aruba, off the north coast of Venezuela, for the purpose of preventing "possible German attempts at sabotage in the important oil refineries of these islands."<sup>13</sup> The novelty of the case was apparent in the circumstance that the United States itself did not, in harmony with its traditional preference, seek to act as protector, or possibly share the task with its American neighbors.

## g

**§ 93. Opposition to Interference with Political Independence.** The United States asserts the right to oppose generally the attempt of any non-American power to interfere with the political independence of any American State. This assertion, apart from its relation in any particular case to the requirements of self-defense which may confront the United States, finds justification on those grounds which normally excuse intervention; for it is simply the manifestation of the propriety of interference with acts themselves essentially illegal and oppressive.

Objection is thus made to the assertion of non-American influence to change the form of an existing American Republic, or to control the free will of its people.<sup>1</sup> Such assertions were made long after President Monroe's message of 1823. Although they ceased to be recurrent before the outbreak of the World War in 1914, the danger of attempts from another continent to impose repressive or undemocratic systems of government upon an American State has, within the past decade been regarded as not unlikely.

Between 1862 and 1867, France intervened in Mexico, making the attempt to suppress by force republican government in that State and to establish a monarchy therein.<sup>2</sup> This conduct, as is well known, ultimately aroused such opposi-

<sup>13</sup> British Foreign Office announcement, reported by James B. Reston, *New York Times*, May 12, 1940, section 1, p. 1, where it was stated that the communiqué announced that "the United States Government has been kept informed of the position by the Allied diplomatic representatives in Washington."

See also A. Randale Elliott, *Foreign Policy Reports* (of Foreign Policy Assn.) Aug. 15, 1940, 138, 141.

§ 93. <sup>1</sup> Mr. Seward, Secy. of State, to Mr. Kilpatrick, Minister to Chile, No. 9, June 2, 1866, MS. Inst. Chile, XV, 333, Dip. Cor. 1866, II, 413, Moore, Dig., VI, 445; Mr. Cass, Secy. of State, to Mr. Lamar, Minister to Central America, July 25, 1858, MS. Inst. American States, XV, 321, Moore, Dig., VI, 443; Mr. Buchanan, Secy. of State, to Mr. Livingston, Minister to Ecuador, May 13, 1848, MS. Inst. Ecuador, I, 3, Moore, Dig., VI, 473; Mr. Buchanan, Secy. of State, to Mr. Appleton, Minister to Bolivia, No. 2, June 1, 1848, MS. Inst. Bolivia, I, 2, Moore, Dig., VI, 436; Mr. Buchanan, Secy. of State, to Mr. Hise, Minister to Central America, June 3, 1848, H. Ex. Doc. 75, 31 Cong., 1 Sess., 92-96, Moore, Dig., VI, 442; Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, May 18, 1900, For. Rel. 1900, 712, Moore, Dig., VI, 476; Mr. Olney, Secy. of State, to Mr. Bayard, Ambassador to Great Britain, July 20, 1895, For. Rel. 1895, I, 545, Moore, Dig., VI, 535, 549; Mr. Foster, Secy. of State, to Mr. Lincoln, Minister to Great Britain, Feb. 8, 1893, For. Rel. 1893, 313, Moore, Dig., III, 238, 241.

<sup>2</sup> See communications from Mr. Seward, Secy. of State, and other documents in Moore, Dig., VI, 488-507, especially Mr. Seward to Mr. Motley, American Minister to Austria, No. 41, Sept. 11, 1863, Dip. Cor. 1863, II, 929; same to Mr. Dayton, American Minister to France, No. 400, Sept. 21, 1863, *id.*, 703; Same to Same, No. 406, Sept. 26, 1863, *id.*, 709; Same to Same, No. 417, Oct. 23, 1863, *id.*, 726; Same to Mr. Bigelow, American Minister to France, No. 300, Nov. 6, 1865, MS. Inst. France, XVII, 467; Same to Same, No. 332,

tion on the part of the United States as to bring about the evacuation of French troops and the reestablishment of a republican government.<sup>3</sup> It should be observed that American interference was attributable not only to sympathy for the oppressed people of a neighboring country, but also to the requirements of the defense of the United States.<sup>4</sup>

The Monroe Doctrine today, as heretofore, remains "opposed," as Secretary Hughes declared on August 30, 1923, "to any non-American action encroaching upon the political independence of American States under any guise."<sup>5</sup>

## h

## Modes of Applying the Monroe Doctrine

### (1)

§ 94. **Avoidance of Concerted Action.** In the process of its own defense a State may or may not deem it necessary to secure the aid of its neighbors or friendly powers of distant continents. It may be reluctant, moreover, to yield by convention or alliance to any foreign States the right to determine under what circumstances the requirements of its own safety demand recourse to a particular form of conduct.<sup>1</sup>

The United States has hitherto generally avoided concerted action with European States in proceedings directed against States of the American continents. Thus, in 1852, it refused to enter into an arrangement with Great Britain, France

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Dec. 16, 1865, House Ex. Doc. No. 73, 39 Cong., 1 Sess., Part 2, p. 495; Same to the Marquis de Montholon, French Minister, Feb. 12, 1866, *id.*, 548.

Also address of James M. Callahan, *Proceedings*, Am. Soc. of Int. Law, IV, 59, 92-105; George F. Tucker, *The Monroe Doctrine*, Boston, 1885, Chap. VII; Herbert Kraus, *Die Monroedoktrin*, Berlin, 1913, 123-128, and documents cited.

<sup>3</sup> That the United States for some time remained a passive spectator of French intervention in Mexico may be attributed partly to the assurances that France "did not intend to permanently occupy or dominate in Mexico, and that she should leave to the people of Mexico a free choice of institutions of government" (Mr. Seward, Secy. of State, to Mr. Motley, Minister to Austria, No. 41, Sept. 11, 1863, Dip. Cor. 1863, II, 929, Moore, Dig., VI, 491), and also to the fact that the United States was engaged in a civil war the successful prosecution of which called for the exercise of all available military and naval force, and rendered necessary the avoidance of serious differences with foreign States. See confidential communication of Mr. Seward, Secy. of State, to Mr. Motley, Minister to Austria, April 14, 1864, MS. Inst. Austria, I, 215, Moore, Dig., VI, 498, note.

<sup>4</sup> Said Mr. Seward, Secretary of State, in the course of a communication to the French Minister, Dec. 6, 1865: "The real cause of our national discontent is, that the French army which is now in Mexico is invading a domestic republican government there which was established by her people, and with whom the United States sympathize most profoundly, for the avowed purpose of suppressing it and establishing upon its ruins a foreign monarchical government, whose presence there, so long as it should endure, could not but be regarded by the people of the United States as injurious and menacing to their own chosen and endeared republican institutions." H. Ex. Doc. 73, 39 Cong., 1 Sess., II, 347, Moore, Dig., VI, 500, 501.

Concerning the prevention by the United States in 1866, of Austrian aid to Maximilian, see Moore, Dig., VI, 505-507, and documents there cited.

See, in this connection, Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, Chap. IV.

<sup>5</sup> "Observations on the Monroe Doctrine," *Am. J.*, XVII, 611, 618.

§ 94. <sup>1</sup> See, in this connection, Elihu Root, "The Real Monroe Doctrine," *Am. Soc. Int. Law, Proceedings*, VIII, 6, 19-20.

and Spain for the neutralization of Cuba.<sup>2</sup> In 1861, it declined to join those powers in a combined movement upon Mexico.<sup>3</sup> In 1881, it was unwilling to unite with France and Great Britain in order to bring to a close a war between Chile and Peru.<sup>4</sup> In 1886, it was indisposed to act in concert with certain European powers against Venezuela.<sup>5</sup>

On the other hand, the United States, in coöperation with Great Britain and France, intervened in 1850–1851, in order to bring about peace between the Empire of Haiti and the Dominican Republic.<sup>6</sup>

By the Clayton-Bulwer Treaty, concluded April 19, 1850, the United States and Great Britain agreed to impose rigid restrictions on their freedom of action with reference to Central America.<sup>7</sup> Each party undertook not to obtain or maintain for itself any exclusive control over a proposed trans-Isthmian canal, not to erect or maintain any fortifications commanding it or in the vicinity thereof, and not to occupy, fortify or colonize, or assume, or exercise any dominion over any part of Central America.<sup>8</sup> Both Governments agreed to accord protection to persons and property involved in the construction of the canal,<sup>9</sup> and they engaged to “guarantee the neutrality” of it upon its completion.<sup>10</sup> Declaring that their purpose was not only to accomplish a particular object, but also to establish a general principle, they agreed to extend their protection to other practicable interoceanic communications by land and water across the isthmus.<sup>11</sup>

The effect of this treaty was to bind Great Britain not to commit numerous acts which would have been opposed to the theory of the Monroe Doctrine, and thereby to secure the coöperation of that State in maintaining it.<sup>12</sup> In view

<sup>2</sup> Mr. Everett, Secy. of State, to the Count Sartiges, Dec. 1, 1852, Senate, Ex. Doc. 13, 32 Cong., 2 Sess., 15, Moore, Dig., VI, 460.

Also J. Reuben Clark, Memorandum on the Monroe Doctrine, Dept. of State Publication, No. 37, 1930, xxiii.

<sup>3</sup> Mr. Seward, Secy. of State, to Messrs. Tassara, Mercier, and Lord Lyons, Dec. 4, 1861, H. Ex. Doc. 100, 37 Cong., 2 Sess., 187, Moore, Dig., VI, 485.

<sup>4</sup> Mr. Blaine, Secy. of State, to Mr. Morton, Minister to France, No. 30, Sept. 5, 1881, For. Rel. 1881, 426.

<sup>5</sup> Mr. Bayard, Secy. of State, to Mr. Scott, Minister to Venezuela, No. 70 (confidential), Oct. 14, 1886, MS. Inst. Venezuela, III, 540, Moore, Dig., VI, 532. Also Mr. Fish, Secy. of State, to General Schenck, Minister to Great Britain, No. 5 (confidential), June 2, 1871, MS. Inst. Great Britain, XXII, 471, Moore, Dig., VI, 531.

<sup>6</sup> Senate Ex. Doc. No. 113, 32 Cong., 1 Sess., especially communication of Mr. Webster, Secy. of State, to Mr. Walsh, special agent, Jan. 18, 1851, contained therein, and given in Moore, Dig., VI, 509; also statement, *id.*, 509–514, and other documents there cited. See, also, Frederic L. Paxson, “A Tripartite Intervention in Hayti, 1851,” reprinted from *University of Colorado Studies*, I, No. 4, 1904.

<sup>7</sup> Malloy's Treaties, I, 659.

<sup>8</sup> Art. I.

<sup>9</sup> Art. III.

<sup>10</sup> Art. V.

<sup>11</sup> Art. VIII.

<sup>12</sup> In a Memorandum by Mr. Olney, Secy. of State, in 1896, on the Clayton-Bulwer Treaty, it was said: “The treaty is characterized by certain remarkable features. It contains numerous and apt provisions for the protection, safety, and neutralization of the proposed ship canal; but it deals not merely with the particular subject-matter which, in the view of the United States, led to its negotiation. It also deals with others of larger magnitude, contemplates alliances with other powers, and lays down general principles for the future guidance of the parties. The United States, in entering upon the negotiation, aimed to accomplish two specific things—the renunciation by Great Britain of its claim to the

of the ascendancy of Great Britain in the Isthmus in 1850, it is believed that the Clayton-Bulwer Treaty served greatly to facilitate the prevention of the development of a British zone in Central America which would have closed the door against the conclusion fifty years later of any agreement permitting any other power such as the United States to construct an interoceanic canal.<sup>13</sup>

Prior to the outbreak of the European War that was initiated in 1939, the United States was not disposed to enter into agreements with other States of the Western Hemisphere for the purpose of safeguarding the latter against acts which the former might regard as at variance with the theory of the Monroe Doctrine.<sup>14</sup>

The reasons for this attitude were thus set forth by Secretary Hughes in 1923:

As the policy embodied in the Monroe Doctrine is distinctively the policy of the United States, the Government of the United States reserves to itself its definition, interpretation, and application. . . . While the United States has been gratified at expressions on the part of other American States of their accord with our Government in its declarations with respect to their independence and at their determination to maintain it, this Government in asserting and pursuing its policy has commonly avoided con-

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Mosquito Coast, and such a protectorate over the canal by Great Britain jointly with the United States as might be expected to attract to the canal British capital. As the result of the negotiations, it secured not only the two things specified, but also a third, viz., Great Britain's express agreement so far as Central America was concerned, to give effect to the so-called Monroe Doctrine. For these advantages it rendered, of course, a consideration. It waived the Monroe Doctrine to the extent of the joint protectorate of the then proposed canal and by Article VIII agreed to waive it as respects all other practicable communications across the Isthmus connecting North and South America, whether by canal or railway. In short, the true operation and effect of the Clayton-Bulwer Treaty is that, as respects Central America generally, Great Britain has expressly bound herself to the Monroe Doctrine, while, as respects all water and land interoceanic communications across the Isthmus, the United States has expressly bound itself to so far waive the Monroe Doctrine as to admit Great Britain to a joint protectorate." Moore, Dig., III, 203, 204. See also Same, to Mr. Bayard, American Ambassador at London, July 20, 1895, For. Rel. 1895, I, 545, 555, Moore, Dig., VI, 535, 550.

*Compare* comment of Dr. Francis Wharton, in Wharton, Dig., I, 168; also that of John W. Foster, *Century of American Diplomacy*, Boston, 1900, 457-458, where it is said: "The treaty marks the most serious mistake in our diplomatic history, and is the single instance, since its announcement in 1823, of a tacit disavowal or disregard of the Monroe Doctrine, by the admission of Great Britain to an equal participation in the protection and control of a great American enterprise."

<sup>13</sup>"Finally, the very idea of joint protection of an interoceanic canal was, in the course of time, certainly by 1880, to be regarded as a possible infringement on Monroe's dictum. But this is to regard only one side of the case. If the Clayton-Bulwer Treaty did not drive the British out of Central America, it certainly opposed a barrier to the further extension of their influence; its language with regard to colonization might almost be regarded as the first recognition by another power of the tenet which John Quincy Adams had laid down twenty-seven years before." (Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, 1941, 97.)

It will be recalled that the Clayton-Bulwer Treaty was superseded by the Hay-Pauncefote Treaty of Nov. 18, 1901, permitting the construction of an interoceanic canal under the auspices of the United States. Malloy's *Treaties*, I, 782.

<sup>14</sup>Declared President Wilson in an address at Topeka, Kansas, Feb. 2, 1916: "We have made ourselves the guarantors of the right of national sovereignty and of popular sovereignty on this side of the water in both the continents of the Western Hemisphere. You would be ashamed, as I would be ashamed, to withdraw one inch from that handsome guarantee; for it is a handsome guarantee. . . . We have nothing to make by allying ourselves with the other nations of the Western Hemisphere in order to see to it that no man from outside, no government from outside, no nation from outside attempts to assert any

certed action to maintain the doctrine, even with the American Republics. As President Wilson observed: "The Monroe Doctrine was proclaimed by the United States on her own authority. It always has been maintained and always will be maintained upon her own responsibility."

This implies neither suspicion nor estrangement. It simply means that the United States is asserting a separate national right of self-defense, and that in the exercise of this right it must have an unhampered discretion. As Mr. Root has pithily said: "Since the Monroe Doctrine is a declaration based upon the nation's right of self-protection, it can not be transmuted into a joint or common declaration by American States or any number of them." They have, of course, corresponding rights of self-defense, but the right is individual to each.<sup>15</sup>

In harmony with the policy thus enunciated, the United States, as a participant in arrangements contemplating the amicable adjustment of international differences with non-American States, was inclined to emphasize its unwillingness to accept an obligation to permit any international body to pass upon the propriety of its conduct under the Monroe Doctrine, or to undertake to refrain from the commission of any acts which it might regard itself as free to commit under cover of that doctrine.<sup>16</sup>

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kind of sovereignty or undue political influence over the peoples of this continent." President Wilson's State Papers and Addresses, edited by Albert Shaw, New York, 1917, 193, 198.

<sup>15</sup>"Observations on the Monroe Doctrine," *Am. J.*, XVII, 611, 616.

Declared Dr. Carlos Concha, Foreign Minister of Peru, in the course of an address before the Eighth International Conference of American States at Lima, Dec. 10, 1938: "That [the Monroe Doctrine] was, nevertheless, a mere declaration of a unilateral policy, which put no juridical obligation on the State which made it, nor created any contractual relationship among the various nations of this hemisphere." (*New York Times*, Dec. 11, 1938, Part 1, p. 56.)

<sup>16</sup>See, for example, Article III, of arbitration treaty between the United States and France, of Feb. 6, 1928, where it is declared that "the provisions of this treaty shall not be invoked in respect of any dispute the subject matter of which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine." (U. S. Treaty Vol. IV, 4181.)

See also, Resolution of the Senate adopted Jan. 27, 1926, in relation to the adherence by the United States to the Protocol of Dec. 16, 1920, of Signature of the Statute for the Permanent Court of International Justice.

The Report of the Senate Committee on Foreign Relations of Jan. 15, 1929 (Ex. Rep. No. 1, 70 Cong., 2 Sess.), on the Pact of Aug. 27, 1928, concerning the renunciation of war as an instrument of national policy, and in the light of which the Senate yielded consent to the arrangement, declared: "The United States regards the Monroe Doctrine as a part of its national security and defense. Under the right of self-defense allowed by the treaty must necessarily be included the right to maintain the Monroe Doctrine, which is a part of our system of national defense. . . ."

"This report is made solely for the purpose of putting upon record what your Committee understands to be the true interpretation of the treaty, and not in any sense for the purpose or with the design of modifying or changing the treaty in any way, or effectuating a reservation or reservations to the same." (70 *Cong. Record*, 1929, 1730.)

It may be observed that the United States has not infrequently acted in concert with American States to prevent war or establish conditions of peace on American soil. Thus through the united efforts of the United States and Mexico, and in the presence of their diplomatic representatives, there was signed at Washington, Dec. 20, 1907, by plenipotentiaries of Costa Rica, Guatemala, Honduras, Nicaragua and Salvador, a general treaty of peace and amity. *Am. J.*, II, Supp., 219; Malloy's Treaties, II, 2302. In 1915, the United States joined with six other American States in an appeal to the revolutionary factions in Mexico to meet in conference to adjust their differences and reestablish constitutional government in that country. Senate Doc. No. 324, 64 Cong., 1 Sess. Such efforts do not, however, manifest any application of the Monroe Doctrine, inasmuch as the participants have

It will be seen, however, that between the years 1938 and 1941, the policy of the Government of the United States underwent a change with respect both to the part to be played by its American neighbors in the application of the Monroe Doctrine, and in the obligation which the United States, for sake of the doctrine, should be prepared to accept towards those neighbors.<sup>17</sup> That policy which was the outgrowth of a readiness not to intervene in the domestic affairs of the American Republics, and contemporaneous with the growth of inter-American solidarity, revealed a fresh disposition to make the claim asserted by the United States under cover of the Monroe Doctrine one that should be participated in and applied by the concerted efforts of the American States.

(2)

§ 94A. **The Declaration of Lima, 1938.** On December 24, 1938, the Eighth International Conference of American States unanimously approved of a "Declaration of the Principles of the Solidarity of America," known as the Declaration of Lima, the text of which is set out below.<sup>1</sup> Inasmuch as it manifests single-

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been exclusively American States, and the problems involved have been unrelated to those of other continents.

<sup>17</sup> See The Declaration of Lima, 1938, *infra*, § 94A; The Act of Habana and Convention of July 30, 1940, *infra*, § 94B.

§ 94A. <sup>1</sup> "The Eighth International Conference of American States,

"Considering:

"That the peoples of America have achieved spiritual unity through the similarity of their republican institutions, their unshakable will for peace, their profound sentiment of humanity and tolerance, and through their absolute adherence to the principles of international law, of the equal sovereignty of states and of individual liberty without religious or racial prejudices;

"That on the basis of such principles and will, they seek and defend the peace of the continent and work together in the cause of universal concord;

"That respect for the personality, sovereignty, and independence of each American state, constitutes the essence of international order sustained by continental solidarity, which historically has found expression in declarations of various States, or in agreements which were applied, and sustained by new declarations and by treaties in force; that the Inter-American Conference for the Maintenance of Peace, held at Buenos Aires, approved on December 21, 1936, the declaration of the principles of inter-American solidarity and coöperation, and approved, on December 23, 1936, the protocol of nonintervention; the Governments of the American States

"Declare:

"First. That they reaffirm their continental solidarity and their purpose to collaborate in the maintenance of the principles upon which the said solidarity is based;

"Second. That faithful to the above-mentioned principles and to their absolute sovereignty, they reaffirm their decision to maintain them and to defend them against all foreign intervention or activity that may threaten them;

"Third. And in case the peace, security or territorial integrity of any American republic is thus threatened by acts of any nature that may impair them, they proclaim their common concern and their determination to make effective their solidarity, coördinating their respective sovereign wills by means of the procedure of consultation, established by conventions in force and by declarations of the inter-American conferences, using the measures which in each case the circumstances may make advisable. It is understood that the Governments of the American Republics will act independently in their individual capacity, recognizing fully their juridical equality as sovereign states;

"Fourth. That in order to facilitate the consultations established in this and other American peace instruments, the Ministers for Foreign Affairs of the American Republics, when deemed desirable and at the initiative of any one of them, will meet in their several capitals by rotation and without protocolary character. Each government may, under special circumstances or for special reasons, designate a representative as a substitute for its Minister for Foreign Affairs;

"Fifth. This declaration shall be known as the 'Declaration of Lima.'" (Dept. of State



ness of thought on the part of the American Republics with respect to the desirability of community of effort in opposing much that the United States asserts the right to thwart in pursuance of the Monroe Doctrine, the declaration has attained a place in the documentary history of that doctrine.<sup>2</sup> It needs to be observed, however, that apart from the undertaking with respect to consultation set forth in the fourth paragraph, the agreement is devoid of intimation that there rests upon any party to it a legal obligation to take any particular affirmative steps, in concert or otherwise, as a means of preventing the commission of acts which are seemingly deplored.<sup>3</sup>

(3)

§ 94B. **The Act of Habana and Convention of July 30, 1940.** At the First Meeting of the Foreign Ministers of the American Republics at Panama, there was adopted on October 3, 1939, a resolution providing for a consultative meeting, in case any geographic region of America subject to the jurisdiction of any non-American State should be obliged to change its sovereignty and there should result therefrom a danger to the security of the American Continent. It was pointed out, however, that the resolution should not apply to a change of status resulting from the settlement of questions then pending between non-American States and States of the continent.<sup>1</sup>

At the Second Meeting of the Foreign Ministers of the American Republics, at Habana, there was signed on July 30, 1940, a Final Act which embraced, as part XX thereof, a resolution known as the "Act of Habana concerning the Provisional Administration of European Colonies and Possessions in the Americas." From the same Conference there emanated a supplementary Convention which was to enter into force when two-thirds of the American Republics should have "deposited their respective instruments of ratification."<sup>2</sup> In the Convention cognizance was taken of the fact that, as a consequence of events which were taking place on the Continent of Europe, there might develop in territories of the

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Press Releases, Dec. 24, 1938, 474, 475.) See also Report on the Results of the Conference submitted to the Governing Board of the Pan American Union by the Director General, 1939, Pan American Union, Congress and Conference Series No. 27, Appendix A, p. 92.

<sup>2</sup> See Charles G. Fenwick, "The Monroe Doctrine and the Declaration of Lima," *Am. J., XXXIII*, 257.

<sup>3</sup> It should be observed that by Art. II of the Convention for the Maintenance, Preservation and Re-establishment of Peace, concluded at Buenos Aires, Dec. 23, 1936, the contracting parties agreed that "in the event of an international war outside America which might menace the peace of the American Republics, such consultation shall also take place to determine the proper time and manner in which the signatory States, if they so desire, may eventually cooperate in some action tending to preserve the peace of the American Continent." (U. S. Treaty Vol. IV, 4819.)

§ 94B. <sup>1</sup> The statement in the text is that contained in the Report of the Delegate of the United States, Dept. of State Publication 1451, Conference Series 44, Washington, 1940, p. 15. See The Declaration of Panama, *infra*, § 888B.

<sup>2</sup> The texts of the Final Act and of the Convention are set forth in Dept. of State Bulletin, Aug. 24, 1940, 127, and 145, respectively.

The Senate of the United States gave its advice and consent to the ratification of the Convention on Sept. 27, 1940, Dept. of State Bulletin, Sept. 28, 1940, 269. See communication of Secretary Hull to the President, Sept. 12, 1940, concerning the Convention, *id.*, 269. On Oct. 24, 1940, the instrument of ratification on behalf of the United States, was deposited with the Pan American Union, Dept. of State Bulletin, Nov. 2, 1940, 402.

possessions which some belligerent nations held in America, situations "which may extinguish or materially impair the sovereignty which they exercise over them, or leave their government without a leader, thus creating a state of danger to the peace of the continent and a state of affairs in which the rule of law, order, and respect for life, liberty and property of inhabitants may disappear."<sup>8</sup> Accordingly, it was declared:

*Three.* That the American Republics consider that force cannot constitute the basis of rights, and they condemn all violence whether under the form of conquest, of stipulations which may have been imposed by the belligerents in the clauses of a treaty, or by any other process;

*Four.* That any transfer, or attempted transfer, of the sovereignty, jurisdiction, possession or any interest in or control over any such region to another non-American State would be regarded by the American Republics as against American sentiments and principles and the rights of American States to maintain their security and political independence;

*Five.* That no such transfer or attempt to transfer or acquire any interest or right in any such region, directly or indirectly, would be recognized or accepted by the American Republics no matter what form was employed to attain such purposes;

*Six.* That by virtue of a principle of American international law, recognized by various conferences, the acquisition of territories by force cannot be permitted;

*Seven.* That the American Republics, through their respective government agencies, reserve the right to judge whether any transfer or attempted transfer of sovereignty, jurisdiction, cession, or incorporation of geographic regions in the Americas, possessed by European countries up to September 1, 1939, has the effect of impairing their political independence even though no formal transfer or change in the status of such region or regions shall have taken place;

*Eight.* That in the cases foreseen, as well as any others which might leave the government of such regions without a leader, it is, therefore, necessary to establish a provisional administrative régime for such regions until such time as their definitive régime is established by the free determination of their people;

*Nine.* That the American Republics, as an international community which acts strongly and integrally, using as a basis political and juridical principles which they have applied for more than a century, have the unquestionable right, in order to preserve their unity and security, to take such regions under their administration and to deliberate as to their destinies, in accordance with their respective degrees of political and economic development;

*Ten.* That the provisional and transitory character of the measures agreed to does not imply an oversight or abrogation of the principle of non-intervention which regulates inter-American life, a principle proclaimed by the American Institute, recognized by the meeting of jurists held at Rio de

<sup>8</sup> In the preamble of the Act of Habana, it was said that "as a result of the present European war there may be attempts at conquest, which has been repudiated in the international relations of the American Republics, thus placing in danger the essence and pattern of the institutions of America." (*Id.*, Aug. 24, 1940, 138.)

Janeiro and fully reaffirmed at the Seventh International American Conference held at Montevideo;

*Eleven.* That this community has therefore international juridical capacity to act in this manner;

*Twelve.* That in this case, the most appropriate régime is that of a provisional administration; and that this system entails no danger because the American Republics do not entertain any purpose whatsoever of territorial aggrandizement;

*Thirteen.* That the establishment of a special provisional régime in the present convention and in the Act of Habana concerning the provisional administration of European colonies and possessions in the Americas does not eliminate or modify the system of consultation agreed upon at Buenos Aires, confirmed at Lima, and practiced at Panama and Habana.<sup>4</sup>

The preamble was followed by twenty articles. In Article 1 it was announced that "if a non-American State shall directly or indirectly attempt to replace another non-American State in the sovereignty or control which it exercised over any territory located in the Americas, thus threatening the peace of the continent, such territory shall automatically come under the provisions of this convention and shall be submitted to a provisional administrative régime."<sup>5</sup> That régime was to be carried on by a commission to be known as the "Inter-American Commission for Territorial Administration," which was established by the convention.<sup>6</sup> The principles enunciated in the convention found expression also in the Act of Habana, which was a declaration of the Foreign Ministers as to a course that might be permitted and pursued under certain circumstances. In the Act of Habana it was announced:

That when islands or regions in the Americas now under the possession of non-American nations are in danger of becoming the subject of barter of territory or change of sovereignty, the American nations, taking into account the imperative need of continental security and the desires of the inhabitants of the said islands or regions, may set up a régime of provisional administration under the following conditions:

(a) That as soon as the reasons requiring this measure shall cease to exist, and in the event that it would not be prejudicial to the safety of the American Republics, such territories shall, in accordance with the principle reaffirmed by this Declaration that the peoples of this Continent have the right freely to determine their own destinies, be organized as autonomous states if it shall appear that they are able to constitute and maintain themselves in such condition, or be restored to their previous status, whichever of these alternatives shall appear the more practicable and just;

(b) That the regions to which this declaration refers shall be placed temporarily under the provisional administration of the American Republics and this administration shall be exercised with the two-fold purpose of contributing to the security and defense of the Continent, and to the economic, political and social progress of such regions.<sup>7</sup>

<sup>4</sup> Dept. of State Bulletin, Aug. 24, 1940, 145-146.

<sup>5</sup> *Id.*

<sup>6</sup> Art. XVI, *id.*

<sup>7</sup> *Id.*, 138-139

Accordingly, it was resolved to create an emergency committee, composed of one representative of each of the American Republics, which committee should be deemed to be constituted as soon as two-thirds of its members should have been appointed, the appointments to be made as soon as possible. The committee was to meet on the request of any signatory to the resolution. It was declared that if it became necessary as an imperative emergency measure before the coming into effect of the convention, to apply its provisions in order to safeguard the peace of the Continent, taking into account also the desires of the inhabitants of the regions concerned, the committee would assume the administration of the region attacked or threatened, acting in accordance with the provisions of the convention; and that as soon as the convention should come into effect, the authority and functions exercised by the committee should be transferred to the International American Commission for Territorial Administration.<sup>8</sup>

Through the Convention of Habana inter-American solidarity strode forward; the instrument revealed acknowledgment of the existence of an inter-American juridical entity possessed as such of the right to defend America as against non-America.<sup>9</sup> By acquiescing in the arrangement the United States appeared to agree that the burden which it had long previously undertaken to bear by itself was, under certain circumstances, to be shared by its neighbors, and also that it itself was under certain contingencies obliged to act with them in a particular way. Apart, however, from the commitments specified in the convention, the United States did not undertake to bind itself to take affirmative steps in order to vindicate what it conceived to be its rights under the Monroe Doctrine.<sup>10</sup>

(4)

§ 95. **Preventive Measures.** The United States assumes no responsibility for the action of other American States.<sup>1</sup> Nor, as has been seen, does it assert the

<sup>8</sup> It was added: "Should the need for emergency action be so urgent that action by the committee cannot be awaited, any of the American Republics, individually or jointly with others, shall have the right to act in the manner which its own defense or that of the Continent requires. Should this situation arise, the American Republic or Republics taking action shall place the matter before the committee immediately, in order that it may consider the action taken and adopt appropriate measures."

"None of the provisions contained in the present Act refers to territories or possessions which are the subject of dispute or claims between European powers and one or more of the Republics of the Americas." (*Id.*, 139) See illuminating statement by Secy. Hull, Sept. 12, 1940, Dept. of State Bulletin, Sept. 28, 1940, 269-271.

<sup>9</sup> See Declaration of Principles of Inter-American Solidarity and Co-operation, approved Dec. 21, 1936, at the Inter-American Conference for the Maintenance of Peace at Buenos Aires, Report of the Delegation of the United States to the Conference, Dept. of State Publication 1088, Conference Series 33, Appendix 53. Through the Declaration of Lima of Dec. 24, 1938, the Governments of the American States reaffirmed their "continental solidarity." Dept. of State Press Releases, Dec. 24, 1938, 474-475; and they also made a Joint Declaration of Continental Solidarity on Oct. 3, 1939, at the Conference of Panama. See Report on the Meeting of the Ministers of Foreign Affairs of the American Republics, Pan American Union, Congress and Conference Series No. 29, p. 13.

<sup>10</sup> In the arrangement purporting to be made with Denmark in April, 1941, contemplating concessions to the United States for certain purposes in the island of Greenland, reference was made to the obligations of the United States under the Act of Habana, of July 30, 1940. See *infra*, § 494. The American Government did not, however, appear to feel that it was obligated by undertakings accepted at Habana, to act in concert with its American neighbors in seeking the concessions in Greenland to which the arrangement of 1941 referred.

§ 95 <sup>1</sup> Mr. Olney, Secy. of State, to Mr. Bayard, American Ambassador at London, July 20, 1895, For. Rel. 1895, I, 545, Moore, Dig., VI, 535, 548.

right to shield them from the consequences of misconduct, save under circumstances when attempts to secure justice involve acts on the part of non-American powers threatening permanent occupation of territory or interference with rights of political independence.<sup>2</sup>

It was suggested by President Roosevelt in 1904, that "chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society," might in America, as elsewhere, ultimately require intervention by some civilized power, and that in the Western Hemisphere the adherence of the United States to the Monroe Doctrine might force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.<sup>3</sup> This idea has doubtless at times been influential in causing the United States to conclude agreements designed to place under its protection for specified purposes certain Central American States. Nevertheless, there may be a wide gap between the lapses of an American Republic and those particular forms of conduct on the part of an offended non-American State which the United States, under cover of the Monroe Doctrine, essays to thwart. The absence of a necessary causal connection between them has served to beget confusion of thought when that doctrine was referred to as an excuse for the exercise by the United States of international police powers in the western hemisphere.<sup>4</sup>

A situation may, however, arise where the American Republics acting individually or collectively, have solid reason to gain and assert control of a particular area remote from their shores as an obvious and necessary means of preventing its use by a non-American power as a base of contemplated aggressive action against some part of the Western Hemisphere.<sup>5</sup> Those Republics in so acting need not invoke the Monroe Doctrine in defense of their conduct. Yet that conduct may exemplify a form of opposition to non-American action which the claim of the United States under cover of that doctrine is conceived to embrace. In a word, when American acts of prevention are in fact and by design the means taken to ward off interference by non-America with the political or territorial control of any portions of the Western Hemisphere, the claim of the United States under the Monroe Doctrine is exemplified or duplicated. As President Roosevelt declared on July 7, 1941, in the course of a message to the Congress announcing the occupation of Iceland by forces of his country: "The United States cannot permit the occupation by Germany of strategic outposts in the

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"As the Monroe Doctrine neither asserts nor involves any right of control by the United States over any American nation, it imposes upon the United States no duty towards European powers to exercise such a control. It does not call upon the United States to collect debts or coerce conduct or redress wrongs or revenge injuries." Elihu Root, "The Real Monroe Doctrine," *Proceedings*, Am. Soc. Int. Law, VIII, 6, 18.

<sup>2</sup> Certain Acts Involving or Threatening Permanent Occupation, *supra*, § 92. See, also, President Roosevelt, Annual Message, Dec. 3, 1901, For. Rel. 1901, xxxvi, Moore, Dig., VI, 595.

<sup>3</sup> President Roosevelt, Annual Message, Dec. 6, 1904, For. Rel. 1904, xli, Moore, Dig., VI, 596. Cf. Leo S. Rowe, "Misconceptions and Limitations of the Monroe Doctrine," Am. Soc. Int. Law, *Proceedings*, VIII, 126, 140-141.

<sup>4</sup> See Non-interference with American States, *infra*, § 95A; also Certain Acts Involving or Threatening Permanent Occupation, *supra*, § 92.

<sup>5</sup> See The Act of Habana and Convention of July 30, 1940, *supra*, § 94B.

Atlantic to be used as air or naval bases for eventual attack against the Western Hemisphere. We have no desire to see any change in the present sovereignty of those regions. Assurance that such outposts in our defense frontier remain in friendly hands is the very foundation of our national security and of the national security of every one of the independent nations of the New World.”<sup>6</sup>

## (5)

§ 95A. **Non-interference with American States.** The Monroe Doctrine has reference to interference with the freedom of States outside of the American continents. As has been observed, that doctrine is no longer invoked by the United States as a reason for thwarting the freedom of other American countries.<sup>1</sup> Nor would the United States admit that the restraining of a non-American State ever constitutes an interference with the political independence of an American neighbor save under circumstances when by virtue of international law, such action finds solid excuse. Thus, if in a particular case the United States should interpose to prevent the transfer, as by cession, of American territory, to a non-American power, the requirements of its own safety would be the defense relied upon in justification of the effort to check grantor as well as grantee.<sup>2</sup>

The Monroe Doctrine is not, however, indicative of the character or scope of the rights of the United States to intervene in the affairs of other American countries. If, in its judgment, conditions are such as to warrant an interference which is consonant with the requirements of international law and is unrestricted by treaty, the absence of any connection between those conditions and non-American countries is not a necessary deterrent. If or when such interference is inspired by the conviction that it is an indispensable means of preventing or warding off the commission of undesired acts by an aggrieved non-American State, it may, in the particular case, be regarded by the latter as an appropriate substitute for its own efforts, and also not necessarily opposed to its interests.<sup>3</sup> It should be constantly borne in mind that not until the action of a non-American State constitutes, or is fairly to be deemed likely to constitute, permanent lodgement on American soil,

<sup>6</sup> Dept. of State Bulletin, July 12, 1941, 15.

§ 95A. <sup>1</sup> See *supra*, § 92.

“The Doctrine does not concern itself with purely inter-American relations; it has nothing to do with the relationship between the United States and other American nations, except where other American nations shall become involved with European governments in arrangements which threaten the security of the United States, and even in such cases, the Doctrine runs against the European country, not the American nation, and the United States would primarily deal thereunder with the European country and not with the American nation concerned.” (J. Reuben Clark, Memorandum on the Monroe Doctrine, Dec. 17, 1928, Dept. of State Publication, No. 37, 1930, xxiv.)

<sup>2</sup> “The declaration against acquisition by non-American powers of American territory even by transfer might seem, at first glance, to furnish some basis for objection (although plainly in the interest of the integrity of American States) as an interference with the right of cession — but even this theoretical objection disappears when we consider the ground of the declaration upon this point by the Government of the United States. That ground is found in the recognized right which every State enjoys, and the United States no less than any other, to object to acts done by other powers which threaten its own safety.” (Charles E. Hughes, “Observations on the Monroe Doctrine,” Aug. 30, 1923, *Am. J. XVII*, 611, 618.)

<sup>3</sup> It is not suggested that the United States retains a disposition to intervene in the affairs of an American neighbor. The extent to which it has relinquished that privilege is noted elsewhere. See Intervention, Non-intervention in the Western Hemisphere, *supra*, § 83B

or interference with the political independence of an American State, does there arise an issue between the United States and such non-American power as is creative of those special grounds which enable the United States appropriately to invoke the Monroe Doctrine as a convenient weapon for its own defense and as a basis of protection for a neighbor.

## (6)

§ 95B. **Inter-continental Arrangements of American States.** If it still be acknowledged (as it was acknowledged throughout the nineteenth century) that forcible measures of self-help may be directed against an offending State without necessary impairment of its political independence, the United States is not illogical in abstaining from the intimation that the employment of such measures by a non-American State against an American State is necessarily opposed to the Monroe Doctrine. Its record in earlier decades was distinguished on occasions by such abstinence, and even by statements reflecting its unconcern.<sup>1</sup> That record is ample enough to justify the conclusion that the United States may under some conditions not have reason to regard with apprehension the consequences of breaches by American States of inter-continental agreements for the amicable adjustment of international differences, even where they involve the imposition of penalties by offended non-American powers.<sup>2</sup> Such a situation may present itself in a case where the offending American State has itself acquiesced in a scheme of penalization laid down in a multi-partite treaty to which the aggrieved non-American country is also a party.

It is not without significance that in recent years the United States has not apparently felt that its claims under the Monroe Doctrine precluded it from consulting non-American powers with reference to appropriate and effective modes of causing American States at variance with each other to heed their mutual obligations pertaining to amicable adjustment as imposed by the Briand-Kellogg Pact of August 27, 1928. Thus, on January 24, 1933, Secretary Stimson conferred with the Ambassadors of Great Britain, Germany, Japan and Italy concerning

§ 95B. <sup>1</sup> See, for example, Mr. Cass, Secy. of State, to Mr. McLane, Minister to Mexico, No. 39, Sept. 20, 1860, MS. Inst. Mexico, XVII, 306, Moore, Dig., VI, 481; Mr. Seward, Secy. of State, to Messrs. Tassara, Mercier and Lord Lyons, Dec. 4, 1861, H. Ex. Doc. 100, 37 Cong., 2 Sess., 187, Moore, Dig., VI, 485, 486; President Roosevelt, Annual Message to Congress, Dec. 3, 1901, For. Rel. 1901, xxxvi-xxxvii. The foregoing are among the documents invoked by J. Reuben Clark in his Memorandum on the Monroe Doctrine of Dec. 17, 1928, pp. 192-201, under the caption "The Monroe Doctrine Does not Prevent Europe from Waging War against the Latin Americas."

<sup>2</sup> It must be clear that as the employment of military forces committing hostile acts may easily pass from the field of non-political interposition to that of intervention serving to impair the political independence of the American State against which they are directed, the United States may be expected to be alert to endeavor both to ward off such a contingency and to effect adjustment of the existing issue by other and amicable processes. The Briand-Kellogg Pact of Aug. 27, 1928, if applicable, would doubtless be invoked. The statement in the text points, therefore, merely to the fact that theoretically there may be a gap between even severe measures of self-help shorn of every amicable feature, and those particular forms thereof which the United States may be expected to resist under cover of the Monroe Doctrine. The hiatus suffices, moreover, to reveal the basis for the contention that a variety of penalties may be applied against a covenant-breaking American State by a non-American State without running counter to any manifestation of opposition attributable to the Monroe Doctrine.

See also, *supra*, § 92.

the Leticia dispute between Colombia and Peru. In so doing he stated that he would welcome from any of the Governments represented at the meeting suggestions for the settlement of that dispute.<sup>3</sup>

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§ 96. **The Relation of the Monroe Doctrine to International Law.** The place in the law of nations which the efforts of the United States to restrict the freedom of action of non-American States have attained, must depend upon the effect which in practice such efforts have produced upon the conduct of those States. That effect is a bare fact the existence of which is not to be ascertained by reference to the expediency or in expediency of the policies which have influenced the United States in shaping its conduct. Nor is it affected by the circumstance that grounds of interference relied upon in the twentieth century may differ in any respect from those invoked by President Monroe, or embrace objections to non-American conduct that he and his cabinet did not raise. It is also unimportant in legal contemplation, whether the term Monroe Doctrine fitly describes what has taken place or is a desirable mode of referring to forms of conduct which it is said to inspire.

The United States derives no enlargement of the privileges of intervention from sheer policies of self-interest to which it may avow attachment. The test of the soundness of acts attributable to the Monroe Doctrine depends, therefore, upon the support to be found in the law of nations. The United States recognizes that test. It does not admit that any restriction which it seeks to apply by virtue of that doctrine is at variance with any requirements of that law. In interfering with non-American efforts to impair the political independence of an American Republic, there is no difficulty in making a convincing showing. In opposing the transfer of American territory by any process to a non-American State the principle of self-defense is invoked by way of justification. It may be contended, however, that the value of the excuse depends upon proof in each particular case that the transfer to a non-American power enlarges the burden of safeguarding the United States; and it may be urged that a transfer of an area remote from its territory should not be deemed invariably to be a menace to its security. The familiar response is in substance that the rule of non-American accessions or transfers is itself the safeguard which needs to be sustained, and that the yielding to a transfer in any quarter appreciably weakens its value. If applications of the principle of self-defense appear to the impartial mind to be far-reaching or unwarranted, the United States would point to the acquiescence that has been yielded by non-American powers whenever an issue has arisen.

Some States of Latin America, as they have gone on from strength to strength, have at times hitherto been inclined to regard with critical concern the assertions of a protector for whose services as such they felt a diminishing need; and they may have resented the suggestion of an anticipated restraint upon the vol-

<sup>3</sup> It is not understood that there is any public documentary record of this conference or conversation. One of the participating Governments made a proposal looking to the settlement of the dispute, in which reference was made to the Briand-Kellogg Pact.



untary transfer of territory to a non-American power.<sup>1</sup> This attitude fails, however, to mark a check upon the claim of the United States, partly because the Monroe Doctrine, as has been observed elsewhere, is not directed against American States as such, and also because there is as yet no persistent effort on the part of non-American powers to seek transfers of American territory from grantors whose action as such the United States endeavors incidentally to check. Thus the restraint upon the political independence of an American State, regardless of the sufficiency of the plea of the United States, has become reduced to a theoretical or academic objection, the soundness of which few countries of other continents are striving to put to the test, and which no American Republic is likely to ignore.<sup>2</sup>

In general, it is of utmost significance that acts of interference within the purview of the Monroe Doctrine, as above set forth, have been eminently successful, and have at times led to explicit acknowledgment of the soundness of the principles behind them.<sup>3</sup> Warnings to stop have been heeded. Dreaded movements have been brought to a standstill, and that without a clash of arms. The unwillingness of thwarted States to challenge by force the stand of the interferer has been impressive. Moreover, there has been a significant absence of tokens of disapproval when in the course of accepting the terms of general international conventions with non-American powers the United States has made avowal of its devotion to the Monroe Doctrine and its unwillingness to adjudicate issues pertaining to it.<sup>4</sup> Such a record inspires doubt whether non-American powers still remain in a position to contend that what the United States opposes under the Monroe Doctrine is regarded by them as at variance with international law. In a word, by yielding to the contentions of the United States the acquiescing States of other continents have either acknowledged that its applications of the

§ 96.<sup>1</sup> This sense of self-sufficiency, together with fears of unreasonable interference by the United States, was greatly diminished when the events of the European war in 1940, caused the assembling at Habana of the Ministers of Foreign Affairs of the American Republics and their readiness to subscribe to the Act of Habana and the Convention of July 30, of that year. See *supra*, § 94B.

<sup>2</sup> It is not suggested, however, that a few non-American countries may not covet voluntary transfers from American grantors. It is not probable, however, that an American Republic would at the present time voluntarily exercise the function of a grantor.

<sup>3</sup> J. B. Moore, *Principles of American Diplomacy*, New York, 1918, 258-261.

<sup>4</sup> "The governments of Europe have gradually come to realize that the existence of the policy which Monroe declared is a stubborn and continuing fact to be recognized in their controversies with American countries. We have seen Spain, France, England, Germany, with admirable good sense and good temper, explaining beforehand to the United States that they intended no permanent occupation of territory, in the controversy with Mexico forty years after the Declaration, and in the controversy with Venezuela eighty years after. In 1903 the Duke of Devonshire declared 'Great Britain accepts the Monroe Doctrine unreservedly.'" Elihu Root, *Proceedings*, Am. Soc. Int. Law, VIII, 6, 9.

<sup>5</sup> "To its explicit acceptance by Great Britain and Germany there may be added the declaration which was spread by unanimous consent upon the minutes of the Hague Conference, and which was permitted to be annexed to the signature of the American delegates to the Convention for the peaceful adjustment of international disputes, that nothing therein contained should be so construed as to require the United States 'to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign State,' or to relinquish 'its traditional attitude towards purely American questions.'" J. B. Moore, *Principles of American Diplomacy*, 261.

See Malloy's *Treaties*, II, 2032. Cf. also Resolution of Ratification by the Senate of the Hague Convention of 1907, for the Pacific Settlement of International Disputes, *id.*, II, 2247.

principles invoked were not unreasonable as tested by accepted standards, or were themselves to be taken as indicia of conduct not to be regarded as internationally illegal.<sup>5</sup>

The present importance of the Monroe Doctrine is largely derived, as Sir Frederick Pollock once pointed out, from the continuous and deliberate approval of it by the presidents of the United States. The doctrine, he declared, "is a living power because it has been adopted by the Government and the people of the United States, with little or no regard to party divisions, for the best part of the century."<sup>6</sup> It is the resolute, and habitual attitude expressed in behalf of the United States, whenever the conduct of non-American States threatens to disregard the obligations of non-interference and of abstinence from acquisitions of territory which it has sought to impose, that sustains and invigorates its claim.<sup>7</sup> This has, moreover, also been fortified by the readiness of other American

<sup>5</sup> It is not to be denied that Germany and certain of its allies would not acknowledge the loss of any legal right to acquire or control territory in the Western Hemisphere by any convenient means that proved to be efficacious to that end. Accordingly, it is not to be anticipated that they would admit an acquiescence in the assertions of the United States under the Monroe Doctrine that could be fairly deemed to have deprived them of that freedom. Such an attitude, in harmony with their contempt for many forms of restraint imposed by law, should not, however, be regarded as indicative of the thinking of the law-respecting members of the international society, or as diminishing the value of the evidence of their acquiescence. See in this connection reference in a statement from Secy. Hull of July 5, 1940, to a communication from the German Minister of Foreign Affairs, of July 1, 1940, in relation to the Monroe Doctrine, Dept. of State Bulletin, July 6, 1940, 3.

<sup>6</sup> "The Monroe Doctrine," Senate Doc. No. 7, 58 Cong., 1 Sess., reprinted from *The Nineteenth Century*, Oct., 1902.

<sup>7</sup> "As the particular occasions which called it forth have slipped back into history, the declaration itself, instead of being handed over to the historian, has grown continually a more vital and insistent rule of conduct for each succeeding generation of Americans. Never for a moment have the responsible and instructed statesmen in charge of the foreign affairs of the United States failed to support every just application of it as new occasion has arisen. Almost every president and secretary of state has restated the doctrine with vigor and emphasis in the discussion of the diplomatic affairs of his day." (Elihu Root, *Proceedings*, Am. Soc. Int. Law, 1914, VIII, 9.) See John W. Foster, *A Century of American Diplomacy*, Boston, 1900, 477.

Declared President Roosevelt in a radio address on Pan-American Day April 14, 1939: "The American peace which we celebrate today has no quality of weakness in it. We are prepared to maintain it, and to defend it to the fullest extent of our strength, matching force to force if any attempt is made to subvert our institutions, or to impair the independence of any one of our group." (See Associated Press Dispatch, *New York Herald-Tribune*, April 15, 1939, p. 2.)

"Finally, and principally, it is a mistake to imagine that the Monroe Doctrine is other than a policy beneficial to the whole world—a true gospel of peace." (Eugene Wambaugh, *Proceedings*, Am. Soc. Int. Law (1914), VIII, 143, 154.)

"With the passing of 100 years the Monroe Doctrine remains a cherished policy, inimical to no just interest and deemed to be vitally related to our own safety and to the peaceful progress of the peoples of this hemisphere." Charles E. Hughes, "Observations on the Monroe Doctrine," (Aug. 30, 1923, *Am. J.*, XVII, 611, 628.)

"So far as Latin America is concerned, the Doctrine is now, and always has been, not an instrument of violence and oppression, but an unbought, freely bestowed, and wholly effective guaranty of their freedom, independence, and territorial integrity against the imperialistic designs of Europe." (J. Reuben Clark, Memorandum on the Monroe Doctrine, Dec. 17, 1928, Dept. of State Publications, No. 37, 1930, xxv.)

Declared Secretary Hull in an address before the Eighth International Conference of American States, at Lima, Dec. 10, 1938: "There must not be a shadow of a doubt anywhere as to the determination of the American nations not to permit the invasion of this hemisphere by the armed forces of any power or any possible combination of powers. Each of our nations obviously must decide for itself what measures it should take in order to meet its share of our common interest and responsibility in this respect. As far as my country is concerned, let no one doubt for a moment that, so long as the possibility of armed challenge exists, the

Republics to coöperate in opposing much that the United States itself asserts the right to thwart.

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§ 97. **The Relation of the Monroe Doctrine to the League of Nations.** In January, 1917, President Wilson announced as a proposal "that the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world: that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful."<sup>1</sup>

Without discussing the extent to which the Covenant of the League of Nations may have failed to give expression to the policy enunciated by President Wilson, the history of the making of that document and the terms of the instrument in their final form reveal no concerted effort to challenge the assertions of the United States under the Monroe Doctrine. Article XXI of the Covenant declaring that nothing therein should "be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings (*ententes régionales*) like the Monroe Doctrine, for securing the maintenance of peace,"<sup>2</sup> was rather the fruition of an attempt to harmonize the projected arrangement with that doctrine, and to satisfy American opinion that the operation of the former was unlikely to check the United States in its applications of the latter.<sup>3</sup> While the reference to the assertions of the United States proclaimed under the Monroe Doctrine as a regional understanding was inept and technically unconvincing,<sup>4</sup> it suggests that, in the light of the record of the United States up to 1919,

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United States will maintain adequate defensive military, naval and air establishments." Dept. of State Press Releases, Dec. 10, 1938, 423, 426.

§ 97.<sup>1</sup> Address to the Senate, Jan. 22, 1917, on the essentials of permanent peace, For. Rel. 1917, Supp. 1, p. 24, 29. President Wilson's Foreign Policy, Messages, etc., edited by J. B. Scott, 1918, 245, 254. On Jan. 8, 1918, the President proposed as one of the fourteen points of what he declared to be the only possible program for peace, a general association of nations to be formed under specific covenants for the purpose of affording mutual guaranties of political independence and territorial integrity to small and great States alike. For. Rel. 1918, Supp. 1, p. 12.

<sup>2</sup> Among the numerous pertinent documents in Miller's Diary, see, Miller's draft of March 26, 1919, Document 607, VII, 168a; Miller's Memorandum of April 14, 1919, document 781, *id.*, VIII, 311; Miller's Memorandum of June 22, 1919, XX, *id.*, 444, 449; Miller's Memorandum of July 17, 1919, *id.*, XX, 484, 486; also Mr. Root's views of March 27, 1919, document 652, *id.*, VII, 330; Mr. Hughes' Union League Club speech of March, 1919, document 654, *id.*, VII, 333; remarks, embracing those of President Wilson, at meeting of Commission on League of Nations, April 10, 1919, document 775, *id.*, VIII, 282; President Wilson's remarks at meeting of same Commission, April 11, 1919, document 773, *id.*, VIII, 275; Miller's own account of the meeting of April 11, 1919, *id.*, I, 239, 243-244; discussion of same Commission's report at Plenary Session of Conference, April 28, 1919, *id.*, XX, 59, 91-92.

<sup>3</sup> Declared President Wilson on April 11, 1919, at a meeting of the Commission on League of Nations: "There is no thought in my mind that the Monroe Doctrine invalidates the Covenant, but there is in some minds the thought that the Covenant invalidates the Doctrine, so that we are seeking to remove that, as I believe, erroneous impression by distinctly saying that there is nothing in this Covenant inconsistent with the Monroe Doctrine. Now, if there is anything in the Monroe Doctrine inconsistent with the Covenant, the Covenant takes precedence of the Monroe Doctrine, not only because it is subsequent to it, but because it is a body of definite obligations which the United States cannot explain away even if it wanted to explain." Miller's Diary, document 773, VIII, 275.

<sup>4</sup> Cf. text of Mr. Miller's interesting draft of March 26, 1919, to the effect that "Nothing

and of the reactions of non-American powers at that time, there may have been a taking cognizance of the fact that there existed an understanding that in relation to particular regions assertions attributable to the Monroe Doctrine were worthy of respect.<sup>5</sup>

The terms of Article X of the Covenant registered the undertaking of the members of that body to respect and preserve as against external aggression, the territorial integrity and existing political independence of all members of the League.<sup>6</sup> It may well be urged that this undertaking forbade those members which were not American States from committing against their fellow members in the Western Hemisphere some acts which the United States itself, in pursuance of the Monroe Doctrine, was to be expected to assert the right to oppose. Respect for the Covenant thus appeared to lighten the burden assumed by the United States, in removing from the horizon some occasions for its interference. Moreover, acceptance of membership in the League by an American State appeared to render valueless the objection that the exercise by that body of its normal processes designed to effect amicable adjustment of international differences was an interference with the political independence of the American member against which pressure might be brought.

It seems to be clear, however, that the Covenant recognized the voice of American States in the affairs of non-American States, and reciprocally that of the latter in affairs of the Western Hemisphere.<sup>7</sup>

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### § 97A. The Alignment of the United States with America and Non-America. With the increasing confidence of Latin America in the purposes and

in this Covenant shall be deemed to affect the Monroe Doctrine which is recognized as having in view the peace of the world." Miller's Diary, document 607, VII, 168a.

<sup>5</sup> Such an idea finds apparent support in Mr. Miller's Memorandum of July 17, 1919, *id.*, XX, 484, 486.

Also, in this connection, statement in British commentary on the Covenant, 1919, Cmd., 151, 18.

Also communication from the Council of the League, Sept. 1, 1928, to the Government of Costa Rica, interpretative of Article XXI of the Covenant, League of Nations Document No. 6. 165. M. 50 1928. 90.

See, in this connection, Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, 1941, Chap. VIII.

<sup>6</sup> According to the typewritten draft of the original plan of a covenant understood to have been proposed by President Wilson at the Peace Conference early in 1919, the contracting parties agreed to "unite in guaranteeing to each other political independence and territorial integrity." Cf. *Treaty of Peace with Germany*, Hearings before Senate Committee on Foreign Relations, 66 Cong., 1 Sess., II, 1165, 1166. See supposed comments of Messrs. D. H. Miller and G. Auchincloss, legal advisers, touching this proposal, *id.*, 1183. The foregoing documents were offered as exhibits by Wm. C. Bullitt, formerly Chief of Division of Current Intelligence Summaries of the American Commission at the Peace Conference, at a hearing before the Senate Committee on Foreign Relations, Sept. 12, 1919.

<sup>7</sup> "The idea of Pan-Americanism is obviously derived from the conception that there is such a thing as an American system; that this system is based upon distinctive interests which the American countries have in common; and that it is independent of and different from the European system. To the extent to which Europe should become implicated in American politics, or to which American countries should become implicated in European politics, this distinction would necessarily be broken down, and the foundations of the American system would be impaired; and to the extent to which the foundations of the American system were impaired, Pan-Americanism would lose its vitality and the Monroe Doctrine its accustomed and tangible meaning. I say this on the supposition that the Monroe Doctrine is, both geographically and politically, American, its object being to safeguard the Western Hemisphere against territorial and political control by non-American powers. Of this limited application I

aspirations of the United States, which events in Haiti in 1915, and in Nicaragua in 1926–27, had served to diminish, the way has been paved for a stronger and more useful alignment of the States of the Western Hemisphere. The relinquishment by the United States of certain rights of control over Haiti and Cuba and Panama, together with its renunciations in 1933 and 1936, of the right to intervene in the affairs of its American neighbors have borne fruit.<sup>1</sup> The achievements of the Conference of Lima in 1938, and of the Conference of Habana in 1940, are illustrative.<sup>2</sup> They may be a portent of such a welding together of inter-American interests in opposition to non-American aggrandizement in the Western Hemisphere as will ultimately beget an inter-American law that is to be definitely proscriptive of acts that are subversive of the common defensive need, and which may even call for some forms of affirmative action by the individual American State.<sup>3</sup> It should be observed, however, that as a participant in the making and development of an inter-American law, the United States, on whose shoulders rests the heaviest burden in upholding what it conceives to be its rights under the Monroe Doctrine, is not to be expected to accept a régime whereby its own freedom in opposing non-American aggrandizement will be checked or determined or enlarged by any extrinsic American entity.

At the present time, in the mind of the Government of the United States the success of its opposition to the conduct embraced within the claim under the Monroe Doctrine is inseparably connected with the upholding of a certain non-American State whose existence as an independent political entity is threatened by an implacable enemy.<sup>4</sup> Moreover, it is also felt that the danger lest that claim be challenged and weakened springs chiefly from the conduct and aspirations of the rulers of portions of non-America who are committed to the totalitarian doctrine. These two conclusions are fraught with implications. One is that a political rather than a geographical or hemispheric alignment projects itself as

would adduce as proof not so much the fact that the Monroe Doctrine, although conceived in terms of colonial emancipation, has not prevented the United States and other American governments from forcibly extending their territorial limits at one another's expense, as to the fact that it has been regarded by the United States as justifying the latter's recent enforcement in Nicaragua, Haiti, Santo Domingo, and elsewhere, of precisely such measures of supervision and control as it is understood to forbid non-American powers to adopt in American countries." J. B. Moore, *Principles of American Diplomacy*, 1918, X–XI.

§ 97A. <sup>1</sup> See treaty with Cuba of Jan. 23, 1934, U. S. Treaty Vol. IV, 4054, abrogating the earlier treaty with that country of May 23, 1903, Malloy's Treaties, I, 364, that embodied the so-called Platt amendment; executive agreement with Haiti of Aug. 7, 1933, U. S. Executive Agreement Series No. 46, whereby the United States relinquished certain powers acquired under the treaty with that country of Sept. 16, 1915, U. S. Treaty Vol. III, 2673 (as prolonged by an additional Act of March 28, 1917); Agreement on Haitian Finances of Sept. 13, 1941, replacing that of Aug. 7, 1933, U. S. Executive Agreement Series, No. 220; treaty with Panama of March 2, 1936, U. S. Treaty Series No. 945, providing for the relinquishment of the right of intervention for certain purposes in the affairs of that country, as set forth in Art. VII of the treaty concluded on Nov. 18, 1903, Malloy's Treaties, Vol. II, 1349, 1351.

<sup>2</sup> See The Declaration of Lima, 1938, *supra*, § 94A; The Act of Habana and Convention of July 30, 1940, *supra*, § 94B. See Non-intervention in the Western Hemisphere, *supra*, § 83B.

<sup>3</sup> See Declaration of Principles of Inter-American Solidarity and Co-operation, emanating from the Inter-American Conference for the Maintenance of Peace at Buenos Aires, in 1936, Dept. of State Publication 1088, Conference Series 33, 227.

<sup>4</sup> See Mr. Hull, Secy. of State, in statement before the House Committee on Foreign Affairs, Jan. 15, 1941, Dept. of State Bulletin, Jan. 18, 1941, 85, 88.

See also *supra*, § 83C.

See President Roosevelt, in message to the Congress relating to the occupation of Iceland, July 7, 1941, Dept. of State, Bulletin, July 12, 1941, 15.

a vital defensive factor. Another supplementary one is the circumstance that the distinctive dangers to America which have bred the opposition proclaimed through the Monroe Doctrine are not to be anticipated from the conduct of non-American countries professing attachment to democratic principles of government, and least of all by that British entity the continuity of whose independent life is regarded as a bulwark of defense for the Western Hemisphere.<sup>5</sup> This does not mean that coöperation with Britain is to be taken as illustrative of the Monroe Doctrine. Nor does it signify that the alignment of the American States is illogical or impracticable or necessarily short-lived, but rather that there has been an awakening to the fact that a vast means of protection for America exists in a particular European country whose maintenance is for that reason of vital concern to the United States and its neighbors. This awakening accentuates the question whether, at the present time, the Western Hemisphere can be adequately defended without the aid of that country as against the aggressive designs of the military master of Europe.<sup>6</sup> The successes of Germany as a belligerent since 1939, together with the breadth of the aggressive designs imputed by the Government of the United States to the rulers of that country, may inspire a negative response. If that be the correct one, the importance, however great, of the inter-American alignment to the United States may be overshadowed by the value of its coöperation with States of both hemispheres whose thinking and political philosophy resemble its own, and whose united military strength suffices to preserve them from molestation. Generations who welcome the advent and progress of the Twenty-first Century may look back to the early 1940s as the significant time when the United States began to see that the maintenance of its own safety and institutions could not be assured by people or things solely within its own hemisphere.<sup>7</sup>

## 8 .

§ 97B. **The Panama Canal Doctrine.** In 1923, Secretary Hughes pointed to the special relationship of the Panama Canal to the defensive problem of the United States, and in that connection, to some consequences of the right of maintenance of that waterway in relation to the Caribbean area. He said:

We have established a waterway between the Atlantic and Pacific oceans — the Panama Canal. Apart from obvious commercial considerations, the

<sup>5</sup> This was not the case in 1895 (see *supra*, § 91), and there may be those who would contend that it may not be true in 1995. At the present time, however, it is difficult to visualize a situation or time when Britain will have recourse to conduct which the United States may regard as opposed to its claim under the Monroe Doctrine.

<sup>6</sup> In a word, with Britain paralyzed, and bereft of its naval and air forces, could America today maintain its territorial and political integrity through purely American devices as against the Axis Powers bent on aggrandizement therein?

<sup>7</sup> In an illuminating study by Percy W. Bidwell and Arthur R. Upgren on "A Trade Policy for National Defense," in *Foreign Affairs*, XIX, January, 1941, 282, the fact is emphasized that the Western Hemisphere is not economically self-sufficient; that in order to keep its head above water it must trade with non-America; that a régime controlling the commercial policy of Europe might deal disastrously with an American Republic not disposed to accept its terms unless some fairly compensatory market were found in another quarter outside of the Americas; and that an economic union between the Western Hemisphere and the British Empire might go far to satisfy such a need.

adequate protection of this canal — its complete immunity from any adverse control — is essential to our peace and security. We intend in all circumstances to safeguard the Panama Canal. We could not afford to take any different position with respect to any other waterway that may be built between the Atlantic and the Pacific Oceans. Disturbances in the Caribbean region are therefore of special interest to us not for the purpose of seeking control over others but of being assured that our own safety is free from menace.<sup>1</sup>

Thus, according to Secretary Hughes, the very construction of an interoceanic canal across the Isthmus of Panama by the United States has served to add to the complexity of its own defensive problem, by demanding the largest effort to safeguard that particular waterway. A permitted instrument of permanent defense is seen to require itself a special defense or protection throughout an area with which it is geographically and strategically associated. The United States may, therefore, be expected to assert the right, within such area, to protect the Panama Canal and its approaches and communications from dangers of every kind attributable to American as well as non-American conduct. Moreover, it is to be anticipated that the United States will regard as perilous to the safety of the entities to be protected any measures of violence calculated to produce conditions of prolonged unrest. In a word, the very appearance or existence of the Panama Canal is deemed to confer upon the constructor and maintainer the right to demand that no acts in the vicinity of it jeopardize its safety, and also to thwart the commission of any that in its judgment are likely to do so.

One may be permitted to doubt whether the claim of the United States, which has no necessary connection with the Monroe Doctrine when the matter of the protection of the Panama Canal is seemingly interfered with or thwarted merely by conditions of violence or unrest prevailing within the domain of a neighboring Republic, was relinquished by the acceptance by the United States of the inter-American conventional arrangements of 1936, marking a disclaimer of the right of intervention in the affairs of an American Republic.<sup>2</sup> Possibly, for that reason, the inter-American community of States may, as such, become alert to endeavor to hold in leash any member thereof whose unrestrained conduct in an area in proximity to the Canal may inspire the United States to thwart acts which appear to jeopardize the safety of the waterway.

§ 97B.<sup>1</sup> "The Monroe Doctrine — A Review," Nov. 30, 1923, *The Pathway of Peace*, New York, 1925, 142.

In his address of Aug. 30, 1923, before the American Bar Association, Secretary Hughes declared: "By building the Panama Canal we have not only established a new and convenient highway of commerce, but we have created new exigencies and new conditions of strategy and defense. It is for us to protect that highway. It may be necessary for us at some time to build another canal between the Atlantic and Pacific Oceans and to protect that. I believe that the sentiment of the American people is practically unanimous that in the interest of our national safety we could not yield to any foreign power the control of the Panama Canal, or the approaches to it, or the obtaining of any position which would interfere with our right of protection or would menace the freedom of our communications." ("Observations on the Monroe Doctrine," *Am. J.*, XVII, 611, 619.)

See Dexter Perkins, *Hands Off, A History of the Monroe Doctrine*, 1941, 335.

<sup>2</sup> See Non-intervention in the Western Hemisphere, *supra*, § 83B.

## TITLE B

### GENERAL RIGHTS OF PROPERTY AND CONTROL

#### 1

#### CREATION. TRANSFER. EXTINCTION.

##### a

##### Creation

##### (1)

§ 98. **In General.** The existence of an exclusive right of property and control over an area necessarily implies the existence of a possessor whose capacity to possess is recognized by the family of nations. Every State of international law has such capacity, and is bound to utilize it. A country may, in the course of its internal development, reach a stage where it is deemed to be capable of exercising such a right, and of responding to the obligations incidental to it, long before it attains a position such as to justify its admission to full membership in the society of States.<sup>1</sup> Thus certain countries, which by reason of their connection with and attachment to a civilization other than that which is known as European or Christian, have not been received for all purposes into the family of nations, nevertheless, enjoy relationships to territory not unlike those maintained by States generally. The former are regarded as capable of possessing exclusive rights of property and control.<sup>2</sup>

A right of property and control, or, as it is frequently termed, a right of territorial sovereignty, may be said to come into being when a State, or a country regarded as possessed of the requisite capacity, asserts dominion by appropriate

§ 98.<sup>1</sup> According to Westlake, in order to enable a country to secure recognition of its capacity to possess a title to territorial sovereignty, there must be "a territory in which the pursuits of civilised life can be carried on, under a sovereign power sufficiently understanding those pursuits and sufficiently organised to be capable of giving them the necessary protection, and of administering justice in the questions arising out of them. Or at least whether there is a sovereign power which can do this in conjunction with consuls accredited to it and whose authority is normally supported by it, as happens in states like Turkey or China." (Int. L., 2 ed., I, 91-92.)

Also, Gustav Smedal, *Acquisition of Sovereignty Over Polar Areas*, Oslo, 1931, 10, and 24. <sup>2</sup> In spite of the "Boxer" troubles in China in 1900, Mr. Hay, Secretary of State, made singular effort to secure a solution which should preserve the territorial and administrative entity of that country. See his circular note of July 3, 1900, For. Rel. 1900, 299.

Acts in Derogation of the Supremacy of the Territorial Sovereign, *infra*, § 202; The Conclusion of Special Relationships, *supra*, § 57. Also, The Protection of Backward Communities or of Countries of Unique Civilization, *supra*, § 25; Countries not familiar with Accepted Standards of Civilization, *supra*, § 33.



action over territory not in fact under that of any other State or political entity acknowledged to be qualified to exercise such a right.<sup>3</sup> It becomes necessary to observe what acts have been regarded, and are now deemed sufficiently assertive of dominion in order to create such a right. In so doing it will be found that the objects of acquisition so greatly vary in point of climate as to raise the question whether substantially the same acts are essential for the acquisition of rights of property and control in all parts of the globe; and especially whether the same steps need to be taken in the polar regions as in those within temperate or torrid zones; and again, whether areas of ice, as distinct from ice-covered lands may be dealt with as if they were land, and made the objective of a right of sovereignty.<sup>4</sup>

The present knowledge of the geography of the globe, and of the peoples occupying its surfaces, the highly developed means of communication that broadcast to the world both discoveries and fresh assertions of dominion over remote places, coupled with the fact that relatively few areas of land remain unclaimed by an entity possessed of capacity to acquire rights of property and control, distinguish the world today from that of even yesterday, and completely transform it from the planet of Columbus and the Cabots.

In their day legal thinking might keep apace with, but could not out-distance the influence of conditions then existing. The growth of a commonly accepted law was correspondingly slow. It depended upon the dispelling of ignorance of geographical facts, as well as upon the birth of a new political philosophy that should make room for independent statehood. Such achievements needed centuries of contacts for their fulfilment. Clearness of thought as to the steps to be taken for the acquisition of rights of sovereignty over previously unknown lands that a prolonged period of exploration and colonization has since served to produce, must not, therefore, be imputed to monarchs of the fifteenth and sixteenth centuries. Compliance with the requirements of the time is all that could then have been expected. Accordingly, the modern State when relying upon such compliance in support of an ancient claim of title, as by way of historical evidence thereof, is not necessarily deviating from, or showing lack of respect for, the exacting and well-defined conditions that are now acknowledged to be essential.<sup>5</sup>

<sup>3</sup> See Moore, Dig., I, 303.

See, The Case Concerning the Legal Status of Eastern Greenland, *infra*, § 101A.

"In the course of the correspondence that took place between Mr. Ekerold and the Department of State regarding the company's claim to rights on the island [of Jan Mayen], the Department pointed out, on Feb. 16, 1927, that the general recognition of the status of the island as *terra nullius* rendered it impossible to acquire title to property there, as ordinarily understood, because 'Ownership, in its essential features, constitutes the use and enjoyment of the property owned, to the exclusion of all others in its use and enjoyment, and is secured to the owner under the authority of the Government exercising the right of sovereignty with relation both to the island and its inhabitants.'" (Hackworth, Dig., I, 476, footnote.)

<sup>4</sup> See, Acquisition of Rights of Sovereignty over Polar Areas, In General, *infra*, § 104A.

<sup>5</sup> "Titles must be judged by the state of international law at the time they arose." Westlake, Int. L., 2 ed., I, 114, invoked in Memorandum of the United States in Island of Palmas Arbitration, Washington, 1925, 51-53.

Cf. Award of Huber, Sole Arbitrator, in that Case, April 4, 1928, *Am. J.*, XXII, 867, 883.

## (2)

§ 99. **Discovery. Taking of Possession.** When Europe became aware of the existence of the American continents there was no commonly accepted public law that determined how pieces of them could be acquired by a monarch who was hungry for land across the Atlantic. The time was not ripe for clearness of thought. Ignorance of the contour and position and size of the areas that were seemingly thrown into the lap of civilization added to the confusion. The nations were long disposed to work along the lines of least resistance rather than by reference to suggestions or offerings from pre-existing legal systems.<sup>1</sup> Moreover, they were confronted, as will be observed, with the claims of the Pope as the almoner of the earth and the fullness thereof in so far as it remained unexplored.

The law that slowly developed in relation to the coming into being or acquisition of what might be called exclusive rights to control these little-known areas beyond the seas was attributable to the influence of facts rather than theory. The pregnant ones were geographical and economic; and their influence was decisive. The distance of the Americas from Europe, as well as slow and uncertain means of communication by small sailing vessels, played a part. Nature played another. Varying and oftentimes intolerable climatic conditions, impenetrable mountains and forests, and the prevalence of the mosquito and other pests were barriers to exploration, while the native population proved oftentimes to be an implacable and persistent foe. These were the grim obstacles to settlement which it required centuries to overcome. Yet statesmen were far from admitting that a newly-found area which a monarch could not in fact control might not under certain circumstances be regarded as belonging to him, and still less that the creation of his right of sovereignty therein had to await a settlement that could not be anticipated for generations.<sup>2</sup> The portrayal of what took place suffered, however, and has continued to suffer, from the effort to interpret State

§ 99.<sup>1</sup> A portion of the Roman law concerning the theory of the possession of immovables embodied principles capable of aiding the statesmen of the sixteenth century. According to that law, in order to obtain a right of possession, there was required of the possessor, declares Westlake, both "a bodily act and a mental attitude." The "necessary bodily act," he adds, "was prehension; such a seizure as to give the mastery over the thing, including the power of retaining it, without which there would not be mastery." The extent of the possession was determined by the amount which the possessor could control from the position actually taken up. The mental attitude required was an intention to possess. Such intention, however, had reference to the nature of the right sought to be acquired, rather than to the extent of what was acquired. Westlake, 2 ed., I, 99-100, *citing* Paulus, in Dig. 41, 2, 3; Javolenus, in Dig. 41, 2, 22; Savigny on Possession, pp. 173-174, English translation.

See, also, Julius Goebel, Jr., *The Struggle for the Falkland Islands*, New Haven, 1927, Chap. II, in which that author ably portrays the offerings or contributions presented by the Roman law of occupation.

<sup>2</sup> In the Case concerning the Legal Status of Eastern Greenland, the Permanent Court of International Justice declared: "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (Publications, Permanent Court of International Justice, Series A/B, No. 53, 46.)

See also *Arbitral Award by His Majesty, King Victor Emanuel*, of Jan. 28, 1931, concerning the controversy between France and Mexico, relative to The Sovereignty Over Clipperton Island, *Am. J.*, XXVI, 390, *Rev. Gén.*, 3 sér., VI, 129.

conduct in terms of legal theory that were not necessarily respected by the actors, and also by the tendency to attach to a particular term of frequent use a technical signification that paid scant heed to the simple idea that it was supposed to register. That word in its English form is *discovery*.

To discover new lands was to ascertain the existence of territory previously unknown to civilization.<sup>3</sup> Such conduct was not, however, assertive of an exclusive right of control over what was discovered; and it did not even call for the setting of foot upon it. Nevertheless, the term discovery was not infrequently employed in reference to conduct that embraced more than the bare ascertainment of the existence of previously unknown lands. This may have been due to the character of the conduct to which the discoverer usually had recourse.<sup>4</sup>

At the time of the European explorations in the Western Hemisphere in the fifteenth and sixteenth centuries, the discoverer seems to have been expected to assert dominion in behalf of his sovereign over what he found.<sup>5</sup> Upon reaching newly-found shores he landed and formally took possession.<sup>6</sup> The methods by which he might do so were various and differed in respect to the formalities employed. The action, howsoever expressed, marked a definite endeavor to acquire

<sup>3</sup> This circumstance served to render confusing the views of those who did not take pains to indicate that they were attaching to the word a significance not apparent from its etymology. It may account, moreover, for the seeming failure of some writers to portray accurately what was deemed to be the significance in law of particular acts.

<sup>4</sup> In earlier centuries the so-called discoverer was oftentimes in reality merely the explorer who investigated the nature and extent of lands of which the existence was generally although loosely known, but of which the contour and area and physical characteristics were unknown. He was truly the discoverer of mountains and plains and rivers and islands; and he ascertained, as no others had before him, the vastness of territories through which he roamed. In a strict sense the places which he explored were not infrequently new-found lands, because no representative of European civilization had previously seen them or had the slightest knowledge of what they were like.

Mr. Upshur, Secy. of State, to Mr. Everett, Oct. 9, 1843, MS. Inst. Great Britain, XV, 148, 165, Moore, Dig., I, 259, 260.

<sup>5</sup> Henry VII, by letters patent of March 5, 1496 (the date assigned to them by J. W. Jones of the British Museum), authorized John Cabot and his sons not only "to seeke out, discover, and finde, whatsoeuer illes, countreyes, regions or prouinces, of the heathen and infidelles, whatsoeuer they bee, and in what part of the worlde soeuer they be, whiche before this time haue been vnknowne to all Christians," but also "to set up our banners and ensignes in euery village, towne, castel, yle, or maine lande, of them newly founde," and to "subduc, occupie, and possesse" the same, and "as our vassailes and lieutenantes, getting vnto vs the rule, title, and jurisdiction of the same." Richard Hakluyt, *Divers Voyages Touching the Discovery of America*, published by The Hakluyt Society, with notes and introduction by John Winter Jones, London, 1850, p. 21.

See letters patent granted by Queen Elizabeth to Sir Humphrey Gilbert, June 11, 1578, Richard Hakluyt, *The Principal Navigations Voyages Traffiques & Discoveries of the English Nation*, 1904 ed., Glasgow, p. 17.

<sup>6</sup> In the Journal of his first voyage, Columbus thus describes his landing on Oct. 12, 1492: "The Admiral took the royal standard, and the captains went with two banners of the green cross, which the Admiral took in all the ships as a sign, with an F and a Y and a crown over each letter, one on one side of the cross and the other on the other. Having landed, they saw trees very green, and much water, and fruits of diverse kinds. The Admiral called to the two captains, and to the others who leaped on shore, and to Rodrigo Escovedo, secretary of the whole fleet, and to Rodrigo Sanchez of Segovia, and said that they should bear faithful testimony that he, in presence of all, had taken, as he now took, possession of the said island for the King and for the Queen his Lords, making the declarations that are required, as is now largely set forth in the testimonies which were made in writing." *Original Narratives of Early American History, The Northmen, Columbus, and Cabot*, edited by Julius E. Olson and Edward Gaylord Bourne, New York, 1906, p. 110.

See Adolf Rein, *Der Kampf Westeuropas um Nordamerika im 15. und 16. Jahrhundert*, Stuttgart-Gotha, 1925.

territory in behalf of a monarch, and so to bring into being something akin to a right of sovereignty over an area that at the moment of acquisition belonged to nobody.

Sometimes the taker of possession did more than rely upon a symbolic act; he built a fort and left a portion of his followers within range of it.<sup>7</sup> Not infrequently he sailed away leaving little or no trace of his visit.<sup>8</sup> Occasionally the fact of his achievement remained long unknown, and a later explorer might lay claim to the same area in behalf of another sovereign whose subjects finding none in possession proceeded to settle therein. They in turn, after securing a frail lodgment might be exterminated by the native inhabitants, or by forces of the monarch on behalf of whom the original taking of possession had been effected.<sup>9</sup> Such situations gave rise to the problem concerning what acts were to be deemed sufficient to bring into being a right that a sovereign might fairly invoke as against a rival. The solution of it was perhaps complicated by the large assertions of the Church.

The Pope made claim to unknown lands, and asserted the right to regulate their discovery and exploration.<sup>10</sup> Here was an impressive suggestion from a

<sup>7</sup> See Mr. Adams, Secy. of State, to Don Luis de Onís, Spanish Minister, March 12, 1818, with respect to the acts of La Salle and his followers at the Bay of St. Bernard in 1685, Am. State Pap. For. Rel., IV, 468, 473-475.

<sup>8</sup> "When navigators have met with desert countries, in which those of other nations had, in their transient visits, erected some monument to show their having taken possession of them, they have paid as little regard to that empty ceremony as to the regulation of the Popes, who divided a great part of the world between the crowns of Castile and Portugal." (Vattel, Book I, Ch. 18, Sec. 108, Chitty's ed., London, 1834, p. 99.) It may be doubted whether this statement by Vattel gives an accurate portrayal of the significance or legal consequence of acts which manifested a taking of possession. While it is doubtless true that explorers were disposed to snatch and lay claim for their sovereigns whatever they found uncontrolled, just as the robber clutches the wallet of him who leaves it exposed to theft, the taking of possession was far from an "empty ceremony" and was for centuries the mode by which monarchs purported to bring into being a right of sovereignty over a newly-found land.

<sup>9</sup> The experience of the French Huguenot colonists in Florida in 1565 at the hand of the Spanish Menéndez who vindicated by the sword the rights accruing to the original taker of possession is illustrative. See Keller, Lissitzyn and Mann, Creation of Rights of Sovereignty through Symbolic Acts, 1400-1800, 45-48; 109-110, and documents cited.

<sup>10</sup> See The Bull *Romanus Pontifex* (Nicholas V), Jan. 8, 1455, and The Bull *Inter Caetera* (Calixtus III), March 13, 1456, by which exclusive rights to acquire territory and make conquests from the capes of Bojador and Não southward through and beyond Guinea were given to Portugal. Also, the Bulls of Pope Alexander VI (*Inter Caetera*, May 3, 1493; *Eximiae Devotionis*, May 3, 1493; *Inter Caetera*, May 4, 1493; *Dudum Siquidem*, Sept. 26, 1493), assigning to the Crown of Castile exclusive rights in lands discovered and to be discovered west of the meridian fixed one hundred leagues west of any of the islands of the Azores and Cape Verde, provided that such lands were not in the actual possession of any Christian king or prince by Christmas, 1492.

It may be observed that of the foregoing Bulls, those of 1455 and 1456 referred to lands already acquired and to be acquired (*jam acquisita et que in futurum acquiri contigerit, postquam acquisita fuerint*, according to that of Jan. 8, 1455), while those of Alexander VI of 1493 embraced lands which were unknown and had been or remained to be discovered (*omnes et singulas terras et insulas predictas, sic incognitas, et hactenus per nuntios vestros reperiatis et reperiendas in posterum*, according to the Bull *Inter Caetera* of May 3; *omnes insulas et terras firmas inventas et inveniendas, detectas et detegendas*, according to the Bull *Inter Caetera* of May 4, 1493). Perhaps the achievement of Columbus may account for the specific reference to acts of discovery. It should be noted, however, that the treaty concluded between Spain and Portugal at Alcaçovas, Sept. 4, 1479, referred to lands "discovered or to be discovered" (*tierras descubiertas e por descubrir*), and that this treaty was confirmed by the Bull *Aeterni Regis* (Sixtus IV), of June 21, 1481, which made reference likewise to "lands, discovered or to be discovered" (*terris, detectis seu detegendis, inventis et inveniendis*).

Authoritative texts of all of these Bulls, and of the Treaty of Alcaçovas, together with Eng-

powerful political entity that a right of exclusive control did not necessitate even a formal taking of possession. Apart from the nature of the authority invoked in support of the Papal claim that gave it validity in the minds of the faithful, the very preferment of it offered a convenient precedent to an ambitious monarch bent on acquiring a domain overseas by the easiest means.<sup>11</sup> While the claim of the Pope was challenged by countries other than Spain and Portugal which were the chief beneficiaries under it, and ultimately broke down in the face of the character of the international law that was welding States together,<sup>12</sup> the very invocation of it marked an assertion that tended to obscure and perhaps deter acceptance of what was to become the basis of accepted doctrine.

The contention that the mere visual apprehension of newly-found lands — discovery in the strict sense of the word — sufficed to create a right of sovereignty was not acceptable to or respected by monarchs or entities that were to constitute the international society.<sup>13</sup> More was expected and required. It was the taker of possession whose acts were decisive. His conduct, manifesting as it did an assertion of dominion, was early and generally regarded as sufficient and also requisite. Thus on December 18, 1523, Charles I of Spain in an instruction to his ambassador, Juan de Zúñiga, relative to the Spanish claim to Maluco, adverted to the legal value of a taking of possession in behalf of his Crown, and to the inadequacy of Portuguese pretensions which lacked such a foundation.<sup>14</sup> The

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lish translations, are among the first eight documents contained in *European Treaties Bearing on the History of the United States and Its Dependencies*, edited by Frances G. Davenport, Washington, The Carnegie Institution, 1917. Attention is called to the illuminating introduction by the editor, and to the introductory editorial note and bibliography preceding each document.

See, also, E. Nys, *Les Origines du Droit International* (1894), 370-374; H. Vander Linden, "Alexander VI and the Demarcation of the Maritime and Colonial Domains of Spain and Portugal," *Am. Hist. Rev.*, XXII, 1. See, in this connection, *British Guiana-Venezuela Boundary Arbitration, Case of Great Britain, Venezuela No. 1* (1899) [Cd. 9336], pp. 157 *et seq.*; also by comparison, *Counter Case of Venezuela, Venezuela No. 5* (1899) [Cd. 9500], pp. 116 *et seq.*

Also, Gustav Smedal, *Acquisition of Sovereignty Over Polar Regions*, Oslo, 1931, 13-15; C. Salomon, *De l'Occupation des territoires sans maître*, Paris, 1889, 33-34.

<sup>11</sup> Moreover, the Pope was seen as the dispenser of sovereignty to a monarch whose subjects had made a discovery. See Clément VI (1342-1352), *Lettres Closes, Patentes et Curiales (publiées ou analysées d'après les registres du Vatican)* Paris, 1925, Vol. I, Part 2, p. 274, for text of decree of Nov. 15, 1344, to the effect that: "*Ludovicus de Hispania princeps Fortuniae constituitur, dummodo dictae Insulae Fortunatae, sic acquisitae, in feudum ab ecclesia Romana teneantur.*"

<sup>12</sup> See Julius Goebel, Jr., *The Struggle for the Falkland Islands*, New Haven, 1927, 64-65.

<sup>13</sup> See *Johnson v. McIntosh*, 8 Wheat. 543, in which Chief Justice Marshall declared: "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." (572-573)

*Cf.* Memorandum of the United States in *Island of Palmas Arbitration*, before the Permanent Court of Arbitration at The Hague, 1925, 51-60.

<sup>14</sup> He said in part:

"Therefore, it was quite evident, since Maluco had been and was found by Castilian and not Portuguese ships, as they declared, that we, according to the terms of the same treaty, held it lawfully, at least in the time taken in arriving at and concluding the true determination of demarcation. . . . Furthermore it was declared in our behalf, that, although Maluco had been

potency of such conduct was not, however, clearly observed or duly appraised by portrayers of the law in the course of its development.<sup>15</sup> This may have been partly due to the fact that the significance of the term discovery as employed in diplomatic correspondence was not always easily comprehensible, and also to the circumstance that there was doubtless some evidence suggesting or intimating that in the visual apprehension of newly-perceived lands, which necessarily preceded the taking of possession of them, there was laid the first stone of the foundation of the claim to a right of sovereignty. Thus Portugal, in correspondence with Great Britain in 1782, appeared to rely upon discovery as the basis of its claim to the island of Trinidad.<sup>16</sup>

Again, it needs to be observed that States were by no means consistent in the preferment of their respective claims.<sup>17</sup> Their contradictory attitudes were doubt-

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discovered by the ships of the King of Portugal—a thing by no means evident—it could not, on this account, be made to appear evident, or be said that Maluco had been found by him. Neither was the priority of time, on which he based his claims, proved, nor that it was discovered by his ships; for it was evident, that to find required possession, and that which was not taken or possessed could not be said to be found, although seen or discovered. . . .

"From the above it followed clearly that the finding of which the said treaty speaks, must be understood and is understood effectually. It is expedient to know, by taking and possessing it, that which is found; and consequently the most serene King of Portugal, nor his ships, can in no manner be spoken of as having found Maluco at any time, since he did not take possession of it at all, nor holds it now, nor has it in his possession in order that he may surrender it according to the stipulations of the said treaty.

"And by this same reasoning it appeared that Maluco was found by us and by our ships, since possession of it was taken and made in our name, holding it and possessing it, as now we hold and possess it, and having power to surrender it, if supplication is made to us. . . .

"Furthermore the right of our ownership and possession was evident because of our just occupation. At least it could not be denied that we had based our intention on common law, according to which newly-found islands and mainlands, belonged to and remain his who occupied and took possession of them first, especially if taken possession of under the apostolic authority, to which—or according to the opinion of others, to the Emperor—it is only conceded to give this power." (The Philippine Islands, Vol. I, 1493–1529, Records translated and edited by Emma Helen Blair and James Alexander Robertson, with historical introduction by Edward Gaylord Bourne, Cleveland, 1913, 145, 148–154.)

The learned editors append to the text of the document the following statement: "In another letter of the same date the Emperor complains to the King of Portugal that the latter's ambassadors have not been willing to abide by the terms of the treaty of Tordesillas in their conferences with the Castilian plenipotentiaries, 'although our right to those regions discovered and taken possession of by our fleet is fully apparent from the treaties and compacts negotiated over the division of lands and the line of demarcation, and confirmed in the name of each one of us.'" (*Id.*, 158, note 174.)

<sup>15</sup> That potency was, however, clearly perceived by Messrs. Arthur S. Keller, Oliver J. Lissitzyn and Frederick J. Mann, who in their illuminating monograph entitled *Creation of Rights of Sovereignty through Symbolic Acts (1400–1800)*, published by the Columbia University Press in 1938, declared: "It may be asserted on the basis of the facts that the formal ceremony of taking of possession, the symbolic act, was generally regarded as being wholly sufficient *per se* to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'effective occupation.' A right or title so acquired and established was deemed good against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other State." (148–149.)

See also James Simsarian, "The Acquisition of Legal Title to *Terra Nullius*," *Pol. Sc. Quar.*, LIII, 1938, 111. Cf., Dr. F. A. Freiherr von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law," *Am. J.*, XXIX, 448, 454, 456.

<sup>16</sup> See communication of Chevalier de Pinto, Portuguese Minister at London, to Mr. Fox, British Foreign Secretary, May 30, 1782, *Publicações do Arquivo Nacional*, XXVIII, Rio de Janeiro, 1932, 40. This document was brought to the attention of the author by Oliver J. Lissitzyn, Esq.

<sup>17</sup> Thus, the view expressed by Queen Elizabeth to the Spanish Ambassador Mendoza,

less at times due to expediency; but they were also in part attributable to ignorance of political and geographical factors. Nevertheless, from the record of the period that elapsed between the acts of Columbus and Cabot and the adoption of its Constitution by the United States, there is evidence of the growth of a common understanding — a singleness of thought — that a taking of possession — nothing more or less — was productive of a right of sovereignty. If the taking of possession were productive of a right of sovereignty nothing remained to be done in order to keep it alive; for the thing created was far from an abortive or inchoate entity requiring special resuscitation for the preservation of its life. Moreover, the land to which it attached was no longer *res nullius*. Thus it was that when a monarch sought to acquire an area of which a rival had previously taken possession, the action necessarily marked interference with an existing right of sovereignty, and was inherently wrongful. Accordingly, if the interference were successful and long persisted in, it divested the original owner of his title, and wrought a change of sovereignty.

The creation of rights of sovereignty by a process that did not call for maintenance of control over areas that ceased to be *res nullius* made its appeal at a period when the western hemisphere was not and could not be controlled by Europeans by occupation or other known devices, and when, therefore, formalities served as useful and necessary instrumentalities in the scheme of perfecting and validating monarchical pretensions. Yet the sufficiency of that process was bound to be challenged in various ways when, in a later era areas of that hemisphere were occupied and controlled in fact by European peoples, and when questions concerning boundaries arose and became acute. At the time of the earliest explorations as well as for a considerable period thereafter, there seems, moreover, to have been no common opinion as to the extent of the area which the sovereign of a taker of possession might lawfully claim by reason of what had been done in his behalf; and this circumstance may have been responsible for the repetition of symbolic acts in behalf of the same country or monarch that manifested themselves within the same continent.<sup>18</sup> Again, ignorance or great uncertainty as to the doings of a taker of possession at times led the country entitled to benefit by his action to delay long in so doing. England was far from alert to utilize in diplomatic correspondence the achievements of John

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in 1580, quoted by Westlake, 2 ed., 104, *citing* Camden's Annals, year 1580, denying in substance the value of a mere taking of possession, is difficult to reconcile with her attitude in acknowledging in 1566, the value of the Spanish claim to Florida, Keller, Lissitzyn and Mann, *op. cit.*, 47-48, or with the English view expressed by Sir George Downing, Ambassador to the Netherlands, April 7, 1665, quoted by James Simsarian in *Pol. Sc. Quar.*, LIII, 118, *citing* John R. Brodhead, Documents Relative to the Colonial History of the State of New York, Albany, 1858, II, 331, 332.

See instructions to the English commissioners, May 22/June 1, 1604, to negotiate the treaty with Spain which was concluded Aug. 18/28, 1604. European Treaties Bearing on the History of the United States and Its Dependencies to 1648, edited by Frances Gardiner Davenport, Carnegie Institution, Washington, 1917, 247, note 4.

<sup>18</sup> Thus between 1577 and 1584, Sir Francis Drake, Sir Humphrey Gilbert, Martin Frobisher, as well as Sir Walter Raleigh's Captains Amadas and Barlowe, were taking possession of various areas of North America. These instances are referred to with supporting documents in Keller, Lissitzyn and Mann, *op. cit.*, 57-67.

See Extent of Possession, Continuity, *infra*, § 101.

Cabot in 1497;<sup>19</sup> and when it did so, it was inclined to impute to his son, Sebastian, the really decisive conduct of the father.<sup>20</sup> Nor did the French appear to be zealous to ascertain whether Verrazano took possession in behalf of his patron of any areas which now constitute a portion of the Atlantic seaboard of the United States.<sup>21</sup> As a means, however, of consolidating or extending the westerly and southerly limits of the French domain in North America, La Salle and some of his compatriots, late in the seventeenth century were formally taking possession of inland or coastal areas appurtenant to others where settlement or lodgment had been made.<sup>22</sup> The procedure had important implications; for it showed how the method employed for the creation of a right of sovereignty was regarded as appropriate also for the rough demarcation of territorial limits, as well as for the extension of claims to areas which at the time of such action may have been regarded as *res nullius*.

As the creation of a right of sovereignty was necessarily in behalf of a monarch or entity capable of holding title, and so involved the commission of acts that were for his or its benefit, it was not supposed that such a right could come into being through the acts of one who was not commissioned to take possession, if at least his conduct in so doing was not subsequently ratified by the principal

<sup>19</sup> The conduct of John Cabot laid the foundation of the British claim to territory in North America. On his first voyage he anchored supposedly on June 24, 1497, "somewhere on the eastern seacoast of British North America, between Halifax and southern Labrador. The sailors went ashore and found a pleasant, fertile land. . . . Cabot had fulfilled his purpose as soon as he stepped on shore. Delay might involve his crew in a hopeless conflict with outnumbering natives. Further exploration could add nothing of comparable significance to what he already knew, and this knowledge might easily be lost to Europe by an attempt to increase it. These considerations would have counselled an immediate return to England, and there is no reason, in probability or in the sources of information, why Cabot and his companions need have spent more than a few hours on American soil on their first visit to the western continent. . . . If, as is probable, they spent these hours on Cape Breton Island or thereabouts, they doubtless saw Newfoundland on their return, and coasted eastward along its northern shore until they were clear of Cape Race. Thence an easy run would have brought them to Bristol, as is reported, on August 6, in ample time to allow the captain to post to the court, where he was rewarded for his success on August 10." (George Parker Winship, *Cabot Bibliography* with an introductory essay on the careers of the Cabots based upon an independent examination of the sources of information, New York, 1900, xiii-xiv.) In relation to Cabot's second voyage in 1498, "nothing whatsoever is known of the fate of the expedition" after its encounter with a storm off the Irish coast. (*id.*, xv.) There is solid reason to believe that on landing, on his first voyage, Cabot formally took possession. See letter from Raimondo de Soncino, envoy of the Duke of Milan to Henry VII, Dec. 18, 1497, translated by Prof. B. H. Nash, in Justin Winsor's *Narrative and Critical History of America*, Boston, 1884, Vol. III, p. 54; also James A. Williamson, *The Voyages of the Cabots and the English Discovery of North America under Henry VII and Henry VIII*, London, 1929, Document No. 20, p. 29.

<sup>20</sup> This is exemplified in numerous documents discussed and quoted by James Simsarian in "The Acquisition of Legal Title to *Terra Nullius*," *Pol. Sc. Quar.*, 1938, LIII, 111. See particularly statement in 1667, Calendar of State Papers, Colonial Series, America and West Indies, 1661-1688, 504.

<sup>21</sup> See in this connection, James C. Brevoort, *Verrazano the Navigator, or Notes on Giovanni da Verrazano and on a Planisphere of 1529, illustrating his American Voyage in 1524*, New York, 1874.

<sup>22</sup> See acts of De Saint-Lusson, June 14, 1671, at the Sault Ste. Marie as described in the *Procès Verbal de la Prise de Possession*, as translated and published by Francis Parkman in *La Salle and the Discovery of the Great West*, Boston, 1897, I, 53; also the conduct of La Salle on April 9, 1682, in taking possession at the mouth of the Mississippi of the area known as Louisiana, as set forth in *Procès Verbal*, as translated by Jared Sparks, and printed by Thomas Falconer in his work entitled *On the Discovery of the Mississippi*, London, 1844, appendix, 41-43. These documents are quoted by Keller, Lissitzyn and Mann, *op. cit.*, at 125 and 129, respectively.



in whose behalf he had acted.<sup>23</sup> Such a requirement did not, however, involve definite prior authorization.<sup>24</sup>

As time went on certain subsidiary ideas were gaining recognition. Thus, it came to be regarded as of utmost importance that claims to rights of sovereignty should be proclaimed and made widely known.<sup>25</sup> Moreover, the thought early obtained, at least with respect to the western hemisphere, that the native inhabitants possessed no right of territorial control, such as could be assimilated to a right of sovereignty which a European monarch was bound to respect. Their connection with territory on which they dwelt, in whatsoever fashion, did not suffice to transform it into something that was regarded as other than *res nullius*.<sup>26</sup>

As a matter of fact titles to uncontrolled areas of indefinite scope could not be expected to remain secure against inroads of European settlers possessed of power to maintain themselves in what otherwise was seemingly a vacant land. Although their conduct and that of their monarch in so far as he supported them might be wrongful in maintaining, by the sword or even without it, convenient lodgment within the domain of another, the actual tendency, which almost assumed the importance of a practice, of seizing lands which the lawful sovereign either did not purport to control or perhaps failed so to control as to thwart the ambitions of a rival, served relentlessly, if slowly, to cause the law touching the requirements for the production of an original title greatly to be modified as the centuries went on. That modification did not, however, in itself serve to weaken a right of sovereignty acquired as by a taking of possession at a time when such action sufficed to bring it into being, even though the sufficiency thereof might be asserted at a later period when more than a mere taking of

<sup>23</sup> Captain Gray, an American Citizen, on whose discovery and exploration of the Columbia River in May, 1792, the United States relied in part in claiming the territory drained by that river, did not take formal possession of the territory watered by it, and held no commission to do so. For that reason the British Government contended that the acts of its agent, Captain Vancouver, in previously discovering the mouth of the Columbia, and subsequently, upon learning of Gray's discovery, in exploring the river for one hundred miles and taking possession of the country in the name of his sovereign, laid a better foundation for a title than had the acts of his predecessor. See correspondence between the United States and Great Britain relating to the Oregon Dispute, 1842-1846, Brit. and For. State Pap., XXXIV, 49-64, 108, 125-126. Cf. Mr. Upshur, Secy. of State, to Mr. Everett, Oct. 9, 1844, MS. Inst. Great Britain, XV, 148, 165; Moore, Dig., I, 260; Twiss, *The Oregon Question*, London, 1846; Hall, Higgins' 8 ed., § 33; Dana's Wheaton, 250-254.

"The Settlements of La Salle, therefore, at the head of the Bay of St. Bernard, Westward of the River which he called Rivière aux Boeufs, but which you call Colorado of Texas, was not, as you have represented it, the unauthorized incursion of a private Adventurer into the Territories of Spain, but an Establishment having every character that could sanction the formation of any European Colony upon this Continent; and the Viceroy of Mexico had no more right to destroy it by a Military Force, than the present Viceroy would have, to send an army and destroy the City of New Orleans. It was a part of Louisiana, discovered by La Salle under formal and express authority from the King of France." Mr. Adams, Secy. of State, to Mr. Onís, Spanish Minister, March 12, 1818. Am. State Pap., For. Rel. IV, 473; Brit. and For. State Pap., 1817-1818, 477.

<sup>24</sup> Keller, Lissitzyn and Mann, *op. cit.*, 151.

<sup>25</sup> Westlake, 2 ed., I, 102-103.

<sup>26</sup> Marshall, C. J., in *Johnson v. McIntosh*, 8 Wheat. 543, 573; Messrs. C. Pinckney and Monroe, U. S. Ministers, to Mr. Cevallos, Spanish Minister of State, April 20, 1805, Am. State Pap., For. Rel., II, 664; Brit. and For. State Pap. (1817-1818), 322, 327, Moore, Dig., I, 263. See, also, Dana's Wheaton, § 166.

possession was regarded as essential for such a purpose.<sup>27</sup> In a word, the mere change of the law did not in itself demolish the value of what had earlier been acquired in pursuance of the law.

When, however, conditions of life in the western hemisphere were such that it became possible for a country to control what it claimed as its own, and to bring within reasonable or fairly-recognizable limits the application of a doctrine of constructive control, the international society was no longer willing to acknowledge that the mere taking of possession of particular areas could suffice to create a right of sovereignty unless accompanied or shortly followed by the exercise of substantial control over what was claimed. At the present time it perhaps suffices to take note of the definite change of the law which has slowly taken place and which was not fully wrought until the nineteenth century. The very light shed by available documentary materials which establish authoritatively what were early and for a long period accepted as the minimum requirements reveal the extent of that change. It is not difficult to portray what is now expected of the State which endeavors to bring into being such a right within an area outside of the polar regions. As Secretary Hughes declared on April 2, 1924: "Today, if an explorer is able to ascertain the existence of lands still unknown to civilization, his act of so-called discovery, coupled with a formal taking of possession, would have no significance, save as he might herald the advent of the settler."<sup>28</sup> The disappearance, however, from the western hemisphere of

<sup>27</sup> In his award in 1928, in the *Island of Palmas Arbitration*, between the United States and the Netherlands, Judge Huber, the sole arbitrator, without holding that the bare finding or seeing of the island in question failed to produce or mark the beginnings of a right of sovereignty enuring to the Spanish Crown, expressed a view that deserves attention. He declared:

"As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called *intertemporal law*), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law. International law in the nineteenth century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and that territories without a master had become relatively few, took account of a tendency already existing and especially developed since the middle of the eighteenth century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master, but which are reserved for the exclusive influence of one State, in virtue solely of a title of acquisition which is no longer recognized by existing law, even if such a title ever conferred territorial sovereignty. For these reasons, discovery alone, without any subsequent act, cannot at the present time suffice to prove sovereignty over the *Island of Palmas* (or *Miangas*); and in so far as there is no sovereignty, the question of an abandonment properly speaking of sovereignty by one State in order that the sovereignty of another may take its place does not arise." (*Am. J.*, XXII, 867, 883.)

It is suggested that the learned arbitrator might well have reached the conclusion that the mere seeing or finding of the *Island of Palmas* did not produce a right of sovereignty. But if it did, it is not apparent how a mere change of the law touching the acts necessary to bring into being such a right, served in itself to destroy the existence of one that had in fact already come into being. See in this connection, the critical comment of P. C. Jessup, in "*The Palmas Island Arbitration*," *Am. J.*, XXII, 735, 739-740. Also, Fernand de Visscher, "*L'Arbitrage de l'île Palmas (Miangas)*," *Rev. Droit Int.*, 3 *sér.*, X, 735; W. J. B. Versfelt, *The Miangas Arbitration*, Utrecht, 1933.

<sup>28</sup> Communication to Mr. Bryn, Norwegian Minister at Washington. He added: "And

non-polar regions which may still be fairly regarded as *res nullius*, gives little room for controversy as to the applicability therein of present-day requirements.<sup>29</sup>

## (3)

## SETTLEMENT AND OCCUPATION. CONTROL

## (a)

§ 100. **In General.** The gradual success of European colonizers in maintaining lodgment within various areas of the western hemisphere revealed the fact that it was possible for a monarch to exercise a measure of control over what had been acquired through a taking of possession in his behalf. Settlement was the mode of so doing. Such action was, especially when the settlers fortified themselves, a partial safeguard as against the aggressive acts of a land-hungry rival. By a like process a predatory monarch or State maintained itself within the area which it had forcibly wrested from the rightful owner. Settlement served, therefore, either to strengthen the taker of possession in the enjoyment of the right of sovereignty which his acts had brought into being, or to enable a later claimant, defiant of that achievement, to retain and to endeavor to improve the legal quality of an adverse title which lacked a lawful foundation.

Centuries had to pass before States could effectively control the broad areas on the American continent, even within the non-polar regions thereof, over which they claimed rights of sovereignty. This circumstance necessarily postponed for a protracted period the time when States were generally prepared to demand that such control should be so intimately associated with the creation of such a right as to constitute a condition to be satisfied in the perfecting of it. When that time did arrive, and the changing law keeping pace with changing conditions, required much more than a mere taking of possession for the creation of a right of sovereignty, and that the territorial extent of the achievement of the creator be measured by its power to control what was claimed, there remained few areas of appreciable size or importance within the western hemisphere which had not been subjected to claims of sovereignty when the demands of the law were less exacting.<sup>1</sup> For the relatively few situations where it was sought to

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where for climatic or other reasons actual settlement would be an impossibility, as in the case of the Polar regions, such conduct on his part would afford frail support for a reasonable claim of sovereignty. I am therefore compelled to state, without now adverting to other considerations, that this Government cannot admit that such taking of possession as a discoverer by Mr. Amundsen of areas explored by him could establish the basis of rights of sovereignty in the Polar regions, to which, it is understood, he is about to depart." (For. Rel. 1924, Vol. II, 519.)

<sup>29</sup> See Acquisition of Sovereignty over Polar Areas, The Position of the United States, *infra*, § 104D.

§ 100.<sup>1</sup> With the dawn of the nineteenth century the only non-polar regions within the western hemisphere fairly to be regarded as *res nullius* were islands. Within Asia and Africa there still remained, however, extensive areas that might be deemed to belong to no State, and various islands of the eastern hemisphere were in a like condition. It was of course true that some areas subjected to claims of sovereignty within the American continents still remained unsettled, weakly administered, inadequately controlled and even unexplored.

create a right of sovereignty, it was natural to employ a term which should appropriately refer to the requisite process and also intimate what it entailed. The word "occupation" was employed for a purpose. It was descriptive of the assertion by use and settlement of sovereignty over territory not under the dominion of a State or political entity deemed to be capable of exercising an exclusive right of property or control.<sup>2</sup> The conduct to which it had reference was perhaps worthy of a distinctive label at a time when it pointed to the means of satisfying the minimum requirements exacted of the State which sought to create a right of sovereignty over an area which at the time was available for such action..

Inasmuch as it now lies within the power of a State to exercise control over unsettled areas of wide extent by means of aircraft, occupation in so far as it involves acts of settlement, would seemingly find itself driven from the position which within the past fifty years it has enjoyed as the sole condition to be applied in determining whether the conduct of a State has sufficed to create a right of sovereignty. It is the fact of control rather than the method by which it is exercised which is the chief concern of the international society. When, therefore, adequate control may be effected by measures which do not embrace all that occupation supposedly calls for, that particular device or procedure loses much of its significance, and must be regarded as merely one of the methods by which the necessary degree of control may be exerted. Thus, at the present time, it probably suffices if the creator of a right of sovereignty makes its authority felt by some effective means within and throughout the territory which it claims as its own. Such means do not necessarily involve settlement.

(b)

§ 101. **Extent of Possession. Continuity.** During the long interval before it became accepted doctrine that the control of an area was closely associated with the bringing into being of a right of sovereignty therein, the matter of settlement or lodgment had a bearing upon the solution of questions concerning the extent of areas which the sovereign of the settler or lodger might properly regard as its

<sup>2</sup> "Title by occupation is gained by the discovery, use and settlement of territory not occupied by a civilized power." (J. B. Moore, in Moore, Dig., I, 258.)

"Occupation is an *original*, as distinguished from a *derivative*, mode of acquisition of territory. It involves the intentional appropriation by a State of territory not under the sovereignty of any other State. It does not involve the transfer of sovereignty from one State to another. Occupation is usually — though not necessarily — associated with the discovery of the territory in question by the occupying State." (Hackworth, Dig., I, 401.)

Declares Oppenheim: "The territory must really be taken into possession by the occupying State. For this purpose it is necessary that it should take the territory under its sway (*corpus*) with the intention of acquiring sovereignty over it (*animus*). This can only be done by a settlement on the territory, accompanied by some formal act which announces both that the territory has been taken possession of, and that the possessor intends to keep it under his sovereignty." (McNair's 4 ed., § 222.) Also, W. Lakhtine, "Rights over the Arctic," *Am. J.*, XXIV, 703, 704; Huber, as Sole Arbitrator in Island of Palmas Arbitration, 1928, *Am. J.*, XXII, 867, 875.

Declared Mr. Middleton, American Minister, to Count Nesselrode, Russian representative in the course of negotiations in 1824, concerning the rights of their States in North America: "The dominion cannot be acquired but by a real occupation and possession, and an intention (*animus*) is not enough." (Brit. and For. St. Pap., LXXXII, 264.)

See also, Award in Swiss-Italian arbitration concerning the Alpe Craivairola District, Dec. 31, 1873, H. La Fontaine, *Pasicrisie Internationale* (1774-1900), 201.

own. To maintain a frail lodgment or even a settlement of appreciable dimensions on an ocean coast or elsewhere was not to control areas that were remote from it. Hence, if such an achievement were to be deemed to clothe the State in whose behalf it was made with a right of sovereignty over distant lands, the result was necessarily due to acquiescence in a theory which imputed the requisite assertion of dominion over what was claimed to conduct that was unaccompanied by manifestations of control. It marked deference for a doctrine of constructive possession; and tokens of such deference were frequently seen.<sup>1</sup> Obviously, by recourse to a formal taking of possession, the extent or limits of the territorial pretensions of a claimant might be in fact proclaimed or even extended.<sup>2</sup> It was as reasonable to lay claim to a broad and contiguous area by such process as it was to create a right of sovereignty by symbolic act. Thus, whether the conduct of La Salle and his followers in the course of explorations between the Great Lakes and the Gulf of Mexico, in asserting dominion in behalf of Louis XIV over wide and roughly defined tracts to the westward of the Mississippi were to be regarded either as creative of rights of sovereignty, or merely indicative of the geographical scope of those that were already existent, the legal value of what was done is believed to have been substantial.

In the slow process of endeavoring to adjust controversies growing out of the conflicting claims of monarchs or States that had maintained themselves through relatively isolated lodgments in the western hemisphere, some bases of conduct were seen that in varying degree exemplified practices which by the time the United States began its life as a State, were gaining recognition, and perhaps had attained a position sufficient to justify the conclusion that they might be regarded as rules of law. It is not sought to trace their development, but rather to accentuate certain considerations upon which stress was laid.

It came to be constantly asserted that a State in whose behalf a number of detached or isolated settlements had been established, as along a coastline, might fairly be regarded as the sovereign of the intervening areas that connected them, as well as of others extending inland therefrom.<sup>3</sup> The assertion was doubtless

§ 101.<sup>1</sup> In the western hemisphere, at the time of the promulgation of the Monroe Doctrine, "there were vast regions not settled by the subjects of civilized powers." Moore, Dig., VI, 414, note. Also, The Monroe Doctrine, The Non-Colonization Principle, *supra*, § 88.

See Case of Guatemala, Guatemala-Honduras Boundary Arbitration under treaty of July 16, 1930, Washington, 1932, pp. 4-6; 24-25; 671-672.

<sup>2</sup> See Taking of Possession, *supra*, § 99.

<sup>3</sup> Messrs. Pinckney and Monroe, American Plenipotentiaries, to Don Pedro Cevallos, April 20, 1805, Am. State Pap., For. Rel., II, 662, 664, Brit. and For. St. Pap., V, 323, 327; Mr. Gallatin, American Plenipotentiary, to Mr. Addington, British Plenipotentiary, Dec. 19, 1826, Am. State Pap., For. Rel., VI, 666, 667-668.

In the course of his correspondence with Mr. John Quincy Adams, Secy. of State, relating to the boundaries of the territory acquired by the United States in the Louisiana Purchase, Don Luis de Onís, on Jan. 5, 1818, declared: "These Dominions and Settlements of the Crown of Spain were connected with those which she had on the Gulf of Mexico, that is to say, with those of Florida and the Coasts of the province of Texas, which, being on the same Gulf, must be acknowledged to belong to Spain, since the whole circumference of the Gulf was hers; which property, incontestably acquired, she had constantly maintained among her possessions, not because she occupied it throughout its whole extent, which was impossible, but on the principle generally recognized, that the property of a lake or narrow Sea, and that of a Country, however extensive, provided no other Power is already established in the interior, is acquired by the occupation of its principal points." (Am. State Pap., For. Rel., IV, 455, 456, Brit. and For. St. Pap., V, 425-428.)

strengthened by geographical factors which at times were a barrier to settlement and long retarded occupation or other forms of control. Political rivalries, breeding as they did the common need of safeguarding existing lodgments and of charting out fields of prospective development, encouraged some practices that were followed.

It was felt that the sovereign in whose behalf settlement had been effected at a particular spot might be supposed within a reasonable time to seek to extend his dominion over the surrounding country because such an extension was either necessary for his own safety, or incidental to the natural development of his domain.<sup>4</sup> The application of such a theory was, however, beset with difficulties, partly because of lack of agreement concerning the period of time within which a State might properly claim an exclusive right to extend and assert its control over the surrounding country as well as of areas that were remote therefrom.<sup>5</sup> Centuries had to elapse before a relevant law could gain general approval; and what that law was ultimately to ordain necessarily awaited the time when States could in fact exercise control over what was claimed.

It was natural, however, that statesmen should enunciate principles in justification of claims which they asserted. In the controversy between the United States and Spain respecting the boundaries of the Louisiana territory, the American Plenipotentiaries, Messrs. Pinckney and Monroe, April 20, 1805, relied upon the following principles which were later supported by Mr. John Quincy Adams, as Secretary of State, in 1818:

The first of these is, that when any European Nation takes possession of any extensive Sea Coast, that possession is understood as extending into the interior Country, to the sources of the Rivers emptying within that Coast, to all their branches and the Country they cover; and to give it a right, in exclusion of all other Nations, to the same. . . .

The second is, that, whenever one European Nation makes a discovery, and takes possession of any portion of that Continent, and another afterwards does the same at some distance from it, where the Boundary between them is not determined by the principle above mentioned, the middle dis-

<sup>4</sup> Cf. discussion in Westlake, 2 ed., I, 103-105.

<sup>5</sup> Declared Lord Salisbury in a despatch May 18, 1896, for Mr. Olney, Secy. of State: "All the great nations in both hemispheres claim, and are prepared to defend, their right to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of 'Hinterland', with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control." For. Rel. 1896, 228, 230; Moore, Arbitrations, I, 974. In reply June 22, 1896, Mr. Olney said in part: "The accepted rule as to the area of territory affected by an act of occupation in a land of large extent has been that the crest of the watershed is the presumptive interior limit, while the flank boundaries are the limits of the land watered by the rivers debouching at the point of coast occupied. . . . Unless the treaties looking to the harmonious partition of Africa have worked some change, the occupation which is sufficient to give a State title to territory cannot be considered as undetermined. It must be open, exclusive, adverse, continuous, and under claim of right. It need not be actual in the sense of involving the *possessio pedis* over the whole area claimed. The only possession required is such as is reasonable under all the circumstances—in view of the extent of territory claimed, its nature, and the uses to which it is adapted and is put—while mere constructive occupation is kept within bounds by the doctrine of contiguity." For. Rel. 1896, 232, 235; Moore, Arbitrations, I, 976, 980.

tance becomes such of course. The justice and propriety of this rule is too obvious to require illustration.

A third rule is, that, whenever any European Nation has thus acquired a right to any portion of Territory on that Continent, that right can never be diminished or affected by any other Power, by virtue of purchases made, by grants or conquests of the Natives within the Limits thereof.<sup>6</sup>

It may be observed that the first of the foregoing propositions received in 1927, the approval of the Judicial Committee of the Privy Council in its judgment in the boundary dispute between Canada and Newfoundland in the Labrador Peninsula.<sup>7</sup>

At the present time, when it is contended in the course of a boundary dispute, that in an earlier century a State which acquired a right of sovereignty through a lodgment at the mouth of a river was entitled to an unoccupied area extending inland to the watershed, the claim may be in fact challenged if it is not shown that at the time or period when the test of limits was to be taken, the claimant failed to assert that the area up to the watershed was its own.<sup>8</sup> In a word, absence of evidence of appropriate assertion at that time may prove to be more detrimental than absence of evidence of administrative control.

<sup>6</sup> Am. State Pap., For. Rel., II, 662, 664; Brit. and For. St. Pap., V, 322, 327-328, Moore, Dig., I, 263.

The United States claimed that France, by virtue of the explorations and settlements of La Salle in 1681-1682, along the Illinois and Mississippi rivers, and particularly at the mouth of the latter stream, acquired title to the Mississippi Valley. It was also claimed that the establishment by La Salle in 1685, of the settlement at the Bay of Espiritu Santo, four hundred miles west of the mouth of the Mississippi, which was destroyed by the Indians in 1689, and which the French never sought to regain while they were sovereign of Louisiana, was still within the constructive possession of France by virtue of its retaining the mouth of the Mississippi. It was maintained, therefore, that the boundary line between the territories of the United States and Spain should be along the Rio Grande, being halfway between the Bay of Espiritu Santo and the most easterly Spanish settlement, notwithstanding the fact that no French settlements had ever been permanently established in the vicinity of the Bay of Espiritu Santo, or even west of the Red River, and in spite of the fact that the Spanish had from 1690 continuously (save during their own ownership of Louisiana, 1763-1800), maintained settlements not only east of the Rio Grande, but even within a short distance of the Bay of Espiritu Santo. See Don Pedro Cevallos, Spanish Minister of State, to Messrs. Pinckney and Monroe, April 13, 1805, Am. State Pap., For. Rel., II, 660; Brit. and For. St. Pap., V, 315; Messrs. Pinckney and Monroe to Don Pedro Cevallos, Spanish Minister of State, April 20, 1805, Am. State Pap., For. Rel., II, 662; Brit. and For. St. Pap., V, 322; Don Luis de Onís, Spanish Minister, to Mr. John Quincy Adams, Secy. of State, Jan. 5, 1818, Am. State Pap., For. Rel., IV, 455; Brit. and For. St. Pap., V, 425; Mr. Adams, Secy. of State, to Don Luis de Onís, Spanish Minister, March 12, 1818, Am. State Pap., For. Rel., IV, 468; Brit. and For. St. Pap., V, 461. Cf. criticism of the position of the United States in Hall, Higgins' 8 ed., § 33.

Concerning the reasoning in support of the claim of the United States to the entire region drained by the Columbia River, cf. Mr. Calhoun, Secy. of State, to Mr. Pakenham, British Minister, Sept. 3, 1844, Brit. and For. St. Pap., XXXIV, 64.

<sup>7</sup> 137 Law Times Reports, 187, which was invoked by Guatemala in its Case, p. 676, in the Arbitration of its boundary dispute with Honduras, under treaty of July 16, 1930.

"Balboa and Dávila took possession of the Pacific Ocean and all of the islands and lands in and adjoining it, while Dávila in addition specified lands in which the waters fall into the South Sea (*que están aguas vertientes á la dicha mar*), thus introducing the idea of the watershed. The same idea was perhaps expressed in the formula 'from the stones [or sands] of the rivers to the folds of the mountains' used by Dávila and Oñate." (Keller, Lissitzyn and Mann, Creation of Rights of Sovereignty through Symbolic Acts, 43, and documents there cited.)

<sup>8</sup> See Opinion and Award, Guatemala-Honduras Special Boundary Tribunal, Jan. 23, 1933, 45.

It may be observed that Mr. Calhoun, Secretary of State, in his correspondence with the British Minister in 1844, relating to the Oregon Dispute, contended that the principle of continuity furnished a just foundation for a claim of ownership to unoccupied lands adjacent to those which were actually occupied.<sup>9</sup> By virtue thereof he maintained that the United States was entitled to the territory on its western frontier as far as the Pacific Ocean.<sup>10</sup>

With the gradual settlement of greater portions of the western hemisphere other than Polar regions, and the proportional enlargement of the power of the settler to control adjacent areas sparsely populated, or even unpopulated, both the necessity and desirability of invoking and relying upon the doctrine of constructive possession diminished.<sup>11</sup> Accordingly, there was room for application of the theory that areas which a State claimed as its own be subjected to its control. Respect for that theory was calculated to minimize conflicting claims; and it was useful also as a guide in measuring the geographical extent of territorial claims in the course of future explorations. If control, as by use and settlement

<sup>9</sup> Brit. and For. St. Pap., XXXIV, 64, 67-68, Moore, Dig., I, 264.

<sup>10</sup> It was contended, therefore, by Mr. Calhoun, that Great Britain had claimed that its territorial rights extended from the Atlantic to the Pacific, and had definitely asserted them in patents and charters to the Plymouth Company, 1620, Massachusetts Bay, 1628, Connecticut, 1662, Carolina, 1663, and Georgia, 1764. Papers relating to the Treaty of Washington, V, 21-22, Moore, Dig., I, 265. By Art. VII of the Treaty of 1763, between Great Britain and France, the former yielded all claims and all chartered rights of its colonies west of the Mississippi. *Rec.* I, 104-106. According to Mr. Calhoun, the effect of the treaty was the extension beyond the Mississippi of the right of continuity previously claimed by Great Britain and transferred by it to France. "Certain it is," he declared, "that France had the same right of continuity, in virtue of her possessions in Louisiana, and the extinguishment of the right of England by the Treaty of 1763, to the whole country west of the Rocky Mountains, and lying west of Louisiana, as against Spain, which England had to the country westward of the Alleghany Mountains, as against France, with this difference, that Spain had nothing to oppose to the claim of France at the time but the right of discovery (and even that England has since denied), while France had opposed to the right of England in her case, that of discovery, exploration and settlement. It is therefore not at all surprising that France should claim the country west of the Rocky Mountains (as may be inferred from her maps), on the same principle that Great Britain had claimed and dispossessed her of the regions west of the Alleghany; or that the United States, as soon as they had acquired the rights of France, should assert the same claim, and take measures immediately after to explore it, with a view to occupation and settlement. But since then we have strengthened our title by adding to our own proper claims and those of France, the claims also of Spain, by the Treaty of Florida, as has been stated." (Brit. and For. St. Pap., XXXIV, 64, 69. Another portion of this communication is contained in Moore, Dig., I, 264.

See, in this connection, Westlake, 2 ed., I, 115-117, who declares that the limits described in the British charters to the Colonies "must be taken as intended to operate between the Colonies and the Crown and between adjoining Colonies; no pretension of so far-reaching an extent was advanced by Great Britain against Foreign States."

<sup>11</sup> "These English settlements were, for a long time, mere spots on the coast, many hundred miles apart, and reaching only a few miles into the interior. And two centuries later, down to the era (say, 1850-60) when transcontinental roads and railways became near certainties, the explorer might journey for a thousand or fifteen hundred miles west of the Mississippi and in the corresponding portion of Canada without encountering traces of civilized man, and in constant peril from unsubjected savages. Down to the period of the discovery of gold (1848), the Pacific coast, north of what is now San Francisco, for some thousand miles had no white inhabitants save two or three small settlements, as at the mouth of the Columbia, and in the Vancouver region, with one or two Russian posts farther north.

"In 1845 an Englishman could have entered from Canada and gone to Mexico without encountering a single white man, unless it might be the Mormons at Salt Lake City. A Russian could, in the same way, have traversed British Columbia from Alaska to Winnipeg." (Printed Argument of Venezuela, in Venezuela-British Guiana Boundary Arbitration, I, 216, quoted in Memorandum of United States, Island of Palmas Arbitration, 100.)



or other processes, were to be deemed to be closely associated with, and perhaps essential for the creation of a right of sovereignty over territory that still lacked an owner, it was reasonable also that such control should be co-extensive with the limits of areas over which such a right was brought into being. The law doubtless exacts the exercise of such control by the present-day creator of a right of sovereignty.<sup>12</sup> The point to be observed is, however, that until the very modern conditions existed which made feasible and served to produce the demand for control, as by occupation, as a condition to be satisfied in the creation of a right of sovereignty, there could not exist a practice or a law that was heedless of the value of claims over uncontrolled or unoccupied lands. Hence the growth of a law that recognized such a requirement was necessarily extremely slow. It had not made much headway when the United States began its life as a State. Nor was there room, even then, for its application in a situation where the claim to a right of sovereignty over an unoccupied or uncontrolled area remained unchallenged by a foreign State.<sup>13</sup>

§ 101A. **The Case Concerning the Legal Status of Eastern Greenland.**<sup>1</sup> In its judgment of April 5, 1933, concerning the Legal Status of Eastern Greenland, the Permanent Court of International Justice announced conclusions revealing deference for the value of ancient claims as the foundation of rights of sovereignty over an unpossessed and unexplored territory, unwillingness to derive abandonment thereof from a mere cessation of any visible connection between the claimant sovereign and such territory for some two centuries, and a readiness to accept as tests of the limits of territorial pretensions over a vast area remaining unoccupied even in the twentieth century, something other and less than actual administrative control throughout the same. The conclusion was reached that on July 10, 1931, Denmark "possessed a valid title to the sovereignty over all Greenland."<sup>2</sup>

<sup>12</sup> See Award of His Majesty the King of Italy with regard to the Boundary between the Colony of British Guiana and the United States of Brazil, June 6, 1904, Brit. and For. St. Pap., XCIX, 930.

See General Act of the Berlin Conference of 1885, *infra*, § 102.

<sup>13</sup> See, The Case Concerning the Legal Status of Eastern Greenland, *infra*, § 101A.

§ 101A.<sup>1</sup> This Section reproduces in substance a contribution by the author to the American Journal of International Law, XXVII, 732, entitled "The Case Concerning the Legal Status of Eastern Greenland."

<sup>2</sup> Publications, Permanent Court of International Justice, Series A/B, No. 53, p. 64.

In 1931, the Danish Government by an Application instituted proceedings against the Norwegian Government in The Permanent Court of International Justice on the ground that the latter had on July 10, 1931, published a proclamation declaring that it had proceeded to occupy certain territories in Eastern Greenland, which, in the contention of the Danish Government, were subject to the sovereignty of the Crown of Denmark. The Applicant asked the Court for judgment to the effect that "the promulgation of the above-mentioned declaration of occupation and any steps taken in this connection by the Norwegian Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid." It may be greatly doubted whether, in view of the relevant facts, the judgment that was rendered, in harmony with the request of the Applicant, necessitated a decision as to the sovereignty of Denmark over Eastern Greenland. (*Cf.* Dissenting opinion of Judge Anzilotti, *id.*, 76-95.) The real issue between the parties was whether Norway was in a position with respect to Denmark, whereby it could lawfully make the declaration of occupation of which the latter made complaint. Norway, however, asked for a judgment to the effect that "Denmark has no sovereignty over Eirik Raudes Land" (a portion of East Greenland), and the Court proceeded to pass upon the existence and extent of the

"It was about the year 900 A.D. that Greenland was discovered. The country was colonized about a century later. The best known of the colonists was Eric the Red, who was an inhabitant of Iceland of Norwegian origin; it was at that time that two settlements called Eysribygd and Vestribygd were founded towards the southern end of the western coast. These settlements appear to have existed as an independent State for some time, but became tributary to the Kingdom of Norway in the XIIIth century. These settlements had disappeared before 1500."<sup>3</sup> In 1380 the kingdoms of Norway and Denmark were united under the same Crown. The Union lasted until 1814. There was nothing to show, in the opinion of the Court, that during this period Greenland, in so far as it constituted a dependency of the Crown, should not be regarded as a Norwegian possession. The important point here to be observed is that in the mind of the Court, "the disappearance of the Nordic Colonies did not put an end to the King's pretensions to the sovereignty over Greenland."<sup>4</sup>

The Court declared that though the Eskimos might have produced the complete destruction of the so-called Nordic settlements in Greenland, the fact was not to be likened to conquest in a war between two States; that there was nothing to show any definite renunciation or voluntary abandonment on the part of the Kings of Norway or Denmark; that "during the first two centuries or so after the settlements perished, there seems to have been no intercourse with Greenland, and knowledge of it diminished; but the tradition of the King's rights lived on, and in the early part of the XVIIth century a revival of interest in Greenland on the part both of the king and of his people took place."<sup>5</sup> From

Danish sovereignty over Greenland on the date mentioned, and also upon the attitude or undertakings of Norway in relation to the Danish position.

See also documents in Hackworth, Dig., I, § 70.

<sup>3</sup> Judgment of the Court, *id.*, p. 27. Declared the Norwegian judge *ad hoc*, M. Vogt, in his dissenting opinion: "In 1261, the Greenlanders submitted themselves of their own free will to the King of Norway, who promised to maintain regular navigation to the colonies in Greenland.

"This regular navigation, which was essential to the Greenlanders, ceased in 1410 and thus isolated, the settlers succumbed in the course of the XVth century to the rigours of the climate and the attacks of the native Eskimos from the North who destroyed the colonies.

"In the following centuries, some expeditions set out for Greenland, but no regular communications were established and no colonization undertaken.

"Only at the beginning of the XVIIIth century were regular communications with Greenland re-established, after the Norwegian Pastor Hans Egede had succeeded in forming the Greenland Company of Bergen." (*Id.*, 97.)

<sup>4</sup> *Id.*, 27.

<sup>5</sup> *Id.*, 47. In this connection it was declared: "In the period when the Nordic colonies founded by Eric the Red in the Xth century in Greenland were in existence, the modern notions as to territorial sovereignty had not come into being. It is unlikely that either the chiefs or the settlers in these colonies drew any sharp distinction between territory which was and territory which was not subject to them. On the other hand, the undertaking (1261) recorded by Sturla Thordarson that fines should be paid to the King of Norway by the men of Greenland in respect of murders whether the dead man was a Norwegian or a Greenlander and whether killed in the settlement or even as far to the North as under the Pole Star, shows that the King of Norway's jurisdiction was not restricted to the confines of the two settlements of Eysribygd and Vestribygd. So far as it is possible to apply modern terminology to the rights and pretensions of the Kings of Norway in Greenland in the XIIIth and XIVth centuries, the Court holds that at that date these rights amounted to sovereignty and that they were not limited to the two settlements." (*Id.*, 46.)

Cf. Judge Anzilotti's dissenting opinion, *id.*, 82-86.

the foregoing events the Court concluded that the foundation of a right of sovereignty accruing to the Kings of Norway in the XIIIth and XIVth centuries was not destroyed, that it was not limited to the two settlements, and that it remained a sufficient basis on which to erect an extensive superstructure in the XVIIth and later centuries.

While in the XVIIth century no colonies or settlements existed in Greenland, contact with it was not entirely lost, because the waters surrounding it, especially on the East coast, were regularly visited by whalers, and the maps of the period show that the existence and the general configuration of Greenland, including the East coast, were by no means unknown.<sup>6</sup> "At the beginning of the XVIIIth century, closer relations were once more established between Greenland and the countries whence the former European settlements on its coasts had originated. In 1721, the pastor Hans Egede, of Bergen in Norway, founded a 'Greenland Company,' went to Greenland as a missionary and founded a new colony there which was soon followed by other settlements."<sup>7</sup> A fresh concession was granted in 1734, and renewed in 1740, to a certain Jacob Severin; it expired in 1750. In 1751, a concession was granted to the "General Trading Company" of Copenhagen. Penal ordinances of 1740, 1751, 1758, and 1776, together with Regulations of 1781, pointed to the assertion of the right to control and monopolize trade. "During this period, settlements were established described as colonies, factories or stations, along the West coast between latitude 60° 42' and 72° 47' N.; according to the Ordinance of March 18th, 1776, the 'colonies and factories' then existing extended from 60° to 73° N."<sup>8</sup> The terms of the ordinances impelled the Court to conclude that in the XVIIIth century period and up to 1814, the legislative and administrative acts had reference to more than the actually colonized area on the West coast; and that in view of "the absence of any claim to sovereignty by any other Power, and the arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty, and that his rights over Greenland were not limited to the colonized area."<sup>9</sup>

In 1814, the Treaty of Kiel, providing for the cession of the Kingdom of Norway to Sweden, excepted from its operation Greenland, the Færoe Isles and Iceland.<sup>10</sup> During the century that followed, the coasts of Greenland were entirely explored.<sup>11</sup> "In 1822 the Scottish whaler Scoresby made the first landing by a European in the territory covered by the Norwegian declaration of occupa-

<sup>6</sup> Judgment of the Court, *id.*, 28.

With reference to this period the Court declared: "That the King's claims amounted merely to pretensions is clear, for he had no permanent contact with the country, he was exercising no authority there. The claims, however, were not disputed. No other Power was putting forward any claim to territorial sovereignty in Greenland, and in the absence of any competing claim the King's pretensions to be sovereign of Greenland subsisted." (*Id.*, 48.)

<sup>7</sup> *Id.*, 28.

<sup>8</sup> *Id.*, 29-30.

<sup>9</sup> *Id.*, 50-51.

<sup>10</sup> Article IV, *id.*, 30.

<sup>11</sup> *Id.*, 31.

tion" in the present case.<sup>12</sup> Subsequently the whole East coast was explored by Danish expeditions. In 1863, a Danish concession to one Tayler, an Englishman, yielded to him extensive privileges on the East coast, embracing the establishment of trading stations, to be placed "under the sovereignty of the Danish Crown"; but the concessionaire was unable to establish any stations.<sup>13</sup> In 1894, at Angmagssalik, (in latitude 65° 30' N.) the first Danish settlement on the East coast was established. In the years following, a series of Danish decrees announced and extended the limits of the colonized areas.<sup>14</sup> In the XXth century, the Danish Government went further. A decree of 1921 declared that in consequence of the establishment of Danish Trading, Mission and Hunting Stations on the East and West coasts of Greenland, "the whole of that country is henceforth linked up with Danish colonies and stations under the authority of the Danish Administration of Greenland."<sup>15</sup> The Court adverted to the fact that "throughout this period and up to the present time the practice of the Danish Government in concluding bi-lateral commercial conventions or when participating in multi-lateral conventions relating to economic questions — such as those concluded since 1921 under the auspices of the League of Nations — has been to secure the insertion of a stipulation excepting Greenland from the operation of the convention."<sup>16</sup> From legislative enactments, decrees, conventions and diplomatic correspondence, the Court concluded that Denmark satisfied the two requisites for the creation of a right of sovereignty to be derived from continued display of authority (as distinct from a right derived by way of transfer, as by cession) — namely, "the intention and will to act as sovereign, and some actual exercise or display of such authority,"<sup>17</sup> and that Denmark "must be regarded as having displayed during this period from 1814 to 1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty."<sup>18</sup>

In 1925, legislation was enacted regulating the hunting and fishing, and in the same year Greenland was divided into provinces by a law which declared that all commercial activity was reserved to the State.<sup>19</sup> Declared the Court:

<sup>12</sup> *Id.*, 31, where the Court took occasion to say: "About 1900, thanks to the voyages of the American Peary, the insular character of Greenland was established."

<sup>13</sup> *Id.*, 32.

<sup>14</sup> *Id.*, 32–33.

<sup>15</sup> *Id.*, 33. This decree was notified to the Powers, and was followed on June 16th, 1921, by a Proclamation (Notice to Mariners) concerning navigation in the seas around Greenland, to the effect that the closing of the Island to Danish and foreign ships extended to "the whole of the coasts and islands pertaining to Greenland." (*Id.*, 34.)

<sup>16</sup> *Id.*, 34. An exception was noted, however, in the case of a convention with Japan of Feb. 12, 1912, *id.*, 34.

<sup>17</sup> *Id.*, 46. The Court said in this connection: "It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries." (*Id.*, 46.)

<sup>18</sup> *Id.*, 54.

<sup>19</sup> *Id.*, 62. Declared the Court: "This legislation with regard to hunting and fishing, and the law dividing the country into provinces, are noteworthy, as are also the admission of French and British nationals to most-favoured-nation treatment in Eastern Greenland, under notes exchanged between Denmark and the British and French Governments in 1925." (*Id.*, 62.) See also *id.*, 39–41.

These acts, coupled with the activities of the Danish hunting expeditions which were supported by the Danish Government, the increase in number of scientific expeditions engaged in mapping and exploring the country with the authorization and encouragement of the Government, even though the expeditions may have been organized by non-official institutions, the occasions on which the *Godthaab*, a vessel belonging to the State and placed at one time under the command of a naval officer, was sent to the East coast on inspection duty, the issue of permits by the Danish authorities under regulations issued in 1930, to persons visiting the eastern coast of Greenland, show to a sufficient extent—even when separated from the history of the preceding periods—the two elements necessary to establish a valid title to sovereignty, namely: the intention and will to exercise such sovereignty and the manifestation of State activity. . . . Even if the period from 1921 to July 10th, 1931, is taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty. When considered in conjunction with the facts of the preceding periods, the case in favour of Denmark is confirmed and strengthened.<sup>20</sup>

In a word, the requisite display of authority was seen in a “manifestation of State activity” that did not in fact embrace the exercise of administrative control, but expressed itself in large part through bare assertions of State interest in an unoccupied area. This is a significant feature of the judgment. It shows not only how very small a part, if any, actual control or possession played in the creation of what was deemed to be an ancient and basic right of sovereignty, but also how small an amount of control, measured geographically or otherwise, sufficed, under the circumstances, to yield to the modern inheritor and existing possessor of that right of sovereignty, a vast and unoccupied and unclaimed island.

It should be observed that applications addressed by the Danish Government to foreign governments between 1915 and 1921, seeking recognition of Denmark's position in Greenland, embraced, in certain instances, reference to an “extension of sovereignty” over uncolonized parts of the country.<sup>21</sup> The Court concluded that what Denmark was seeking thereby “was recognition of existing sovereignty and not consent to acquisition of new sovereignty,”—assurances of acceptance of the Danish point of view “that all Greenland was already subject to Danish sovereignty,” and of contentment to see an extension of Denmark's activities to the uncolonized parts of Greenland.<sup>22</sup> Accordingly, it

<sup>20</sup> *Id.*, 62–63; 63–64.

<sup>21</sup> *Id.*, 54. “The first country to be approached was the United States, and the moment chosen was that of the negotiation of the treaty for the cession of the Danish Antilles.” (*Id.*, 56.) In proceeding to the signature of the treaty Secretary Lansing declared that “the Government of the United States of America will not object to the Danish Government extending their political and economic interests to the whole of Greenland.” (U. S. Treaty Vol. III, 2564; Publications, Permanent Court of International Justice, Series A/B, No. 53, 56.)

<sup>22</sup> Publications, Permanent Court of International Justice, Series A/B, No. 53, 55, 61–62. For discussions of the Danish diplomatic correspondence with the United States, Norway, France, Italy, Japan, Great Britain and Sweden, see *id.*, 56–62. See also U. S. For. Rel. 1922, II, 1–4.

concluded that there could be no ground for holding that, "by the attitude which the Danish Government adopted, it admitted that it possessed no sovereignty over the uncolonized part of Greenland, nor for holding that it is estopped from claiming, as it claims in the present case, that Denmark possesses an old established sovereignty over all Greenland."<sup>23</sup> Moreover, in consequence of a declaration by M. Ihlen, Norwegian Minister of Foreign Affairs, of July 22, 1919, in response to a Danish request of July 12, 1919, Norway was deemed by the Court to have placed itself "under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland."<sup>24</sup>

Other indications of what the Court regarded as decisive of Norwegian acceptances of the Danish position,<sup>25</sup> together with the circumstance that the Danish pretensions were made with respect to an area claimed by no other State,<sup>26</sup> and comprising in part an Arctic and inaccessible region,<sup>27</sup> were attending factors that doubtless also restrict the value of the case as a precedent. Nevertheless, the readiness of the Court to find in the conduct in behalf of the

<sup>23</sup> Publications, Permanent Court of International Justice, Series A/B, No. 53, 62.

Judge Anzilotti derived a different conclusion from the Danish negotiations. He said: "If one reads the documents as they stand, giving the words the sense which they naturally bear in the context, one is inevitably led to the conclusion that the Danish Government was making a distinction between the colonized districts of Greenland and the other parts of the country, and that what it was requesting from the States whom it approached was, not the recognition of an already existing sovereignty, but the recognition of the right to extend its sovereignty to the whole of Greenland." (*Id.*, 82. Also *id.*, 77-81.)

*Cf.* dissenting opinion of Judge Vogt, *id.*, 98-102; and also his reference, *id.*, 106-107, to letter of the Danish Ministry of the Interior, of Nov. 3, 1916, to the Parliamentary Commission for the Danish West Indies.

<sup>24</sup> *Id.*, 73; also 69-73.

In his dissenting opinion, *id.*, 86-95, Judge Anzilotti took the position that by the Ihlen declaration, which he regarded as producing a valid agreement, Norway had undertaken not to oppose the extension of Danish sovereignty over the whole of Greenland, and accordingly was, "before everything else," bound not to occupy any part of the region, thereby making it impossible for Danish sovereignty to be extended to it; that the Norwegian occupation, constituting a violation of the existing legal situation was, therefore, unlawful, and justifying, within those limits, an acceding by the Court to the Danish Government's submission. Inasmuch, however, as he regarded the place occupied by Norway to be *res nullius*, rather than under the sovereignty of Denmark, he was unable to regard the Norwegian conduct, although at variance with an undertaking towards Denmark, as without value. In a word, he regarded Norway as acquiring, in defiance of its obligation to Denmark, an original right of sovereignty over an area that was at the time *res nullius*. While this did not mean that as against Denmark Norway could profit by its conduct, it was not inconsistent with the Norwegian submission, by way of counterclaim, "that Denmark does not possess sovereignty over Erik Raudes Land," and "that Norway has acquired sovereignty over Erik Raudes Land." (*Id.*, 94-95.)

*Cf.* dissenting opinion of Judge Vogt, in relation to the Ihlen declaration, *id.*, 112-122.

<sup>25</sup> Declared the Court: "A second series of undertakings by Norway, recognizing the Danish sovereignty over Greenland, is afforded by various bilateral agreements concluded by Norway with Denmark, and by various multilateral agreements to which both Denmark and Norway were contracting parties, in which Greenland has been described as a Danish colony or as forming part of Denmark or in which Denmark has been allowed to exclude Greenland from the operation of the agreement." (*Id.*, 68.) In this connection attention was called to the Commercial Treaty between Denmark and the United Kingdoms of Sweden and Norway, of Nov. 2, 1826, and to provisions in the Universal Postal Conventions of 1920, 1924, and 1929. *Id.*, 68.

<sup>26</sup> To quote the language of the Court: "One of the peculiar features of the present case is that up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland. Indeed, up till 1921, no Power disputed the Danish claim to sovereignty." (*Id.*, 46.)

<sup>27</sup> *Id.*, 50.

monarchs of Norway and Denmark the creation and maintenance of rights of sovereignty over an unoccupied area, and the early development of the territorial limits of those rights by assertions of authority that were and remained unsupported by the exercise of actual administrative control or occupation,<sup>28</sup> is of much significance.<sup>29</sup>

(c)

§ 102. **General Act of the Berlin Conference of 1885.** According to Articles XXXIV and XXXV of the General Act of the Berlin Conference of 1885, providing for the acquisition of rights of sovereignty on the African coast, there was required of any power which should take possession of a tract of land, or assume a protectorate therein, a notification addressed to the other signatory powers to enable them, if need be, to make good any claims of their own. Furthermore, the obligation was recognized by the signatory powers to assure the establishment of authority in the regions occupied "sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon."<sup>1</sup> It was also understood that the notification to be given required a certain determination of the limits of the tracts of land occupied, and that the powers interested could always demand such information as they might deem necessary for the protection of their rights.<sup>2</sup>

According to Article 10 of the Convention concerning the Revision of the General Act of Berlin of February 26, 1885, signed at St. Germain-en-Laye on September 10, 1919,<sup>3</sup> which has been said to replace the earlier Act "as between the signatory powers which have ratified it"<sup>4</sup>: "The Signatory Powers acknowledge their obligation to maintain in the regions under their control actual authority and police forces sufficient to insure protection for persons and property and, if the case should arise, freedom for commerce and transit." This article which does not purport to be limited in its operation to particular areas in Africa,<sup>5</sup> reveals impressively what is expected of the contracting parties as a means of maintaining rights of sovereignty acquired as by occupation at the present time.<sup>6</sup>

<sup>28</sup> Cf. Observations by Judges Schücking and Wang, *id.*, 96.

<sup>29</sup> See Discovery and Kindred Acts, *supra*, § 99.

§ 102.<sup>1</sup> For the proceedings of the Berlin Conference and the text of the General Act, see French Yellow Book, *Affaires du Congo et de L'Afrique Occidentale*, 1885; Brit. and For. St. Pap., LXXVI, 4.

See Mr. Bayard, Secy. of State, to Mr. von Alvensleben, German Minister, April 6, 1885. For. Rel. 1885, 442; also Moore, Dig., I, 268. Cf. Westlake, 2 ed., I, 106-111.

<sup>2</sup> See Declaration of the Commission annexed to Protocol No. 8 of Berlin Conference, French Yellow Book, *Affaires du Congo et de L'Afrique Occidentale*, 1885, 220.

<sup>3</sup> U. S. Treaty Vol. IV, 4849, 4853.

<sup>4</sup> Statement in Hackworth, Dig., I, 403.

<sup>5</sup> Attention is called to this fact in a footnote, *id.*, I, § 59.

<sup>6</sup> Declares M. F. Lindley: "In view of the adoption by Great Britain, Germany, France and the United States, both before and after the Berlin Conference, of the principle of effective occupation, and of the fact that, during recent years, no colonial Power appears to have taken exception to the applicability of the rule to new occupations, it seems to be justifiable to say that all recent acquisitions of territory, whether on the coasts of Africa or not, are subject to it." (The Acquisition and Government of Backward Territory in International Law, London, 1926, 157.)

## (d)

§ 103. **Declaration of the Institute of International Law, of 1888.** In 1888, the Institute of International Law made a Declaration regarding the occupation of territories. It was there announced that occupation by sovereign right could not be recognized as effective unless it complied with the following conditions: first, the taking possession in the government's name of territory enclosed within certain limits; and secondly, official notification of taking possession. It was declared that the taking of possession was accomplished by the establishment of a responsible local power, provided with sufficient means to maintain order and assure the regular exercise of its authority within the limits of the territory occupied, and that those means should be taken over from the institutions existing therein. It was prescribed that such notification, which was to be given either by publication in the form customarily employed in each State for the notification of official acts, or through the diplomatic channel, should contain an approximate statement of the limits of the occupied territory.<sup>1</sup>

This declaration was regarded by Westlake as a summing up of "the present state of opinion" at the time when he wrote.<sup>2</sup>

At the time when the Institute of International Law made its Declaration, "occupation of territory by sovereign right" under the conditions set forth in that instrument was perhaps fairly to be regarded as exemplifying the principal mode by which a right of sovereignty could be brought into being. This was true because it was not then supposed that the minimum requirements with respect to the exercise of authority could be met by any other process. As has been noted above, however, the needed measure of control may now be applied by methods which do not necessarily call for actual settlement or such kindred acts as occupation may be supposed to involve.<sup>3</sup> Hence, the Declaration is at the present time important chiefly to the extent that it accentuates the fact that a claimant State must by some appropriate means make the exercise of its authority duly operative for governmental purposes throughout the area concerned.

## (e)

§ 104. **Contiguous and Other Islands.** On principle, unoccupied islands in the open sea and beyond the territorial waters of a State are not, by reason of their relative proximity to its shores, to be deemed a part of its domain.<sup>1</sup> Such was the contention of the United States in 1852, with respect to the Lobos Islands off the coast of Peru.<sup>2</sup>

§ 103. <sup>1</sup> *Annuaire*, X, 201; J. B. Scott, Resolutions, 86. It was also declared that these rules were applicable in the case where a power, without assuming entire sovereignty over a territory, and while maintaining, with or without restrictions, the local administrative autonomy, placed the territory under its protection. Art. II.

<sup>2</sup> Westlake, 2 ed., I, 112. This edition was published in 1910.

<sup>3</sup> See Settlement and Occupation, Control, *supra*, § 100; Extent of Possession, *supra*, § 101. See also Acquisition of Sovereignty over Polar Areas, Some Conclusions, *infra*, § 104D.

§ 104. <sup>1</sup> See, in this connection, Westlake, 2 ed., I, 118-120.

<sup>2</sup> Declared Mr. Webster, Secy. of State, in a communication to Mr. Osma, Peruvian Minister, Aug. 21, 1852: "The Lobos Islands lying in the open ocean, so far from any continental possessions of Peru as not to belong to that country by the law of proximity



At the present time a State would be neglectful of its interests should it fail to take steps necessary and appropriate to create a right of sovereignty with respect to an island that was *res nullius* and in such proximity to its coast as would cause it to be a menace to the safety of the State were such a right there brought into being by any other. The control necessary for the creation of such a right might not call for settlement or occupation.<sup>3</sup>

It is not apparent why there should be, in general, any relaxation of the requirements of international law respecting the bringing into being of a right of sovereignty, when the area concerned is an island in the open sea over which no State may have in fact previously striven to assert dominion.<sup>4</sup> Although such an endeavor may have been appropriately made, and have sufficed in point of law to be creative of a right of sovereignty, the creator may still not regard it as worth while to persist in utilizing or maintaining the benefits of its achievement. The agreement effected by an exchange of notes between the United States and Great Britain, on April 6, 1939, relative to a joint control over Canton and Enderbury Islands, without prejudice to the respective claims of the contracting parties,<sup>5</sup> was illustrative of the willingness of the United States for reasons of policy not to press for recognition of the validity of a territorial assertion that may have been inherently sound.<sup>6</sup>

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or adjacent position, has the government of that country exercised such unequivocal acts of absolute sovereignty and ownership over them as to give to her a right to their exclusive possession, *as against the United States and their citizens*, by the law of undisputed possession?" Sen. Ex. Doc., No. 109, 32 Cong., 1 Sess., 12, Moore, Dig., I, 575, note.

It may be observed that the distance from the Peruvian coast of the nearest Lobos Island (Lobos de Tierra) is nine nautical miles, and of the furthest therefrom (Lobos de Afuera) thirty-three nautical miles. See Quincy Wright, "Territorial Propinquity," *Am. J.*, XII, 519, 520-521.

See, also, Brief of Mr. J. H. Ashton, counsel for the United States, in case of *Gowen and Copeland v. Venezuela*, No. 16, United States and Venezuelan Claims Commission, under convention of Dec. 5, 1885, Moore, Dig., I, 265-267; also position of the United States in the case of *Aves Island*, Senate Ex. Doc. No. 10, 36 Cong., 2 Sess., 225; also other documents cited in Moore, Dig., I, 571. Compare protocol concluded by Great Britain, Germany and Spain March 7, 1885, relative to the sovereignty of Spain over the Sulu Archipelago, Brit. and For. St. Pap., LXXVI, 58.

<sup>3</sup> "As a matter of fact, most of the Spanish explorers, including also Pedro de Guzmán, Ulloa, Cabrillo, and Mendaña, took possession separately of many small islands to which they came, and with frequency on the coast of the mainland along which they sailed. Thus, Pedro de Guzmán, in 1532, sailing along the western coast of Mexico, took possession of the island of Ramos on March 20, of the island of Nuestra Señora on March 25, and of the island of Madalena on March 27; Ulloa, in 1539, sailing along the same coast and northward along California, took possession on September 18 in latitude 29½° North, on September 28 in latitude 33½° North, on October 6 in latitude 30½° North, on October 15 in latitude 27½° North, on December 1 in latitude 25° North, and on January 20, 1540, on the island of Cedros in latitude 29½° North. The latitudes, as given in the original acts of possession, may contain errors of several degrees, but the frequency of the takings of possession remains clear." (Keller, Lissitzyn and Mann, *Creation of Rights of Sovereignty through Symbolic Acts*, 1400-1800, 43-44.)

<sup>4</sup> See Mr. Phillips, Acting Secy. of State, to the American Ambassador at London, Sept. 12, 1922, in reference to a reservation by the United States of its rights to Wrangell Island, *For. Rel.* 1923, I, 279.

<sup>5</sup> Dept. of State Press Release, April 8, 1939, 287, U. S. Executive Agreement Series, No. 145.

<sup>6</sup> See Jesse S. Reeves, "Agreement over Canton and Enderbury Islands," *Am. J.*, XXXIII, 521. Declares that writer: "The original foundation of the claims of the United States to Canton and Enderbury Islands rests upon the assertion of jurisdiction over them under the

Judge Huber, as sole arbitrator in the Island of Palmas Arbitration between the United States and The Netherlands, was, in 1928, not prepared to admit that the claim of the former to that Island as constituting a part of the group of the Philippine Islands, was to be sustained by virtue of a principle of contiguity. In this connection he said in part:

Although States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a State from the mere fact that its territory forms the *terra firma* (nearest continent or island of considerable size). Not only would it seem that there are no precedents sufficiently frequent and sufficiently precise in their bearing to establish such a rule of international law, but the alleged principle itself is by its very nature so uncertain and contested that even governments of the same State have on different occasions maintained contradictory opinions as to its soundness. The principle of contiguity, in regard to islands, may not be out of place when it is a question of allotting them to one State rather than another, either by agreement between the parties or by a decision not necessarily based on law; but as a rule establishing *ipso jure* the presumption of sovereignty in favour of a particular State, this principle would be in conflict with what has been said as to territorial sovereignty and as to the necessary relation between the right to exclude other States from a region and the duty to display therein the activities of a State. Nor is this principle of contiguity admissible as a legal method of deciding questions of territorial sovereignty; for it is wholly lacking in precision and would in its application lead to arbitrary results. This would be especially true in a case such as that of the island in question, which is not relatively close to one single continent, but forms part of a large archipelago in which strict delimitations between the different parts are not naturally obvious.<sup>7</sup>

Here is revealed the importance of establishing by appropriate evidence governmental activity assertive of dominion through the exercise of a measure of control over an island of which the sovereignty is in dispute,<sup>8</sup> and the inadequacy of relying upon the sheer power to control what is seemingly without a master,

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Act of 1856. Enderbury Island was proclaimed as under the laws of the United States in 1859. Canton, otherwise known as Mary Island (the name by which it is listed among the Phoenix Island group as claimed by Great Britain), was likewise possessed in 1860." (*Id.*, 525.) He remarks also: "This important arrangement is the outcome of the action taken by the United States through the executive order of the President of March 3, 1938, by which Canton and Enderbury Islands were placed under the administrative control of the Secretary of the Interior." (*Id.*, 522.)

Concerning the acquisition by the United States of sovereignty over Swains Island and also over Palmyra Island, see Hackworth, Dig., I, §§ 73 and 74, respectively.

Concerning the acceptance by the United States in 1925 of the treaty concluded with Cuba for the adjustment of title to the ownership of the Isle of Pines, March 2, 1904, see U. S. Treaty Vol. IV, 4036-4039; also Hackworth, Dig., I, 493.

<sup>7</sup> *Am. J.*, XXII, 887, 893. Cf. Memorandum of United States in the Case, 1925, 111-130.

<sup>8</sup> See, Gustav Smedal, Acquisition of Sovereignty over Polar Areas, Oslo, 1931, 39.

especially when the area concerned embraces a solitary island of which the geographical relationship to the territory of the claimant State is such as that which the Island of Palmas bears to the group of the Philippine Islands.

A State may in fact endeavor to protect the activities of its nationals within a distant island that is *res nullius* without simultaneously striving to create a right of sovereignty therein.<sup>9</sup> Nevertheless, its conduct in so doing may suffice in point of law to enable it to go farther, and if it so desires, by bare announcement reasonably to proclaim and assert that the particular island has become its own.<sup>10</sup> Thus the United States, in consequence of legislation pertaining to guano or other islands, and of conduct in pursuance thereof, may find itself in a position to claim that acts committed in its behalf and on which it places reliance and of which it invokes the benefit, have satisfied the requirements of international law concerning the creation of a right of sovereignty, and so place the Republic in a solid position to maintain that it has itself become the creator and acquirer of such a right.<sup>11</sup> Its stand with respect to Navassa Island has been illustrative.<sup>12</sup> In 1925, Attorney General Sargent in an opinion concerning the dominion of the United States over the Swan Islands declared that the Guano Islands Act of August 18, 1856 (Rev. Stat. §§ 5570-5578) "provides the method by which jurisdiction may be acquired and the sovereignty of the United States extended over unoccupied and unclaimed islands containing guano deposits."<sup>13</sup>

It has recently been concluded by two careful investigators that the practice of Great Britain and the United States has revealed certain rules of law applicable to the creation of sovereign rights over small uninhabited islands in the Pacific; that discovery alone has not sufficed for such purpose, or even the issuance of a lease unaccompanied by other factors; and that "the two nations have both acquired islands by the performance of symbolic acts, either an act of possession or a declaration of protectorate."<sup>14</sup>

<sup>9</sup> See Mr. Bacon, Asst. Secy. of State, to Messrs. Dudley and Michener, Jan. 3, 1907, Hackworth, Dig., I, 502; Mr. Phillips, Acting Secy. of State, to Representative Harold Knutson, July 18, 1935, Hackworth, Dig., I, 502.

<sup>10</sup> See opinion of the Solicitor for the Dept. of State, Sept. 25, 1907, Hackworth, Dig., I, 503; Mr. Adee, Acting Secy. of State, to Richard R. Rogers, General Counsel of the Isthmian Canal Commission, July 20, 1908, Hackworth, Dig., I, 512.

<sup>11</sup> See the Legal Adviser of the Dept. of State to Messrs. Eccleston and Knife, Sept. 2, 1936, Hackworth, Dig., I, 503. See also *Jones v. United States*, 137 U. S. 202.

<sup>12</sup> "Since the date of the proclamation by President Wilson the Department of State has uniformly declared that Navassa Island forms a part of the territory of the United States." (Hackworth, Dig., I, 514, and documents there cited and quoted)

<sup>13</sup> 34 Op. Att. Gen. 507, 512.

Concerning the Act of Aug. 18, 1856, see also documents in Moore, Dig., I, 556-580; also documents in Hackworth, Dig., I, § 77.

<sup>14</sup> See Beatrice Orent and Pauline Reinsch, "Sovereignty over Islands in the Pacific," *Am. J.*, XXXV, 443, 461, where it is added: "The symbolic ceremonies were generally supplemented by some exercise of administrative authority, such as the granting of a lease, or by lodgement of private citizens. As a rule, a considerable period of time elapsed between the performance of the formal act and any other manifestation of sovereignty. The special provisions of the Guano Islands Act afforded an opportunity to the United States for asserting sovereignty over many islets. The United States claimed title to these islands by the Presidential confirmation of certain acts of private citizens, including the taking of possession and lodgement."

## (4)

ACQUISITION OF SOVEREIGNTY OVER POLAR AREAS<sup>1</sup>

## (a)

§ 104A. In General. The acquisition of rights of sovereignty over polar areas is complicated by four considerations: first, the circumstance that the objective, especially in the Arctic regions, may be an area of which the surface above the level of the sea is ice rather than land; secondly, the preferment of initial claims is made at a time when the requirements of international law in relation to the acquisition of original rights of sovereignty are fairly well understood, and yet which in the course of their evolution there has been slight occasion to apply or adapt to polar areas; <sup>2</sup> thirdly, the existing inability of a claimant State, by reason of climatic conditions, to attain such a kind and degree of control over a polar region as is acknowledged to be essential for the perfecting of a right of sovereignty over an area in non-polar regions; and, fourthly, the fact that certain polar areas are a natural or geographical prolongation of others outside thereof which are acknowledged to belong to particular States. Transportation by air has made possible a vision by a Peary or a Byrd of vast areas not only uninhabited by civilized man, but which nature also has seemingly done her utmost to forbid him to inhabit or effectively control. Nevertheless, her decree is being challenged, and human resourcefulness is increasingly successful in the battle with her.<sup>3</sup> Yet the very conquerors of nature have their own conflicts among themselves. Out of these understandings may be reached and a pertinent law evolved.

Whether the polar areas as such may be subjected to rights of sovereignty appears no longer to be a moot question. States are in fact asserting that they may be; and that is decisive.<sup>4</sup> Moreover, such rights are preferred in relation to areas of which the surface is a field of ice which in some situations ap-

<sup>1</sup> These sections are based upon, but constitute a revision and enlargement of, an article by the author on "Acquisition of Sovereignty over Polar Areas," *Iowa Law Rev.*, XIX, No. 2, January 1934, 286-294. In the preparation of them, the author has been greatly aided by suggestions from Mr. Hugh S. Cumming, Jr., and Mr. Sidney D. Spear, officers of the Department of State, whose good offices were invoked by Mr. D. V. Sandifer, also of the Department of State.

§ 104A. <sup>2</sup> This was not the case with respect to Greenland which was discovered about 900 A.D., and subjected to a small degree of colonization about a century later. See Judgment in the Case concerning The Legal Status of Eastern Greenland, April 5, 1933, Publications, Permanent Court of International Justice, Series A/B, No. 53, 27.

<sup>3</sup> It was announced on May 22, 1937, that Professor Otto J. Schmidt, with a group of associates, acting in behalf of the Soviet Union, having reached the North Pole, and having asserted dominion in behalf of Soviet Russia over the area appurtenant to it, were making a protracted lodgment for the purpose of making meteorological observations and reports. See *New York Times*, May 23, 1937, p. 1.

<sup>4</sup> See in this connection, René Waultrin, "La question de la souveraineté des terres arctiques," *Rev. Gén.*, XV, 401, 412; T. W. Balch, "Les régions arctiques et antarctiques et le droit international," *Rev. Droit Int.*, 2 Sér., XII, 434; Gustav Smedal, Acquisition of Sovereignty over Polar Areas, Oslo, 1931, 29; also a French translation of the same work (by Pierre Rokseth) entitled *De L'Acquisition de Souveraineté sur les Territoires Polaires*, Paris, 1932; W. Lakhtine, "Rights over the Arctic," *Am. J.*, XXIV, 703, 712; James Brown Scott, "Arctic Exploration and International Law," *Am. J.*, III, 928.

See also Naval War College, Int. Law Situations, 1937, 69-117.

pears to be the habitual covering of water rather than of land that projects itself above the level of the sea. It is not apparent why the character of the substance which constitutes the habitual surface above that level or its lack of permanent connection with what is immovable, should necessarily be decisive of the susceptibility to a claim of sovereignty of the area concerned.<sup>5</sup> This should be obvious in situations where the particular area is possessed of a surface sufficiently solid to enable man to pursue his occupations thereon and which also in consequence of its solidity and permanence constitutes in itself a barrier to navigation as it is normally enjoyed in the open sea.

States at times endeavor to acquire rights of sovereignty over polar areas by acts which would be regarded as inadequate were the regions sought to be acquired within the temperate zone. There is an apparent recrudescence of tests that sufficed generally in earlier centuries; and these find their prototype in the long-successful efforts to found rights of sovereignty upon merely formal assertions of dominion, such as a bare taking of possession in the name of a monarch, rather than upon the assumption of control over areas that were claimed.<sup>6</sup> At least two States, in laying claim to unexplored and perhaps undiscovered islands in a portion of the Arctic regions renew in scope, if not in theory, assertions that found expression in the Papal Bulls of the fifteenth century.<sup>7</sup>

The severity of climatic conditions in polar regions has thus far balked the settlement thereof by the peoples who inhabit non-polar areas. Those conditions do not, however, prevent the exercise of a measure of control by such peoples within places which they as yet find it impossible really to occupy. The significant fact at the present time is that an aspirant to sovereignty over a polar region, although impotent to cause it to blossom as the rose or to support human life may, by means of aircraft and a variety of other devices, make its will felt throughout a district which it claims as its own, and by such process establish its supremacy therein.<sup>8</sup> Thus the question presents itself whether the practice of interested States has developed or is developing a minimum requirement that takes cognizance of this factor and which, while denying the sufficiency of a bare symbolic act to create a right of sovereignty, yields to it a value, provided that it be duly followed by the exercise of requisite control by the asserter of dominion within the area to which it makes claim and within which, nevertheless, it fails to make a substantial settlement.<sup>9</sup>

<sup>5</sup> According to an Associated Press despatch of May 22, 1937, as printed in the *New York Times*, of May 23, 1937, p. 2: "State Department officials said today that no question of sovereignty over the area about the North Pole has ever arisen because there is no land there. For hundreds of miles in every direction from the Pole, geographers said, there is nothing but open sea, filled most of the time with large ice floes."

<sup>6</sup> See Case concerning the Legal Status of Eastern Greenland, Publications, Permanent Court of International Justice, Series A/B, No. 53, 27, 50-51.

<sup>7</sup> See Discovery and Kindred Acts, *supra*, § 99.

<sup>8</sup> See *infra*, §§ 104B and 104C.

<sup>9</sup> See W. L. G. Joerg, Brief History of Polar Exploration since the Introduction of Flying, American Geographical Society, Special Publication No. 11, 2 ed., New York, 1930; Dr. Böhmert, "Die Freiheit der Luftfahrt im Luftraum über dem nördlichen Polarmeere," *Archiv für Luftrecht*, VIII (July-December, 1938), 248.

<sup>9</sup> "What constitutes 'effective occupation' is equally well settled. It has been construed as involving something in the nature of a permanent settlement, a colonization; the periodic

## (b)

§ 104B. **The Sector System and Claims Thereunder.** When the territory of a State within the Arctic Circle, such as that of Canada, is contiguous to areas that extend to the North Pole, and which are unpossessed by another State a device has been suggested by which a right of sovereignty over the entire intervening space may be in fact asserted. It is known as the Sector System. It signifies that the State concerned, such as Canada, may claim all of the area between a base line connecting the meridians of longitude marking the limits of its easterly and westerly frontiers and extending as far north as the final intersection of those meridians at the North Pole. This is primarily a method of measuring the geographical extent of a claim, regardless of its legal value.<sup>1</sup> The use of it marks indifference as to the nature of the surface of the area concerned — whether it be land, or ice, or water. It reveals, moreover, indifference whether through symbolic or other acts committed within that area there has been any appropriate assertion of dominion. It purports to reserve from the application of commonly accepted principles of international law special areas deemed to possess a unique or convenient geographical relationship with the claimant State. Through that relationship there is at times sought to be established a special or extended application of the principle of continuity that is not necessarily limited by, or made dependent upon, the power to control the area sought to be embraced within and subjected to the claim to a right of sovereignty.<sup>2</sup>

Russia is an outstanding advocate of the system. According to a decree of the Presidium of the Central Executive Committee of the U.S.S.R. of April 15, 1926:

Are declared forming part of the territory of the Union of Soviet Socialist Republics all lands and islands already discovered, as well as those which are to be discovered in the future, which at the moment of the publication of the present decree are not recognized by the Union of Soviet Socialist Republics as the territory of any foreign state, and which lie in the Northern Frozen Ocean north of the coast of the Union of Soviet Socialist Republics up to the North Pole, within the limits between the

appearance of hunting and fishing parties, even on a large scale and for commercial purposes, has been regarded as insufficient to fulfil the requirements for 'effective occupation.' W. Lakhtine, "Rights Over the Arctic," *Am. J.*, XXIV, 703, 704. Cf. Gustav Smedal, Acquisition of Sovereignty over Polar Areas, Oslo, 1931, 32-35.

See, Settlement and Occupation, Control, In General, *supra*, § 100.

See in this connection treaty concluded by the United States with Great Britain, Denmark, France, Italy, Japan, Norway, The Netherlands and Sweden, Feb. 9, 1920, recognizing the sovereignty of Norway over the Archipelago of Spitsbergen including Bear Island, U. S. Treaty Vol. IV, 4681. See also Hackworth, *Dig.*, I, 467, and documents there cited.

Concerning the acquisition of rights of sovereignty by Norway over the island of Jan Mayen, see Hackworth, *Dig.*, I, § 71, and documents there cited.

§ 104B. <sup>1</sup> It should be observed that if the northerly projection of a line delimiting a sector encounters foreign territory, a deviation is necessary in order to make allowance for the fact. Thus, in the case of Canada, the line on its eastern frontier at the 60th degree of West Longitude would intersect western Greenland, necessitating, therefore, an appropriate detour. Likewise the Svalbard Archipelago, belonging to Norway, projects across the meridian 32° 4' 35" East Longitude, delimiting a proposed Russian sector, and would cause a deviation therefrom.

<sup>2</sup> See Jesse S. Reeves, "Antarctic Sectors," *Am. J.*, XXXIII, 519.

meridian longitude 32°4'35" east from Greenwich, which passes along the eastern side of Vaida Cay through the triangular mark on the Kekurski Cape, and the meridian longitude 168°49'30" west from Greenwich, which passes along the middle of the strait which separates Ratmanoff and Krusenstern Islands from the group of Diomed Islands in the Behring Straits.<sup>3</sup>

Notwithstanding the absence of any precise declaration registering official support, Canada is understood to approve generally of the sector system,<sup>4</sup> of which one of its statesmen was an early protagonist.<sup>5</sup> The Dominion appears, however, to deem it necessary to fortify its position by other processes, and to endeavor in fact to exert a degree of administrative control over adjacent polar areas which it claims as its own.<sup>6</sup>

The United States is not known to have indicated approval of the sector system. Nor would it be obliged or prepared to admit that by accepting in Article I of its treaty with Russia of March 30, 1867, for the purchase of Alaska, a line of demarcation contained in the Convention between Russia and Great Britain of February 28–16, 1825, and referred to as following in part the meridian line of the 141st degree of west longitude, "in its prolongation as far as the Frozen Ocean," there was approval in principle of that system.<sup>7</sup>

(c)

§ 104C. **Sectors in the Antarctic Areas.** The north polar region is a mass of ice that welds together the continents which close in upon it. The south polar region is itself a continent that stands aloof and detached from any other. Coveted areas of the latter, unlike those of the former, are relatively remote, and separated by broad expanses of water from the territories that are acknowledged to belong to claimant States.<sup>1</sup> Thus they offer no room for the invoca-

<sup>3</sup> W. Lakhtine, "Rights over The Arctic," *Am. J.*, XXIV, 703, 709. Concerning the scope of earlier Russian notices of Sept. 20, 1916, and Nov. 4, 1924, see, *id.*, 708.

See footnote in Hackworth, *Dig.*, I, 461, and documents there cited.

<sup>4</sup> "It is true that Canada has not claimed a sector by any official declaration. . . . Nevertheless, there can be no doubt that Canada claims sovereignty over the islands lying in the sector between its northern coast and the meridians of 60° and 141° W. The Canadian sector claim has been made in different ways and on different occasions." (Gustav Smedal, *Acquisition of Sovereignty over Polar Areas*, Oslo, 1931, 65; also *id.*, 66–67.)

Also, Hunter Miller, "Political Rights in the Arctic," *Foreign Affairs*, IV, 47, 49–51, same author, "Political Rights in the Polar Regions," *Problems of Polar Research*, 1928, 235, 237.

<sup>5</sup> See Senator P. Poirier, in Canadian Senate, Feb. 20, 1907, *Debates, Senate*, Dominion of Canada, 1906–1907, 266–273, quoted by Gustav Smedal in *Acquisition of Sovereignty over Polar Areas*, Oslo, 1931, p. 54.

<sup>6</sup> See, J. D. Craig, *Canada's Arctic Islands*, Ottawa, 1923, 19–21, cited and quoted by Gustav Smedal in *Acquisition of Sovereignty over Polar Areas*, 34–35.

In an amendment of June 27, 1925, to the Northwest Territories Act, the requirement was laid down that scientists and explorers must secure permits in order to enter the Canadian Arctic. (Statutes of Canada, 1925, 15–16, Geo. V. Ch. 48.) A Canadian Order in Council in 1926 implemented this legislation; and the requirement concerning permits has since been fulfilled by the scientists and explorers of many countries. (Despatch of the Minister in Canada, Nov. 21, 1929, Hackworth, *Dig.*, I, 463.)

<sup>7</sup> Malloy's Treaties, II, 1521. The words of the original French version of the text of the Anglo-Russian convention of Feb. 28/16, 1825, were: "*dans son prolongement jusqu'à la Mer Glaciale.*" Hertslet's Commercial Treaties, III, 366, 367.

See, in this connection, Hunter Miller, "Political Rights in the Polar Regions," *Problems of Polar Research*, 1928, 235, 244–247, in respect to the legal theory underlying the Canadian Arctic extension of the 141st Meridian boundary.

§ 104C. <sup>1</sup> Their settlements rarely if ever project themselves from the north into the South Arctic Circle.

tion of theories of continuity or contiguity. The application of a so-called sector system to the south polar areas lacks, therefore, the foundation upon which it rests in the north. Nevertheless, as a convenient, if arbitrary, method of procedure, claims to extensive areas are made by a sector system. The base of a desired sector is not, however, a line marking the continuation of continental territory belonging to the claimant State between meridians of longitude; for no available base facing the Antarctic Circle could serve the end desired. In lieu thereof, an arc is produced extending from the South Pole, embracing between its longitudinal lines the full areas within which discoveries or explorations or takings of possession have been made in behalf of the claimant State. Such arc or sector is then assigned to a particular political subdivision of the claimant State, located within the temperate zone, and which faces on its southerly side the explored area. Great Britain has proceeded in this way to lay claim to what is known as the Ross Dependency, embracing the area from the South Pole to the 60th degree of South Latitude, and from the 160th degree of East Longitude to the 150th degree of West Longitude; and this wide expanse has been assigned to New Zealand.<sup>2</sup> Again an extensive area on another front known as the Falkland Island Dependencies, embracing also some minor islands outside of the Antarctic Circle, has been claimed by Great Britain and assigned to the Falkland Islands.<sup>3</sup> An Order in Council of February 7, 1933, declaring that part of the territory in the Antarctic seas which comprised all the islands and territories other than Adélie Land situated south of the 60th degree of South Latitude and lying between the 160th degree of East Longitude and the 45th degree of East Longitude was territory "over which His Majesty has sovereign rights," placed these "dominions" under the authority of the Commonwealth of Australia.<sup>4</sup>

It may be observed parenthetically that France in 1924, made claim to Adélie Land, attaching it to the Government General of Madagascar, some 8000 kilometers distant therefrom.<sup>5</sup> Information concerning the French claim was transmitted to the Department of State in a dispatch from the Embassy at Paris

It is understood that Argentina claims Laurie Land in the South Orkneys and has maintained a permanent meteorological station therein since about 1904. It is not understood that as yet the Department of State has record of any British settlement in the South Orkney and South Shetland Islands.

<sup>2</sup> See Order in Council, July 30, 1923, No. 974, Statutory Rules and Orders, 1923, p. 712.

<sup>3</sup> See Letters Patent of July 21, 1908 and March 28, 1917, in Statutory Rules and Orders, respectively, of 1908, p. 1042, and of 1917, p. 1135.

It should be observed, however, that textually in the foregoing documents, degrees of latitude are taken as a northerly base between longitudinal limits, from which the desired sectors proceed to run southward; but those bases do not correspond with, and are not measured by the extent or width of possessions of the claimant outside of the Antarctic Circle.

<sup>4</sup> See Statutory Rules and Orders, 1933, 2089. The order was to become effective on such date as might be fixed by proclamation by the Governor-General of the Commonwealth of Australia following Australian legislation providing for the "acceptance of the said territory and the government thereof."

In the Summary of Proceedings of the Imperial Conference of 1926, there is set forth a list of areas in the Antarctic to which "a British title already exists by virtue of discovery." (Parliamentary Papers, 1926, Cmd. 2768, pp. 33-34.)

<sup>5</sup> See Hackworth, Dig., I, § 67.

See also decree of March 27, 1924, *Journal Officiel*, March 29, 1924, p. 3004; decree of April 1, 1938, *Journal Officiel*, April 6, 1938, p. 4098, together with a correction published in the *Journal Officiel* of April 14, 1938, p. 4427.



under date of February 24, 1939, enclosing a note from the French Foreign Office. On May 16, 1939, the Embassy was instructed to inform the French Government that the United States can not admit that sovereignty accrues from mere discovery.<sup>6</sup>

In addition to other Norwegian Antarctic claims, there was sought to be placed under Norwegian sovereignty, by a royal decree of January 14, 1939, that part of the coast of the Antarctic Continent which extends from the boundary of the Falkland Island Dependencies on the west to the boundary of "Australian Antarctic Territory" on the east (45 degrees East Longitude), together with the hinterland and adjacent waters. In acknowledging receipt of this information, the Department of State reserved all rights which the United States or its citizens might have in this area.<sup>7</sup>

The several claims to rights of sovereignty over the Antarctic regions, whether placed within a sector designed to embrace their full extent, and whether assigned or unassigned to particular territorial subdivisions of the claimant, are for the most part assertions based upon the mere finding and formal taking possession of portions of the areas concerned. Official decrees and the announcement of geographical limits have not been attributable to settlement, or to the maintenance of control. They deny by implication the necessity of control or the acquisition of power to control, and still less of settlement, as requisites of title. Moreover, as has been observed, they present no geographical likeness to claims preferred under the sector theory within the Arctic regions.

It should be borne in mind, however, that some claimants to polar regions appear to have made extensive surveys within areas sought to be subjected to a right of sovereignty, and by such means to have indicated the possible limits of territory within which dominion was asserted. It remains to be seen whether and to what extent such action strengthens or validates the position of the claimant in whose behalf there was previously or simultaneously a formal taking of possession.<sup>8</sup>

(d)

§ 104D. **The Position of the United States.** The United States has been reluctant to avail itself of the acts of explorers in its behalf in polar regions with a view to acquiring rights of sovereignty therein.<sup>1</sup> It has made no claim to

<sup>6</sup> Hackworth, Dig., I, 460.

<sup>7</sup> See documents in Hackworth, Dig., I, 460-461.

<sup>8</sup> See wireless despatches from Cuxhaven and Berlin, published in *New York Times*, April 12, 1939, p. 25, and April 13, 1939, p. 11, respectively, concerning the acts of a German Antarctic Expedition under Captain Ritscher, and reported to embrace the aerial photographing of an extensive area, and the dropping of German flags along its boundaries. It is understood that the territory explored by Germany extends from five degrees West Longitude to fifteen degrees East Longitude, and in depth from the coast inland to seventy-five degrees South Latitude.

§ 104D. <sup>1</sup> "The United States has never officially made any claim to any known Arctic lands outside of our well recognized territory," David Hunter Miller, "Political Rights in the Arctic," *Foreign Affairs*, IV, 47, 54; also same author in *Polar Research*, 1928, 235, 249.

Fauchille, in his 8th edition (Vol. I, Part 2, p. 661), imputes to Mr. Denby, Secretary of the Navy, when speaking before the House Committee on Naval Affairs, Jan. 19, 1924, the following words: "*Nous ne pouvons en effet permettre que l'immense zone inexplorée d'un*

Wrangel Island by reason of the discovery and formal taking possession of it by an American Naval Officer.<sup>2</sup> Nor has it asserted a right of sovereignty over Wilkes Land in virtue of the achievements of the Wilkes expedition in 1840.<sup>3</sup> Moreover, it has not formally preferred claims of sovereignty in areas contiguous to the North or South Poles as a consequence of the distinguished accomplishments of Peary or Byrd or Ellsworth.<sup>4</sup> Declared Secretary Hughes on April 2, 1924: "I am compelled to state, without now adverting to other considerations, that this Government cannot admit that such taking of possession as a discoverer by Mr. Amundsen of areas explored by him could establish the basis of rights of sovereignty in the Polar regions, to which, it is understood, he is about to depart."<sup>5</sup> Again, on November 14, 1934, Secretary Hull found occasion to declare to the British Ambassador at Washington that "in the light of

*million de milles carrés qui est adjacente aux Etats-Unis (Alaska) tombe entre les mains d'une autre puissance.*" It has remained for an eminent Norwegian jurisconsult (Dr. Gustav Smedal, in his *Acquisition of Sovereignty over Polar Areas*, p. 68) to point to the fact that Mr. Denby's actual words were: "And furthermore, in my opinion it is highly desirable that if there is in that region land, either habitable or not, it should be the property of the United States. . . . And, for myself, I cannot view with equanimity any territory of that kind being in the hands of another Power." (Hearing on House Resolution 149, concerning contemplated flight of the Shenandoah to the North Polar Regions. Committee on Naval Affairs, House of Representatives, 1924, 452-453.)

<sup>2</sup> See, however, documents in *For. Rel.* 1923, I, 278-286, concerning reservation by the United States of its rights to Wrangel Island. In a footnote in Hackworth, *Dig.*, I, 464, it is stated that "the United States has not relinquished its claim to Wrangel Island."

<sup>3</sup> Declared Mr. Hughes, Secy. of State, in a communication to Mr. A. W. Prescott, May 13, 1924: "So far as this Department is informed the exploration of parts of the Antarctic Continent by American, Belgian, British, French, German, Norwegian, Russian, Swedish, and other travelers has not been followed by permanent settlement upon any part of the continent."

"It is the understanding of this Department that the so-called Ross Dependency of New Zealand has no permanent population. This part of the Antarctic Continent lies immediately east of Wilkes Land."

"It is likewise the understanding of this Department that the portion of the so-called Dependency of the Falkland Islands upon the mainland of the Antarctic Continent which is referred to as 'Graham's Land' in the British Letters Patent of July 21, 1908, and of March 28, 1917, and which was discovered by Captain N. B. Palmer in 1820-21 and named Palmer Land by the United States Geographic Board on November 6, 1912, has no permanent population, although it is understood that British and other whalers use the shoal waters near shore in summer for anchorage."

"It is the opinion of the Department that the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country. In the absence of an act of Congress assertative in a domestic sense of dominion over Wilkes Land this Department would be reluctant to declare that the United States possessed a right of sovereignty over that territory." (Hackworth, *Dig.*, I, 452.)

<sup>4</sup> Admiral Peary declared in his journal entitled "The North Pole, Its Discovery in 1909 under the Auspices of the Peary Arctic Club," New York, 1910, 2 ed., 297: "90 N. Lat., North Pole, April 6, 1909. I have to-day hoisted the national ensign of the United States of America at this place, which my observations indicate to be the North Polar axis of the earth, and have formally taken possession of the entire region, and adjacent, for and in the name of the President of the United States of America. I leave this record and United States flag in possession."

See report by Lincoln Ellsworth from the motor ship Wyatt Earp, Jan. 21, 1936, published in *New York Times*, Jan. 22, 1936, p. 1.

"Despatches and publications of Admiral Byrd indicate that he has claimed for the United States all territory which he has discovered or explored to the east of 150° west longitude during his two Antarctic expeditions and that the name 'Marie Byrd Land' has been applied to all such territory." (Mr. Hull, Secy. of State, to Representative Dunn, March 28, 1936, Hackworth, *Dig.*, I, 454.)

<sup>5</sup> Communication to Mr. Bryn, Norwegian Minister at Washington, April 2, 1924, *For. Rel.* 1924, Vol. II, 519.

long established principles of international law, . . . I can not admit that sovereignty accrues from mere discovery unaccompanied by occupancy and use.”<sup>6</sup>

The Government of the United States has, however, since been made aware of the fact, especially in view of the conduct of other Powers as claimants in both Arctic and Antarctic regions, that the acts of some American explorers may prove to be regarded, according to tests that may be widely accepted, as sufficient to place the United States in a position where it may, by taking certain steps, fairly assert a right of sovereignty over areas that have been claimed in its behalf. Accordingly, the Government has endeavored to preserve its privileges in that regard while the Congress remains inert. Thus it has been made known to other States that the United States reserves any rights that may have accrued to it from the conduct of certain American explorers. By such process effort has been made to forestall the contention that there has been abandonment of something that should have been preserved. Thus, on January 6, 1939, the American Embassies in London and Paris were instructed to reserve American rights both with respect to the question of aerial navigation in the Antarctic and to the underlying questions of territorial sovereignty.<sup>7</sup>

In July, 1939, the Government of the United States, at the direction of the President, set up a semi-permanent organization called “The United States Antarctic Service,” designed to conduct “an investigation and survey of the natural resources of the land and sea areas of the Antarctic regions,” funds therefor having been provided by an act of Congress.<sup>8</sup> It is not understood that the function of the organization was to assert rights of sovereignty in behalf of the United States over particular areas.

(e)

§ 104E. **Some Conclusions.** If, on account of the rigor of the climate in the polar regions, the minimum requirements of the law of nations for the acquisition of a right of sovereignty over newly found lands are to be deemed to be relaxed when the area concerned is within those regions, the scope and character of the relaxation need careful analysis and observation as practices are in course of development. At the present time, means of communication and transportation as well as control are such as to justify a demand for more than an assertion of dominion by a mere symbolic act, and to cause the perfecting of a right of sovereignty to be dependent upon the exercise of some measure of control over the area involved within a reasonable period after the discoverer shall have accompanied his visual apprehension of the area by a formal taking of possession, with or without governmental authorization. The limits of such period, as well as the nature of such control must depend upon the circumstances of the

<sup>6</sup> Hackworth, Dig., I, 457.

<sup>7</sup> See Hackworth, Dig., I, 458-459, and documents there cited.

See “Who Owns Antarctica?”, *The Independent Journal of Columbia University*, III, No. 9, Feb. 21, 1936, p. 1.

<sup>8</sup> Dept. of State Bulletin, July 22, 1939, 57. Rear Admiral Byrd, U. S. N., retired, was designated by the President to serve as commanding officer of an expedition which was duly despatched by The United States Antarctic Service.

particular case. In the Arctic regions it must be acknowledged that the sovereign of a contiguous area of land that projects itself well into the Arctic Circle is in a relatively advantageous position to make its supremacy felt within or over an extensive yet unoccupied area. That potentiality which is attributable in large part to geographical considerations, strengthens the applicability of the sector system to the North Polar regions. Yet it points also to the conditions to be met in order to preserve if not perfect a right of sovereignty therein, as, for example, by Canada or Russia.

In the Antarctic regions, no assumption of the requisite power to control is derivable from the mere assignment of a claimed area to a particular dependency to which the region concerned is not geographically appendant. Obviously, such action fails to establish that it suffices to produce or consummate a right of sovereignty. The sector system as applied in the Antarctic region and as systematized by legislative enactment is chiefly significant as an official pronouncement of the extent of territorial claims. Such pronouncement should not, therefore, be deemed to suffice to bring into being a right of sovereignty or be accepted as a substitute for proof of the power and disposition of the claimant to maintain the requisite control in the area concerned.

(5)

§ 105. **Accretion.** By virtue of a principle known as that of accretion, a State may be said to acquire with respect to the outside world an original and exclusive right of sovereignty over lands which, imperceptibly in their process of formation, are added to its coasts and shores, or which so come into being as islands appendant thereto.<sup>1</sup> No formal acts of appropriation are required.<sup>2</sup>

When the appendage is on the ocean coast, neither the process of formation

§ 105.<sup>1</sup> The Anna, 5 C. Rob. 373. "The doctrine of the English cases is, that accretion is an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distinct points of time." (Blatchford, J., in *Jefferis v. East Omaha Land Company*, 134 U. S. 178, 193.)

See *County of St. Clair v. Lovington*, 23 Wall. 46, 68, where Mr. Justice Swayne declared: "In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the progress was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same."

<sup>2</sup> The term accretion employed by English writers with reference to the acquisition of newly made lands was, notwithstanding its Latin derivation, not borrowed from the Roman law. Neither in the Institutes, nor in the works of its classic commentators is there any word of similar origin used with such a signification. The term *accretio* of that law was always employed in connection with another branch of law. The word *alluvio* was used in the Institutes to describe the process by which land was imperceptibly formed by the action of the water; and the rules of ownership applicable thereto were confined chiefly to situations where the formation occurred within a river. The earliest writers on international law borrowed the principle of *alluvio*, in so far as it was applicable to international disputes relating to newly made lands. Inasmuch, however, as those disputes related to broader problems than those for which the Roman law made provision, the term *alluvio* was incapable of describing generally either a process or a legal principle concerning the acquisition of newly made lands, however and wherever formed. The author acknowledges his indebtedness to Prof. Roscoe Pound and to Prof. Albert Kocourek for guidance enabling him to make this statement.

nor the length of time involved in it appears to be a matter of international concern.<sup>3</sup> The creation of the right of sovereignty, and likewise the question of ownership, are not dependent upon whether the new land is due to the work of men's hands, or formed by the action of water or attributable to other natural causes.<sup>4</sup> Nor is it important whether it is in fact of sudden and perceptible growth, manifesting an instance of avulsion rather than accretion. It has been observed that "natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity."<sup>5</sup>

When, however, new land comes into being along the shore of a river constituting an international boundary, the facts to which its existence are attributable may have significance. Even in such a situation causes productive of accretion seem to have no effect upon the creation of a right of property and control in favor of the State to whose territory such land is appendant, subject to the general limitation that no riparian proprietor may by its own acts, as through artificial works, lawfully alter the boundary.<sup>6</sup>

When new lands are gradually and imperceptibly formed within the course of a river, whether attached either to the shore or arising as islands, the right of sovereignty is in that State on whose side of the boundary line the formation occurs.<sup>7</sup>

# (6)

§ 106. **Conquest.** The term conquest appears to be used to refer to at least two distinct processes or activities: first, that by which a military commander in time of war gains possession of hostile territory and subjects it and its occupants to his control;<sup>1</sup> and secondly, that by which a victorious belligerent compels its enemy to surrender the sovereignty of territory belonging to it.

It is not believed that conquest indicates a mode by which a right of sov-

<sup>3</sup> Opinion of Sir William Scott, in *The Anna*, 5 C. Rob. 373, 385b-385d; Opinion of Mr. Justice Holmes, in *Ker v. Couden*, 223 U. S. 268, concerning the public ownership of accessions by accretion on the ocean coast in the Philippine Islands.

<sup>4</sup> "A State's territory may be increased or decreased by processes of accretion or erosion, respectively. Accretion may result not only in additions to the mainland but also in the formation of deltas, islands, and bars within the maritime belt of the littoral State. Such accretions can generally be brought about only by erosion from other lands. The process, therefore, by which territory is gained by one State may, though not necessarily, involve the loss of territory by another State." (Hackworth, Dig., I, 409.)

<sup>5</sup> Huber, sole Arbitrator in *Island of Palmas Arbitration*, *Am. J.*, XXII, 867, 875.

When such a sovereignty does exist, if land comes into being on the ocean coast through some sudden act of violence, however induced, a right of property and control therein would appear simultaneously.

It should be observed that the litigated cases in the United States and elsewhere, which do not involve decisions as to the extent of the right of a maritime State under international law to assert, as against any other State, sovereignty or ownership over new lands which are added by various processes to its ocean coast, are not to be regarded as purporting to mark the limits of the claim.

<sup>6</sup> See Thalweg, *infra*, § 138. Also, Hackworth, Dig., I, § 60.

<sup>7</sup> *St. Louis v. Rutz*, 138 U. S. 226, 250, 251. Also, *Islands*, *infra*, § 139.

<sup>1</sup> § 106. <sup>1</sup> Story, J., in *United States v. Rice*, 4 Wheat. 246, 254. Declares Oppenheim: "Conquest is the taking possession of enemy territory through military force in time of war." Lauterpacht's 5 ed., I, § 236.

See Belligerent Occupation, Nature and Effect, *infra*, § 688.

ereignty comes into being, or by virtue of which an existing one is transferred.<sup>2</sup> If the inhabitants of the territory concerned are an uncivilized or extremely backward people, deemed to be incapable of possessing a right of sovereignty, the conqueror may, in fact, choose to ignore their title, and proceed to occupy the land as though it were vacant. In such case the conquest refers merely to the military or physical effort by means of which occupation becomes possible. If, on the other hand, the vanquished enemy is a State, or a country whose exclusive rights as sovereign over the territory concerned have been respected, the conqueror is not, at least at the present time, regarded as deriving rights of sovereignty from the military achievement. Although the victor may be able to bring about a transfer of such rights by some appropriate action, the bare possession of the requisite power does not suffice to effect a change. The State whose armies have gained control of enemy territory and occupied it may have no design of doing more. In such case it would be unreasonable to shift the title, and transform the conqueror into the territorial sovereign, even against its will. Thus in practice, upon the withdrawal of a belligerent occupant, the normal government of the State resumes automatically the exercise of its rights in behalf of its sovereign which are deemed to have been suspended rather than transferred during the period of occupation.<sup>3</sup>

If, however, the conqueror so desires, it may, in theory, retain as the fruits of victory the territory which is held, and acquire the sovereignty thereof. The common method of so doing is by demanding and obtaining a transfer embodied in an appropriate treaty.<sup>4</sup>

The conqueror may in fact resort to a different procedure. It may formally annex the occupied yet hostile territory to its own domain.<sup>5</sup> By so doing it announces to the outside world both the design to acquire the rights of sovereignty over the area concerned, and the achievement of that end solely by its own act.

<sup>2</sup> See Westlake, "The Nature and Extent of the Title by Conquest," *Collected Papers*, 475, reprinted from *Law Quar. Rev.*, XVII, 392-401.

<sup>3</sup> Referring to the belligerent occupation by Great Britain of Castine during the war of 1812, Mr. Justice Story declared in the case of the *United States v. Hayward*: "It could only be by a renunciation in a treaty of peace, or by possession so long and permanent, as should afford conclusive proof, that the territory was altogether abandoned by its sovereign, or had been irretrievably subdued, that it could be considered as incorporated into the dominions of the British sovereign." 2 Gall. 485, 501. Marshall, C. J., in *The American Insurance Company v. Canter*, declared: "The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace." (1 Pet. 511, 542. *Cf.*, also, *United States v. Rice*, 4 Wheat. 246, 254; *Fleming v. Page*, 9 How. 603, 614-616.)

"It is quite true that down to the middle of the eighteenth century the practice of belligerent nations was in accord with the theory that all kinds of property, coming into the hands of one of the parties to the war, vested in him as conqueror and were subject to his absolute disposal, so that he might even alienate or cede the occupied territory while the issue of hostilities remained undecided. [*Citing Hall, Int. Law*, 4th ed., 482 *et seq.*] But since that period this rule has been either abandoned or subjected to very considerable limitations both in theory and in practice." (Moore, *Arbitrations*, II, 1607.)

<sup>4</sup> Thus in concluding peace with Spain in 1898, the United States secured by cession rights of sovereignty over territory which was then within its possession. See, for example, Art. II of treaty with Spain, of Dec. 10, 1898, Malloy's *Treaties*, II, 1691.

<sup>5</sup> "Conquest is the taking of possession of territory of an enemy State by military force; it becomes a mode of acquisition of territory — and hence of transfer of territory — only if the conquered territory is effectively reduced to possession and annexed by the conquering State." (Hackworth, *Dig.*, I, 427.)

This process is described as subjugation.<sup>6</sup> It betokens not only the acquisition of rights of sovereignty by virtue of sheer power, but also unconcern on the part of the conqueror as to the lack of any agreement manifesting acceptance of the change by its foe.<sup>7</sup> Subjugation, in so far as it is employed with respect to territory already subjected to rights of sovereignty by the country which is ousted therefrom, cannot be regarded as indicative of a method by which such rights come into being. It manifests rather a mode by which an existing right of exclusive control is taken away from one State (possibly by its very extinction) and lodged in another.

It seems important to observe that at the present time there appears to be much less interest on the part of the family of nations in the mode, howsoever described, by which a conqueror compels its enemy to yield rights of sovereignty, than in the fundamental inquiry whether the conqueror should be deemed to possess a right, limited solely by its power to enforce its will.<sup>8</sup> Inasmuch as it is in connection with the transfer rather than the creation of rights of property and control that the problem arises, the matter is discussed elsewhere.<sup>9</sup>

## b

### Succession

#### (1)

#### CESSION

#### (a)

§ 107. **In General.** Cession is a process by which existing rights of sovereignty are transferred by one State to another. The terms of transfer are embodied in an agreement which commonly assumes the form of a treaty.<sup>1</sup> There is always manifest an act of surrender by a grantor to a designated grantee. In this re-

<sup>6</sup> Lauterpacht's 5 ed. Oppenheim, I, §§ 236-241a. "As in the case of other modes of acquisition by unilateral acts, it is necessary to the accomplishment of conquest that intention to appropriate and ability to keep shall be combined. Intention to appropriate is invariably, and perhaps necessarily, shown by a formal declaration or proclamation of annexation." (Hall, Higgins' 8 ed., § 204.)

<sup>7</sup> See Annexation, *infra*, § 117A. "Thus after the war with Austria and her Allies in 1866, Prussia subjugated the territories of the Duchy of Nassau, the Kingdom of Hanover, the Electorate of Hesse-Cassel, and the Free Town of Frankfort-on-the-Main, and Great Britain subjugated in 1900 the territories of the Orange Free State and the South African Republic." Oppenheim, McNair's 4 ed., I, § 239.

In the course of its war with Turkey, Italy, by a law of February 25, 1912, following a Royal Decree of November 5, 1911, annexed Tripoli and Cyrenaica, placing them under its full sovereignty, *Collezione Celerifera*, 1912, p. 82. The treaty of peace which marked the termination of the war was not concluded until Oct. 18, 1912. See For. Rel. 1912, 632. For a discussion of the question whether the annexation was premature, see Coleman Phillipson, *Termination of War and Treaties of Peace*, London, 1916, 24-28.

As a recent instance of this procedure may be noted the incorporation of Lorraine into the Reich, announced on Nov. 30, 1940; see *New York Times*, Dec. 1, 1940, Section 1, p. 1.

<sup>8</sup> Declared President Wilson in an address before the Congress Jan. 8, 1918: "The day of conquest and aggrandizement is gone by." Official Bulletin, Vol. II, No. 202.

<sup>9</sup> See Cession, Validity, The Principle of Self-Determination, *infra*, § 108.

§ 107.<sup>1</sup> "Cession of territory involves the transfer of sovereignty by means of an agreement between the ceding and the acquiring states. It is a *derivative* mode of acquisition." (Hackworth, Dig., I, 421.)

spect cession differs from relinquishment which betokens a situation where the relinquisher of the right of sovereignty does not purport to convey it to a transferee.<sup>2</sup>

An act of cession may not in fact be described as such in the agreement which sets forth the transfer. Any terms suffice which express the design of a grantor to give over its rights to a grantee, and point to a grantee ready to accept what is yielded.<sup>3</sup> The interested parties are not, however, likely to have recourse to a treaty purporting to be one of cession unless it is agreed that the right of sovereignty has not already been transferred to the proposed grantee by some other process, and that it is desirable, if not essential, that there be a formal surrender of that right by a grantor. A cession usually implies, therefore, respect for the actual as well as theoretical lodgment of rights of property and control in the State called upon to divest itself thereof. When in consequence of the operations of a war those rights have been in fact wrung by force from a vanquished State, the only requirement at the conclusion of the conflict may be some appropriate acknowledgment of what has taken place.<sup>4</sup>

<sup>2</sup> See Relinquishment, *infra*, § 115.

<sup>3</sup> The treaties by virtue of which the United States has acquired rights of sovereignty through acts of cession on the part of foreign States have commonly referred to the mode of transfer as one of cession. As a recent instance, *cf.* Art. I of convention with Denmark of Aug. 4, 1916, providing for the cession of the Danish West Indies, U. S. Treaty Vol. III, 2558. It should be noted, however, that the treaty of peace with Mexico of Feb. 2, 1848 (Guadalupe Hidalgo), whereby the United States acquired much territory from Mexico, merely referred to the transfer by a declaration (Art. V; Malloy's Treaties, I, 1109) indicating how the new boundary should run. In another portion of the same treaty reference to the transfer was made in connection with the treatment to be accorded "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty." Art. VIII.

<sup>4</sup> In the Treaty of Versailles with Germany, of June 28, 1919, the new boundaries of that State were minutely described so as to exclude (subject to specified reservations) from Germany the territory contiguous thereto and of which the sovereignty was, by any process, deemed to be transferred. (Part II, Arts. 27-30.) Acts amounting to cession were elsewhere variously described. By Art. 45 there was a definite cession of the coal mines in the Saar Basin to France. There was also an agreement to cede "all rights and title" to France over such part of the Saar Basin as might be specified by the League of Nations, in the event of a decision of the inhabitants thereof in favor of union with France at the termination of fifteen years from the coming into force of the treaty. (Chap. III of Annex following Art. 50.) According to Art. 51, the territories of Alsace-Lorraine, which had been "ceded" to Germany in 1871, were "restored to French sovereignty" as from the date of the armistice, Nov. 11, 1918. In numerous Articles it was declared that Germany "renounces all rights and title over the territory" within specified limits, "in favor of" a particular State, or in that of the principal Allied and Associated Powers.

Obviously a so-called renunciation, even in favor of a particular party, signifies nothing more than the yielding to that party of a claim of right, valid or invalid, and for what it is worth, with respect to the territory concerned. It is the understanding of the parties in the light of the circumstances of the particular case, which must determine whether the act of renunciation constitutes a mode by which existing rights of sovereignty are transferred, or is merely a convenient method of waiving claims adverse to a transfer already effected, and of acknowledging its validity. In the German treaty of peace the renunciations appear oftentimes to have been regarded as amounting to cessions. This seems to have been the case, for example, with reference to the renunciation in favor of the Czechoslovak State of rights and title over a defined portion of Silesian territory (Art. 83), as well as that in favor of Belgium over the specified territory of Prussian Moresnet (Art. 33), and that in favor of the principal Allied and Associated Powers over the territory embracing the City of Danzig (Arts. 100 and 108). In certain other cases, however, where the agreement to renounce was followed by arrangements for a plebiscite, the definitive transfer of sovereignty was apparently to await the manifestation of the popular will, and then to be established by a new and appropriate frontier. (*Cf.* for example, Arts. 34-37, respecting the Kreise of Eupen and Malmédy.) In the case of Schleswig the very renunciation was limited in scope to territory north of a line to



While a State may by cession attempt to transfer to another a claim to territory, the former is unable to make a valid transfer of the right of sovereignty over an area save to the extent that the former is possessed of the same. As Judge Huber, sole Arbitrator in the Island of Palmas Arbitration declared in his award of April 4, 1928: "It is evident that Spain could not transfer more rights than she herself possessed. . . . It would seem that the cessionary power never envisaged that the cession, in spite of the sweeping terms of Article III, should comprise territories on which Spain had not a valid title, though falling within the limits traced by the treaty. It is evident that whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers."<sup>5</sup>

Cession may be the process through which a State undertakes to transfer to another rights in perpetuity over an area within which the latter is permitted to construct and control an inter-oceanic canal, and that regardless of the extent to which the grantor by so doing divests itself of its rights of sovereignty over the area concerned.<sup>6</sup>

**§ 107A. The Dismemberment of the Austro-Hungarian Dual Monarchy.** The dismemberment of the Austro-Hungarian Dual Monarchy through events of the World War resulted in a unique situation in respect to the matter of transfer of sovereignty. That Monarchy, although itself a State, comprised two

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be fixed in conformity with the will of the inhabitants. (Art. 110.) It should be observed that one of the later and important financial clauses (Art. 254) provided that "the Powers to which German territory is ceded" shall undertake to make certain payments. Reference to this undertaking was constantly made in earlier portions of the treaty in connection with Articles declaratory of renunciations of rights and title. See, for example, Art. 39 (renunciations to Belgium), Art. 86 (renunciations to the Czechoslovak State), and Art. 92 (renunciations to Poland).

According to Art. 119, Germany renounced in favor of the principal Allied and Associated Powers all her rights and titles over her overseas possessions. This general renunciation was doubtless regarded as equivalent to cession. Generally speaking Germany seems to have been called upon, in accepting the terms of the treaty, to renounce her rights and title over territory as a means of transferring lands of which she was then acknowledged to be the *de jure* sovereign, whether or not they had then been wrested from her possession, and as a means also of facilitating the transfer of those to be subjected to the operation of a plebiscite, and with respect to which the final determination of the question of sovereignty was temporarily to remain in abeyance.

According to Art. 15 of the Treaty of Lausanne, of July 23, 1923, Turkey "renounces in favor of Italy all rights and titles" over specified islands. League of Nations Treaty Series, XXVIII, 11.

See The Relation of the United States to the Mandatory System, *supra*, § 26A.

<sup>5</sup> *Am. J.*, XXII, 867, 879-880, where the learned Arbitrator quoted a letter of April 7, 1900, from Secretary Hay to the Spanish Minister at Washington in which it was said: "The metes and bounds defined in the treaty were not understood by either party to limit or extend Spain's right of cession. Were any island within those described bounds ascertained to belong in fact to Japan, China, Great Britain or Holland, the United States could derive no valid title from its ostensible inclusion in the Spanish cession. The compact upon which the United States negotiators insisted was that all Spanish title to the archipelago known as the Philippine Islands should pass to the United States—no less or more than Spain's actual holdings therein, but all. This Government must consequently hold that the only competent and equitable test of fact by which the title to a disputed cession in that quarter may be determined is simply this: 'Was it Spain's to give? If valid title belonged to Spain, it passed; if Spain had no valid title, she could convey none.'"

<sup>6</sup> See, Art. II, Convention between the United States and Panama of Nov. 18, 1903, for the Construction of a Ship Canal, Malloy's Treaties, II, 1349; also Art. I of Convention between the United States and Nicaragua, of Aug. 5, 1914, respecting a Nicaraguan Canal Route. U. S. Treaty Vol. III, 2741.

entities, the Austrian Empire and the Kingdom of Hungary, whose respective territories were co-extensive with and embraced all of the area belonging to the Austro-Hungarian Empire. During the life of the Dual Monarchy, neither Austria nor Hungary was completely bereft of an international personality. Although agreements were made in behalf of either through the Austro-Hungarian Foreign Office, the Dual Monarchy itself through the very terms of its treaties, and through the description of plenipotentiaries assigned to negotiate them purported to act in behalf of Austria and Hungary as distinctive parties, even when acting for both through a single instrument.<sup>1</sup> Again, the Dual Monarchy found it possible to conclude arrangements in behalf of one State rather than in behalf of both.<sup>2</sup> Thus, as a matter of fact, statehood in an international sense appears to have been preserved for the Austrian Empire as well as for the Kingdom of Hungary. Each of them was held out to the world as an entity with which and in whose behalf distinctive foreign relations were to be held.<sup>3</sup>

The breakup of the Dual Monarchy was effected by dividing its territory among several States — Austria, Hungary, Czechoslovakia, Italy, Poland, Roumania and Yugoslavia. There were thus no less than seven successors to the sovereignty over the area that had comprised the territorial domain of the Monarchy. The transfer thereof took place prior to the perfecting of the treaties of peace of Saint Germain-en-Laye, with Austria, and of Trianon, with Hungary.<sup>4</sup> Dismemberment had been wrought before they took effect. Although

§ 107A.<sup>1</sup> See, for example, Convention relative to Civil Procedure of July 17, 1905, *Nouv. Rec. Gén.*, 3 sér., II, 243; also Convention concerning the Regulation of Successions and of Guardianship, the Legalisation of Documents and the Reciprocal Communication of "*actes de l'état civil*," of March 30/17, 1911, *id.*, VII, 595, which purported to be concluded in behalf of Austria-Hungary, Austria, Hungary and Servia; also Copyright Convention between the United States and Hungary, signed at Budapest (in the English and Hungarian languages), Jan. 30, 1912, U. S. Treaty Vol. III, 2692.

<sup>2</sup> See Convention between Austria and Roumania for the Reciprocal Protection of Literary, Artistic and Photographic Property, of March 2 (Feb. 18), 1908, *Nouv. Rec. Gén.*, 3 sér., IV, 223.

<sup>3</sup> See Memorandum concerning the evolution of relations between Austria and Hungary, from the point of view of public law, Annex I to Note II, of Jan. 14, 1920, from Hungarian Peace Delegation to the Allied and Associated Powers, The Hungarian Peace Negotiations, published by the Royal Hungarian Ministry of Foreign Affairs, Budapest, 1921, I, 34; Annex 26 to same note, *id.*, 67; Annex 3 to Note 27, *id.*, 194.

See also *In Re Ungarische Kriegsproduktenaktiengesellschaft*, Court of Appeal, Canton of Zürich, July 5, 1920, where it was significantly declared "But each of the two States of the Union had international personality, and each of them was a contracting State in the international treaties concluded by the common organs." (Williams and Lauterpacht, Annual Dig., 1919-1922, Case No. 45.)

Declared Parker, Commissioner, in Administrative Decision No. I, Tripartite Claims Commission, United States, Austria and Hungary, May 25, 1927: "The former Austrian Empire and the former Kingdom of Hungary while existing as independent states had no international status." (*Am. J.*, XXI, 599, 697.) This statement seemingly fails to take cognizance of the treaty-making practices of the Dual Monarchy.

Concerning the requirement relative to the approval of treaties by the Austrian Reichsrath and the Hungarian Parliament in consequence of the Act of Union as enacted by the Hungarian Parliament in 1867, and the Fundamental Law concerning Joint Affairs as enacted by the Austrian Reichsrath, in the same year, see Crandall, *Treaties*, 2 ed., § 142.

<sup>4</sup> In the preamble of the Treaty of Saint Germain-en-Laye it is said: "Whereas the former Austro-Hungarian Monarchy has now ceased to exist, and has been replaced in Austria by a republican government, and

"Whereas the Principal Allied and Associated Powers have already recognised that the Czecho-Slovak State, in which are incorporated certain portions of the said Monarchy, is a free, independent and allied State, and

Austria was deprived of a considerable portion of the territory of the Dual Monarchy that lay within the confines of the Austrian Empire, and although Hungary was likewise deprived of a considerable portion of the territory that lay within the domain of the Kingdom of Hungary, those treaties did not indicate that up to the time of their consummation, sovereignty over those respective areas remained in Austria or in Hungary. The treaties referred to the dismemberment of the Dual Monarchy as an event that had taken place; and while both Austria and Hungary were compelled to make renunciation of rights and claims to territories beyond the limits of boundaries set forth in the treaties, those areas were for the most part referred to as "territories of the former Austro-Hungarian Monarchy."<sup>5</sup> Those renunciations failed to betoken cessions of territory. They were merely evidence of the recognition and definition of boundaries which the Principal Allied Powers had themselves fixed. They had no other significance, and were far from indicating that either Austria or Hungary were the grantors of rights of sovereignty that they then possessed, or were even, in a technical sense, relinquishers of it.<sup>6</sup>

The time and mode of the change of sovereignty produced by the dismemberment were not necessarily dependent upon a solution of the question whether the Austrian State in whose behalf was signed the Treaty of Saint Germain, and the Hungarian State in whose behalf was signed the Treaty of Trianon, were identical with, and continued respectively, the statehood of the Austrian Empire and of the Kingdom of Hungary. The evidence is convincing that the Allied Powers accepted the position and took the stand that Austria under the new republican régime was a continuation of the former Austrian Empire,<sup>7</sup> and also that the Hungarian State which accepted the Treaty of Trianon acknowledged its identity with the Kingdom of Hungary.<sup>8</sup>

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"Whereas the said Powers have also recognised the union of certain portions of the said Monarchy with the territory of the Kingdom of Serbia as a free, independent and allied State, under the name of the Serb-Croat-Slovene State, and

"Whereas it is necessary, while restoring peace, to regulate the situation which has arisen from the dissolution of the said Monarchy and the formation of the said States, and to establish the government of these countries on a firm foundation of justice and equity." (U. S. Treaty Vol. III, 3151.)

<sup>5</sup> See, for example, Art. 36 of the Treaty of Saint Germain; also, Art. 36 of the Treaty of Trianon. In Art. 53 of the Treaty of Trianon Hungary renounced "all rights and title over Fiume and the adjoining territories which belonged to the former Kingdom of Hungary and which lie within the boundaries which may subsequently be fixed." See also Art. 71 referring to renunciations in favor of Austria.

<sup>6</sup> See Relinquishment, *infra*, § 115.

Art. 203 of the Treaty of Saint Germain-en-Laye, as well as the corresponding Article of the Treaty of Trianon (Art. 186), make significant reference to "Each of the States to which territory of the former Austro-Hungarian Monarchy is transferred, and each of the States arising from the dismemberment of that Monarchy, including Austria" ("including Hungary," in the Treaty of Trianon).

<sup>7</sup> See Treaty of Peace with Austria, Letter of Allied and Associated Powers transmitting to the Austrian Delegation the Treaty of Peace with Austria, together with the Reply of the Allied and Associated Powers to the Austrian Note of July 20, 1919, requesting certain modifications of the terms, U. S. Senate Doc. No. 121, 66 Cong., 1 sess., 14; also, Temperley, Vol. IV, 400.

<sup>8</sup> "We wish first of all to establish the fact that Hungary is no new State born of the dismemberment of the Austro-Hungarian Monarchy, and so cannot be compared from this point of view to German-Austria, to the Czecho-Slovak, nor to the Yugoslav State. As far as public law the Hungary of to-day is the same State she has been through her past of a

In a word, the dismemberment of the Dual Monarchy was accompanied by necessary transfers of sovereignty resulting from the determination of the Principal Allied Powers to accomplish certain ends which military achievements had made possible. Those transfers were confirmed by, rather than attributable to, the treaties of peace.

## (b)

## VALIDITY

## (i)

§ 108. **The Principle of Self-Determination.** The validity of a transfer of rights of sovereignty as set forth in a treaty of cession does not appear to be affected by the motives which have impelled the grantor to surrender them. Such action may have been induced by fear of the consequences of resisting the demands of a victorious foe, or merely by the offer of the grantee to pay an ample price for the territory concerned.<sup>1</sup>

According to the practice of States up to the beginning of the twentieth century, no requirement of international law was deemed to forbid or denounce as internationally illegal a transfer which was opposed by the inhabitants of the territory ceded.<sup>2</sup> Nor were any particular grounds of opposition regarded as constituting a legal obstacle deterring a proposed grantee from acquiring what it desired, especially as the fruits of victory. Little heed was paid to the question whether lands occupied by inhabitants of a single race or nationality should, notwithstanding their opposition, be transferred to a foreign State whose territory was contiguous, and whose nationals inhabiting it were of an alien race. Nor was any economic detriment to the territory to be transferred, however certainly to be anticipated as the consequence of cession, believed to offer a decisive ground for restraint. In a word, the national domain of a State, regardless of the character or degree of civilization of the occupants, and in spite of the requirements of their race or their vital economic needs, was oftentimes dealt with as property subject to exploitation, so long as the individuals in control of the reins of government could be persuaded or compelled to conclude and ratify an appropriate treaty. It was not supposed that any equities of the in-

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thousand years. She kept her position as an independent State on entering into a union with Austria and during the whole existence of this union known by the name of the Austro-Hungarian Monarchy. . . . It is apparent from the above mentioned facts that now the community implied in the appellation 'Austro-Hungarian Monarchy' has ceased. Hungary cannot be considered as a new state formed upon the ruins of the Monarchy, but as a state disposing independently and without restrictions in the questions which she could not dispose of formerly without the concurrence of Austria." (Annex I to Note II appended to Note A, of Jan. 14, 1920, from the Hungarian Peace Delegation to the Allied and Associated Powers, The Hungarian Peace Negotiations, Published by the Royal Hungarian Ministry of Foreign Affairs, Budapest, 1921, I, 34-35.)

§ 108. <sup>1</sup> See Agreements between States, Validity, Consent, *infra*, § 493.

<sup>2</sup> According to Hall: "The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared." Higgins' 8 ed., § 9, p. 54, where the learned editor, writing in the year 1924, appended in a footnote the statement that "A plebiscite of the inhabitants of the ceded territory may be politically advisable, but is not legally necessary."

habitants, although due to natural aspirations based upon the most solid ethnological and geographical foundation, were entitled to respect by the conqueror demanding the cession of coveted lands.

Such equities and the theory to which they gave birth could not be obliterated even when they were ignored. Moreover, they took such deep root in the minds of peoples and nationalities who were oppressed by the prevailing practice, as to rebuke the family of nations for indolence, and to punish it for its unconcern.

It was the operation of the great European treaties of the nineteenth century which gradually led statesmen to see the error of their ways; but the light did not fully dawn upon them until the outbreak of the World War. Arrangements of the Congress of Vienna of 1815, of the Treaty of Frankfort of 1871, as well as the Treaty of Berlin of 1878, in assigning territory to alien rulers, and with contempt for the ethnological and economic claims of the inhabitants, created causes of unrest which the lapse of time merely served to magnify. These not only defied reasonable hopes of permanent peace, in spite of the effort to preserve it by force of arms, but also encouraged war as the only potent means by which old and yet still festering wounds could be healed.<sup>3</sup>

Between the years 1914 and 1920, statesmen became increasingly aware of the disturbing effect upon the general peace which was likely to ensue if a victorious belligerent were permitted to suffer no restraint in enforcing the transfer to itself of hostile territories. The nature and extent of the equities of the inhabitants were perceived, and the value of respect for them as a means of preserving tranquillity was acknowledged. The welfare of the society of nations, in so far as it was associated with the removal of causes of war, was obviously opposed to yielding free rein to a conqueror. This general international interest seemed to be sufficiently acute to justify united effort in restraint of the individual State.<sup>4</sup>

Understanding of the precise nature and extent of that restraint has been clouded by a failure to observe the differing consequences of varying sets of facts that played a distinctive part in the practice of nations. That practice did not indicate that when as a normal matter of voluntary action between State and State, the cession of territory was sought to be effected, any legal duty was manifested by either side either to ascertain the wishes of the occupants of the particular area concerned, or to abide by the result of them. Deference by a grantor State for those wishes was regarded as a matter of domestic policy;<sup>5</sup>

<sup>3</sup> See, in this connection, Sir Walter G. F. Phillimore, Bart. (subsequently Lord Phillimore), *Three Centuries of Treaties of Peace and Their Teaching*, London, 1917.

<sup>4</sup> See, Sarah Wambaugh, *A Monograph on Plebiscites with a Collection of Documents* (prepared under the supervision of Dr. James Brown Scott), New York, 1920, especially historical summary, 1-33; also, same writer, *Plebiscites Since The World War*, with *Collection of Official Documents*, Washington, 1933; Emmanuel Gonsolin, *Le Plébiscite dans le droit international actuel*, Paris, 1921.

<sup>5</sup> "The consent of the population of ceded territory is not essential to the validity of the cession, although Grotius (bk. II, ch. vi, sec. 4) is believed by some to have held the opposite view. It is worthy of note, however, that in recent years cessions of territory have frequently been conditioned upon the will of the people as expressed in a plebiscite." (Hackworth, *Dig.*, I, 422.)

<sup>6</sup> Such, for example, was the case in the matter of the plebiscite demanded and held by Denmark in the islands of St. Thomas and St. John in 1868, in connection with the

and if they revealed opposition to the will of such grantor as manifested by the action of its constituted authorities, the fact was not looked upon as necessarily preventive of a valid transfer.<sup>6</sup> If, however, the occupants, as by successful revolution, attained independence, making themselves masters of their own territory and establishing their eligibility for statehood, a fresh situation confronted the prospective grantee. Obviously, it was thereupon obliged to ascertain whether a change of sovereignty had been wrought, and in such event, to rely upon no grant from a former sovereign.

A different situation presented itself when a State, as victor in a conflict, demanded of its foe a part of its territory. Here again differing results of the victory might present themselves. In one of them, the occupants of the coveted area might, in full alignment with their own sovereign, oppose the transfer, so that the defeated State stood as a unit in its opposition to the conqueror. In a second, the occupants, by reason of ethnographic or economic or other causes of affiliation with the conqueror, might be expected to welcome a transfer of sovereignty. In still a third, the desires of the predominant population of the

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contemplated cession of both to the United States by a treaty signed Oct. 24, 1867, on which the Senate of the United States took no affirmative action. See Sarah Wambaugh, *Monograph on Plebiscites*, New York, 1920, 25, 149-155, and documents (embracing the text of the treaty), *id.*, 945-961.

"This Government regrets that it cannot favor submitting the question of transfer of the islands [the Danish West Indies] to a vote of the inhabitants." (Mr. Lansing, Secy. of State, to Minister Egan, June 9, 1916, *For. Rel.* 1917, 622.) See also documents in Hackworth, *Dig.*, I, § 72.

<sup>6</sup>In the course of the valuable historical summary in her *Monograph on Plebiscites*, Miss Wambaugh declares: "In her annexation of Hanover and Hesse in 1866, Prussia had shown no regard to the popular will. In 1867 she annexed Schleswig in spite of the conditional clause in the treaty. After 1867 and especially after 1870 any support of national self-determination constituted an indictment of the whole German political structure as well as of German action in Schleswig, a fact which German writers were not slow to discern.

"The subsequent history of the doctrine becomes, after 1867, primarily one of discussion rather than of practice. There are, to be sure, a few scattering examples of a resort to self-determination after the Treaty of Prague. Denmark, while still hopeful of arriving at an agreement with Prussia, insisted on a plebiscitary clause in the treaty of cession of the islands of St. Thomas and St. John to the United States, and the plebiscite was actually held in January, 1868. The Italian government insisted on a plebiscite being held in Venetia in 1866, and in Rome in 1870, before the annexation of these provinces to the kingdom. The treaty of cession signed by France and Sweden in 1877 provided for a plebiscite in the island of St. Bartholomew. A clause stipulating for a plebiscite was incorporated in the Treaty of Ancón in 1883. But although all of these plebiscites, except that of the Treaty of Ancón, were duly carried out, nevertheless the cynical disregard of obligation under the Treaty of Prague shown by Prussia was a blow to the prestige of the principle, a blow the greater because of the growth of Germany as a world power, and because of the growing custom of students of history and political philosophy to seek instruction in German universities. . . .

"In attempts at settlement of questions of sovereignty and boundaries by the Treaty of San Stefano in 1878 and the Congress of Berlin in 1878 the doctrine and method were both ignored. The last case of successful appeal to the doctrine before the war of 1914 was that of Crete, which, after constant disregard by the Powers of its repeated vote for union with Greece, passed by each successive elective assembly, at last, in 1912, won their final consent to the ending of a situation grown untenable through continued discontent and made acute through the threatened hostilities between Greece and Turkey. The doctrine had, however, been abandoned by statesmen as being inconsistent with the policy of Balance of Power. Diplomacy had returned to the methods of the Congress of Vienna. Once more, as after Vienna, the doctrine was to find its support from the people whose national aspirations had been thwarted and from political students interested in perfecting tools suited to achieve the stability which had become more than ever essential to the delicate balance of the complex organization of society." (*Id.*, 19-20.)

area concerned might be complicated and unknown and difficult to appraise. The factual aspect of the second situation might, and sometimes did, serve to ease the conscience of a victor in demanding cession, especially when by so doing it was regaining what its foe had formerly taken from it as the fruits of victory in a previous war.<sup>7</sup> Again, in the second situation, the achievement of the conqueror might be due in part to the aid of the occupants who as a result thereof were clamoring for a statehood of their own.<sup>8</sup>

In the third situation noted, the victor might not feel obliged to ascertain what in fact was the preference of the occupants not known to be in distinct opposition to that of its sovereign. Even in the first situation where the defeated State stood as a unit in its opposition, the conqueror might, nevertheless, in fact regard itself as legally undeterred in asserting its will. In this case the main issue was clear — whether a victor might lawfully despoil or dismember its foe, and compel it, through the convenient instrumentality of a treaty of cession, to give up and transfer a right of sovereignty over portions of its domain. This presented the pure question whether a State possessed the right to maintain its territorial integrity in the face of such demands of an alien sovereign that had defeated it in war, and which possibly in so doing had also gained control of territory that was coveted. At the present time it is worth while to observe what response States have themselves within recent years given to this question, and incidentally, as an element thereof, to note the position of some American statesmen in relation to various aspects of it.

Following the proposal of Mr. Blaine, then Secretary of State, the International American Conference convening at Washington, 1889–1890, adopted a resolution denouncing the validity of cessions of territory made under threats of war or in the presence of an armed force.<sup>9</sup>

In his address to the Congress, January 8, 1918, announcing fourteen points

<sup>7</sup> See, for example, text of the preamble to Arts. 51–79 of the Treaty of Versailles of June 28, 1919, in relation to Alsace-Lorraine, U. S. Treaty Vol. III, 3363.

<sup>8</sup> In such case a transfer of sovereignty, as through revolution possibly fortified by the intervening aid of the conqueror, might have been already effected, and nothing more than an appropriate acknowledgment of the fact needed, unless the conqueror sought a cession to itself of what the combined effort of the two entities had placed within its reach. An instance might have been apparent had, for example, the United States in 1898, demanded the cession to itself by Spain of the Island of Cuba.

<sup>9</sup> Moore, Dig., I, 292. Also, Mr. Blaine, Secy. of State, to Mr. Trescot, No. 2, Dec. 1, 1881, with respect to the right of a conqueror to demand a cession of territory from its foe, For. Rel. 1881, 143. Compare Mr. Sherman, Secy. of State, to Mr. Toru Hoshi, Japanese Minister, Aug. 14, 1897, MS. Notes to Japanese Legation, I, 533, 535, Moore, Dig., I, 274, in which it was said: "It can not be that one so well informed as Count Okuma could have wished to suggest thereby the propriety of appealing from the action of the Government to 'the population'. In international comity and practice the will of a nation is ascertained through the established and recognized government, and it is only through it that the nation can speak."

"Much less do the American Commissioners maintain that a nation can not cede or relinquish sovereignty over a part of its territory without the consent of the inhabitants thereof." Memorandum, American Peace Commission, Paris, Oct. 27, 1898, Senate Doc. No. 62, 55 Cong. 3 Sess., Part II, 100–107, Moore, Dig., I, 367, 368.

In his Annual Message of Dec. 1, 1899, President McKinley declared with reference to the cession of the Philippine Islands to the United States: "I had every reason to believe, and I still believe, that this transfer of sovereignty was in accordance with the wishes and the aspirations of the great mass of the Filipino people." For. Rel. 1899, xlv, Moore, Dig., I, 531.

as a proposed basis for peace, President Wilson declared that the adjustment of colonial claims should be based upon a strict observance of the principle "that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined."<sup>10</sup> In an address at New York, September 27, 1918, he announced that one of the issues of the existing war was, whether the military power of any nation or group of nations should be suffered to determine the fortunes of peoples over whom they had no right to rule except the right of force.<sup>11</sup>

The treaty of peace with Germany, concluded at Versailles on June 28, 1919, reflected to some degree these views. There was express recognition of "the moral obligation to redress the wrongs done by Germany in 1871, both to the rights of France and to the wishes of the population of Alsace and Lorraine, "which were separated from their country in spite of solemn protests of their representatives at the Assembly of Bordeaux." There was, accordingly, a restoration to French sovereignty of what had been ceded to Germany in 1871.<sup>12</sup>

<sup>10</sup> For. Rel. 1918, Supp., 1, Vol. I, 12. In the same address the President demanded in part the restoration of territories occupied by the enemy, the readjustment of the frontiers of Italy "along clearly recognizable lines of nationality," and the erection of an independent Polish State which should include the territories inhabited by indisputably Polish populations, and which through free access to the sea should enjoy an economic as well as political independence. Again, he urged that the relations of the several Balkan States should be determined by friendly counsels along historically established lines of allegiance and nationality, and that their political and economic independence and territorial integrity be duly guaranteed.

<sup>11</sup> For. Rel. 1918, Supp., 1, Vol. I, 316. It will be recalled that these two addresses of the President embodied the terms on which, subject to certain qualifications and enlargements, the United States and the belligerent Powers associated with it announced a readiness to negotiate peace with Germany. Cf. communication of Mr. Lansing, Secy. of State, to Mr. Sulzer, Swiss Minister at Washington, in charge of German interests, Nov. 5, 1918, For. Rel. 1918, Supp., 1, Vol. I, 468.

Again, in his statement of April 23, 1919, concerning the dispute over Fiume, President Wilson vigorously opposed any adjustment which would place that port in the hands of a Power whose sovereignty, if established there would, in his judgment, inevitably seem foreign rather than domestic, or identified with the commercial and industrial life which the port would serve. He said: "The interests are not now in question, but the rights of peoples, of States new and old, of liberated peoples and peoples whose rulers have never accounted them worthy of a right; above all, the right of the world to peace and to such settlements of interest as shall make peace secure. These, and these only, are the principles for which America has fought. These, and these only, are the principles upon which she can consent to make peace. Only upon these principles, she hopes and believes, will the people of Italy ask her to make peace." (*Current Hist. Mag.*, X, Part I, pp. 405-407.)

See also other statements by President Wilson set forth in Hackworth, Dig., I, § 61.

In a cablegram from the French Foreign Office on the Principles and Bases of Negotiation with the enemy, of Nov. 15, 1918, it was said that among the leading principles to be proclaimed was the "right of peoples to decide their own destinies by free and secret vote (combined with the principle of a certain homogeneity of the States, principle applicable to Bohemia, Tyrol, Istria, Dalmatia, Luxembourg)." Miller's Diary Doc. No. 5, II, 17, 22. See comments by David Hunter Miller, *id.*, 36-37, and by Col. E. M. House, *id.*, 83-84.

Declared Lt. Gen. J. C. Smuts in a memorandum on the "Position and Power of the League" Dec. 18, 1918 (respecting territories of Russia, Austria and Turkey): "These principles are, firstly, that there shall be no annexation of any of these territories to any of the victorious Powers, and, secondly, that in the future government of these territories and peoples the rule of self-determination, or the consent of the governed to their form of government, shall be fairly and reasonably applied." (Doc. No. 110, Miller's Diary, III, 34, 40.)

Cf. David Hunter Miller's Comment on Supplementary Agreements, I, to the Covenant, being a criticism of President Wilson's first Paris draft, Doc. No. 177, *id.*, III, 305-306; also Comments by Mr. Miller on Supplementary Agreements, I, in President Wilson's second Paris draft, *id.*, III, 453.

<sup>12</sup> Art. 51 and the clause prefatory to it.



Appended to numerous Articles providing for the renunciation by Germany of its rights and titles over other specified areas, were arrangements for a plebiscite to determine whether the inhabitants desired that the territory concerned should remain under German sovereignty or pass to a foreign State.<sup>13</sup> It is understood that in the establishing of the preliminary boundaries of these areas, extraordinary effort was made by the Allied and Associated Powers to ascertain the ethnological and economic basis of the claims of the inhabitants.<sup>14</sup>

## (aa)

§ 109. **The Same.** In a joint memorandum from the Governments of the United States, France and Great Britain, to the Government of Italy, of December 9, 1919, in regard to the adjustment of the territorial dispute with the Serb-Croat-Slovene Kingdom, it was declared that "the broad principle remains that it is neither just nor expedient to annex as the spoils of war territories inhabited by an alien race, anxious and capable to maintain a separate national State."<sup>1</sup> Inasmuch as he deemed that revised proposals offered to the Yugoslav delegation by the British and French Governments January 14, 1920,<sup>2</sup> failed to

<sup>13</sup> On the western frontier of Germany provisions for plebiscites were made with respect to the Kreise of Eupen and Malmédy (Arts. 34-35), and the Saar Basin, at the termination of fifteen years from the coming into force of the treaty (Chap. III of Annex following Art. 50). On the eastern frontier provisions for plebiscites were made with respect to a portion of Upper Silesia (Art. 88, and Annex), and two specified areas of East Prussia (Arts. 94-97). According to Art. 109, the frontier between Germany and Denmark was to be fixed "in conformity with the wishes of the population," and to that end provision was made for a plebiscite in a definite area of Schleswig.

"All 'territories inhabited by indubitably Polish populations' have been accorded to Poland. All territory inhabited by German majorities, save for a few isolated towns and for colonies established on land recently forcibly expropriated and situated in the midst of indubitably Polish territory, has been left to Germany.

"Wherever the will of the people is in doubt a plebiscite has been provided for. The town of Danzig is to be constituted a free city, so that the inhabitants will be autonomous and not come under Polish rule, and will form no part of the Polish State. . . .

"At the same time, in certain cases, the German note has established a case for rectification, which will be made; and in view of the contention that Upper Silesia, though inhabited by a two-to-one majority of Poles (1,250,000 to 650,000, 1910, German census), wishes to remain a part of Germany, they are willing that the question of whether Upper Silesia should form a part of Germany, or of Poland, should be determined by the vote of the inhabitants themselves." Letter of M. Clemenceau in behalf of the Allied and Associated Powers, to Count von Brockdorff-Rantzau, President of the German Peace Commission at Paris, June 16, 1919, in reply to German counter-proposals, Misc. No. 4 (1919), Cmd. 258, 6-7; Conditions of Peace with Germany, Senate Doc. No. 149, 66 Cong., 1 sess., 97, 101.

*Compare*, however, the German renunciations in favor of Japan with respect to Shantung, contained in Arts. 156-158.

See also memorandum of Premiers Millerand and Lloyd George, of Feb. 17, 1920, for President Wilson, referring to the inclusion of 3,000,000 Germans in Czechoslovakia, *Brit. and For. State Pap.*, CXIII, 846, 852.

See Arnold J. Toynbee, "A Turning Point in History," *Foreign Affairs*, 1939, XVII, 305, 316-317.

<sup>14</sup> In this effort the United States played a conspicuous part. Commissions appointed by the American Delegation at the Peace Conference were sent to enemy territory, and there made investigations of archives and authentic documents relative to the validity and merits of geographical and ethnological claims.

§ 109.<sup>1</sup> For the text of the memorandum see Congressional Record, Feb. 27, 1920, LIX, No. 66, p. 3779.

<sup>2</sup> See Congressional Record, Feb. 27, 1920, LIX, No. 66, p. 3782, for a paraphrase of the proposals of Jan. 14, 1920. *Cf.* also inquiry of Mr. Lansing, Secy. of State, Jan. 19, 1920, *id.*; also statement of the French and British Prime Ministers of Jan. 23, 1920, communicated to Mr. Wallace, American Ambassador at Paris, for transmission to Mr. Lansing, *id.* It should

adhere to this principle, partly because it demanded the acceptance as an alternative, of the Treaty of London of 1915, believed to be at variance with the idea of self-determination, President Wilson on February 10, 1920, made vigorous protest.<sup>3</sup> It was declared in his behalf that if it did not appear feasible to secure acceptance of the concessions offered in the memorandum of December 9, he would be obliged to "take under serious consideration the withdrawal of the treaty with Germany and the agreement between the United States and France of June 28, 1919," which were then before the Senate. Following a reply signed by the Prime Ministers of France and Great Britain, February 17, 1920, the President on February 24, 1920, addressed to them a note in which he declared it to be "the central principle fought for in the war that no government or group of governments has the right to dispose of the territory or to determine the political allegiance of any free people."<sup>4</sup> His position was that "the Powers associated against Germany gave final and irrefutable proof of their sincerity in the war" by writing into the treaty of Versailles, Article X of the Covenant of the League of Nations, which was said to constitute an assurance that all the great Powers had done what they had compelled Germany to do—to forego all territorial aggression and all interference with the free political self-determination of the peoples of the world.<sup>5</sup> The President announced that he would

be observed that the United States was not a party to the proposals of Jan. 14, 1920, and does not appear to have been informed as to their contents until the response elicited by Mr. Lansing's inquiry.

<sup>3</sup> Congressional Record, Feb. 27, 1920, LIX, No. 66, pp. 3783–3784. It was here said in part: "But if substantial agreement on what is just and reasonable is not to determine international issues, if the country possessing the most endurance in pressing its demands rather than the country armed with a just cause is to gain the support of the Powers, if forcible seizure of coveted areas is to be permitted and condoned and is to receive ultimate justification by creating a situation so difficult that decision favorable to the aggressor is deemed a practical necessity; if deliberately incited ambition is, under the name of national sentiment, to be rewarded at the expense of the small and the weak; if, in a word, the old order of things which brought so many evils on the world is still to prevail, then the time is not yet come when this Government can enter a concert of Powers the very existence of which must depend upon a new spirit and a new order. The American people are willing to share in such high enterprise, but many among them are fearful lest they become entangled in international policies and committed to international obligations, foreign alike to their ideals and their traditions. To commit them to such a policy as that embodied in the latest Adriatic proposals and to obligate them to maintain injustice as against the claims of justice, would be to provide the most solid ground for such fears. This Government can undertake no such grave responsibility."

<sup>4</sup> Congressional Record, Feb. 27, 1920, LIX, No. 66, p. 3786.

<sup>5</sup> It should be observed that in the memorandum of Feb. 17, 1920, defending their proposals of Jan. 14, 1920, the British and French Governments adverted to the difficulty of reconciling ethnographic with other considerations in general treaties of peace, and declared that this was recognized by President Wilson and his colleagues. That ethnologic reasons could not be the only ones to be taken into account, was said to be "clearly shown by the inclusion of three million Germans in Czecho-Slovakia and the proposals so actively supported by the United States delegation for the inclusion within Poland of great Ruthenian majorities, exceeding three million five hundred thousand in number, to Polish rule."

The foregoing correspondence is contained in Brit. and For. St. Pap., CXIII, 807–868.

In a telegram to Mr. Jay of the American Embassy at Rome, Sept. 24, 1919, President Wilson declared: "I could not, consistently with the principles upon which the rest of the treaty settlements are drawn, acquiesce in the extension of Italian sovereignty to Fiume." (Miller's Diary, XX, 425.)

See also Miller's Diary, XIX, 529–556, for discussions relative to the Adriatic Problem, October, 1919.

On Jan. 27, 1924, an "agreement" concluded by the Serb-Croat-Slovene State and Italy, concerning Fiume, after announcing that the parties were "convinced of the absolute im-

make no objection to a settlement mutually agreeable to Italy and Yugoslavia regarding their common frontier in the Fiume region, provided that such an agreement was not made on the basis of compensations elsewhere at the expense of nationals of a third Power; and he suggested that the results of direct negotiations of the two interested Powers would fall within the scope of the principle of self-determination.

(bb)

§ 109A. **The Same.** Together with the Treaty of Versailles with Germany, of June 28, 1919,<sup>1</sup> there should be observed the course of action followed by the Allied and Associated Powers, as expressed in the treaties of Saint Germain-en-Laye, with Austria, of September 10, 1919,<sup>2</sup> of Neuilly-sur-Seine, with Bulgaria, of November 27, 1919,<sup>3</sup> of Trianon with Hungary, of June 4, 1920,<sup>4</sup> of Sèvres with Turkey, of August 10, 1920 (however abortive it proved to be),<sup>5</sup> and of Lausanne, with Turkey, of July 24, 1923.<sup>6</sup> These several documents reveal in varying degree and form the sense of freedom exhibited by the Allied and Associated Powers to avail themselves of their own military achievement in order not only to retain control, but also to demand and obtain the transfer of rights of sovereignty over portions of enemy territory. Pursuant to their decree areas were lopped off from the country of which they were a part in order to afford an ample domain for new entities coming into statehood, such as Poland or Czechoslovakia.<sup>7</sup> Others were ceded to the victors for subjection to the mandatory system.<sup>8</sup> Still, again, States were themselves politically dismembered, and territories detached in order to enlarge the domain of others, or to create fresh

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possibility of organizing in any practical fashion the Free State of Fiume," referred to, and in harmony with, previous arrangements, declared in Art. 2, that "The Government of the Serbs, Croats and Slovenes recognizes the full and entire sovereignty of the Kingdom of Italy over the City and Port of Fiume and over the territory assigned to it by the frontier line indicated in the following Article." League of Nations Treaty Series, XXIV, 37. Cf. Art. IV of the Treaty of Rapallo, between the same parties, of Nov. 12, 1920, League of Nations Treaty Series, XVIII, 397, 401; also Art. II of agreement between the same parties of Oct. 23, 1922, League of Nations Treaty Series, XVIII, 410, 411.

See also, Art. 53, of the Treaty of Trianon between the Allied and Associated Powers and Hungary, of June 4, 1920, U. S. Treaty Vol. III, 3539, 3563.

§ 109A. <sup>1</sup> U. S. Treaty Vol. III, 3329.

<sup>2</sup> *Id.*, 3149.

<sup>3</sup> British Treaty Series, No. 5, 1920 [Cmd. 522]; also Treaties of Peace 1919-1923, Carnegie Endowment for International Peace, New York, 1924, II, 653.

<sup>4</sup> U. S. Treaty Vol. III, 3539.

<sup>5</sup> British Treaty Series, No. 11, 1920 [Cmd. 964]; Treaties of Peace 1919-1923, Carnegie Endowment for International Peace, II, 789.

<sup>6</sup> League of Nations Treaty Series, XXVIII, 11.

See Lt. Col. Lawrence Martin, "The Legal Basis of the New Boundaries," being Introduction to Vol. I, of The Treaties of Peace, 1919-1923, published by Carnegie Endowment for International Peace, New York, 1924.

<sup>7</sup> See, for example, Art. 27 (Part 6) and Art. 47 of the Treaty of Saint Germain-en-Laye, of Sept. 10, 1919, in relation to Czechoslovakia; Art. 27 (Part 4) and Art. 49 of the Treaty of Trianon of June 4, 1920, in relation to Czechoslovakia.

See also, Art. 27 (Part 7) and Art. 87, of the Treaty of Versailles of June 28, 1919, in relation to Poland.

<sup>8</sup> See Art. 119 in connection with Art. 22 of the Treaty of Versailles.

Also the relinquishment by Turkey in Art. 16 of the Treaty of Lausanne, of July 24, 1923. Also The Mandates System, *supra*, § 26A.

lines of demarcation that policy decreed.<sup>9</sup> The foregoing treaties were employed and served as convenient instruments to register the results and to embody the technical assent of grantors or relinquishers. In the course of such action the victors commonly acknowledged no legal right on the part of their enemies, as they stood before the peace treaties were perfected, to thwart territorial deprivations. The defeated States, as such, acting through, and as represented by their existing governmental agencies, were not deemed to possess a right to continue to maintain their territorial integrity.

The Allied and Associated Powers were not indisposed on the other hand, as has been observed, in the case of the Treaty of Versailles,<sup>10</sup> to endeavor to ascertain and heed the desires of predominant groups of peoples occupying certain areas as might be manifested through the operation of plebiscites; and the preferences so ascertained were to outweigh the opposing equities of the existing enemy governments.<sup>11</sup> Yet this concern and procedure, not always applied with respect to Germany,<sup>12</sup> found little place in the treaty of Saint Germain-en-Laye,<sup>13</sup> and none in the Treaties of Neuilly,<sup>14</sup> or of Trianon.<sup>15</sup>

In the making of decisions concerning the nature and extent of territorial sacrifices to be exacted of enemy States, ethnographical considerations were appraised and were accorded an influence which was not, however, always predominant. Thus, the limits to which, for example, Hungary was restricted, excluded on every frontier a Magyar population, and on its northern border served to deprive that State of a substantial area that was Hungarian to the core.<sup>16</sup>

<sup>9</sup> The disintegration of the Austro-Hungarian Empire is illustrative.

See also, Art. 27 (Part 2) and Art. 36 of the Treaty of Saint Germain-en-Laye in relation to Italy.

<sup>10</sup> See §§ 108 and 109, *supra*.

<sup>11</sup> See Arts. 34 and 35, Annex following Art. 50, Art. 88 and Annex; Arts. 94-97, and Art. 109, of the Treaty of Versailles.

<sup>12</sup> See, for example, Arts. 156-158 of the Treaty of Versailles in relation to Shantung; also Arts. 100-109 respecting the Free City of Danzig.

<sup>13</sup> See arrangements of Art. 49 respecting the Klagenfurt area.

<sup>14</sup> "In the treaty of St. Germain with Austria the Austrian Tyrol was ceded to the Kingdom of Italy against the known will of substantially the entire population of that region." Robert Lansing, "Self-Determination — A Discussion of the Phrase," reprinted by courtesy of the *Saturday Evening Post*, 1921, p. 11.

<sup>15</sup> See the Frontiers of Bulgaria as fixed in Art. 27; also the renunciations in favor of the Serb-Croat-Slovene State (Art. 37), in favor of Greece (Art. 42), and in favor of the Principal Allied and Associated Powers in relation to certain territories in Thrace. (Art. 48.)

<sup>16</sup> Observe the frontiers laid down in Art. 27; and the renunciations in favor of Italy (Art. 36), in favor of the Serb-Croat-Slovene State (Art. 42), in favor of Roumania (Art. 45), in favor of Czecho-Slovakia (Art. 49) and the relinquishment of Fiume (Art. 53); also renunciations in favor of Austria (Art. 71), and in favor of the Principal Allied and Associated Powers (Art. 75).

See in this connection, Hungarian Note XXII and Annex I, Hungarian Peace Negotiations, published by the Royal Hungarian Ministry of Foreign Affairs, Budapest, 1922, II, 12-76; communication of the Allied and Associated Powers to the President of the Hungarian Delegation, May 6, 1920, *id.*, 545-547.

The use of plebiscites was, however, in certain situations contemplated in the Treaty of Sevres of Aug. 10, 1920, that failed to be consummated. See Arts. 62-64 respecting Kurdistan; and Arts. 65-83, respecting Smyrna.

<sup>16</sup> See *Carte ethnographique de la Hongrie construite en accordance avec la densité de la population*, by Count Paul Teleki, being No. IV of *Les Négociations de la Paix Hongroise: Compte Rendu sur les travaux de la Délégation de Paix de Hongrie a Neuilly s/S de Janvier à Mars 1920*, published by the Hungarian Ministry of Foreign Affairs, Budapest, 1920.

See Temperley, Vol. IV, 429, 434.

Economic, geographic and strategic considerations generally played their part. In this regard, however, the special interests of neighboring States aligned with the victors in the major conflict perhaps exercised greatest weight. In final decisions that found expression in the treaties of peace, whether or not respectful of ethnographic or other equities of the occupants of particular areas, no legal duty to pursue a different course was acknowledged.

In demanding the cession by Germany of its oversea possessions and the ultimate relinquishment by Turkey of a broad area in Asia, and in the subjection of both classes of accessions to the mandates system, the will of the victors was responsible for the transfer of sovereignty, and for the character of the restraints to be applied by the successors.<sup>17</sup>

In general, the settlements expressed in the several treaties appeared to indicate the following conclusions on the part of the States that fixed the terms of peace: first, the right of a victor to demand and obtain a transfer or relinquishment on terms of its own devising; secondly, the desirability of ascertaining and heeding the preferences of the occupants of a particular area (when not a backward people); thirdly, the subordination to those preferences of the desires of an enemy State as expressed by its existing government; fourthly, the absence of any duty to seek and respect the preferences of such occupants when for any reason such action was deemed to be impracticable; fifthly, the absence of both a sense of duty and a disposition, to respect ethnographic, economic or geographic equities of opposing States, or of the occupants of areas belonging to them, whenever a strong conflicting strategic or economic or political interest of the victors was deemed to be apparent.

(cc)

§ 109B. **Tacna-Arica.** The plebiscitary provisions of Article III of the Treaty of Peace of Ancón between Chile and Peru of October 20, 1883,<sup>1</sup> in relation to the territory of the provinces of Tacna and Arica proved to be productive of a prolonged controversy between those Republics.<sup>2</sup> According to that Article the territory in question within specified limits:

The Burgenland and the Sopron Plebiscite was attributable to the Venice protocol of Oct. 13, 1921, concluded in behalf of Austria and Hungary, rather than to a treaty of peace. League of Nations Treaty Series, IX, 205.

<sup>17</sup> Declared Lt. Gen. J. C. Smuts in a Memorandum on the "Position and Powers of The League," Dec. 16, 1918: "In the second place, the German Colonies in the Pacific and Africa are inhabited by barbarians, who not only cannot possibly govern themselves, but to whom it would be impracticable to apply any idea of political self-determination in the European sense. They might be consulted as to whether they want their German masters back, but the result would be so much a foregone conclusion that the consultation would be quite superfluous." (Doc. 110, Miller's Diary, III, 34, 40.)

By the Treaty of Lausanne of July 24, 1923, Turkey appeared to be not unwilling to take cognizance of events and achievements that had served to wrest from Turkish control areas in Asia that were being subjected to the Mandates System. No specific reference was made to the matter in Art. 16. By the treaty of Sèvres of Aug. 10, 1920, through which in consequence of the then existing military domination of its enemies, Turkey was obliged to make important territorial cessions to them, and notably in favor of Greece in relation to territorial rights in Europe (see Art. 84), there was in Arts. 94-97 definite reference to the Mandates System as applied to Syria, Mesopotamia and Palestine. See also Art. 132.

§ 109B. <sup>1</sup> *Nouv. Rec. Gén.*, 2 sér., X, 191, Brit. and Foreign St. Papers, LXXIV, 349.

<sup>2</sup> Concerning earlier stages of the controversy see, Sarah Wambaugh, Monograph on Plebiscites, 156-165; documents, *id.*, 985-1050, embracing the text of the Treaty of Ancón at p. 992.

shall remain in the possession of Chile and subject to Chilean laws and authorities, during the term of ten years, to be reckoned from the ratification of the present Treaty of Peace. At the expiration of that term a plebiscite shall, by means of a popular vote, decide whether the territory of the provinces referred to is to remain definitively under the dominion and sovereignty of Chile, or continue to form a part of the Peruvian territory. Whichever of the two countries in whose favour the provinces of Tacna and Arica are to be annexed shall pay to the other 10,000,000 dollars in Chilean silver currency, or Peruvian soles of the same standard and weight.

A protracted dispute concerning the requirements of this Article under circumstances that projected themselves, and during a period which had witnessed the holding of no plebiscite, culminated in the acceptance by the two Republics of an invitation from the Government of the United States to send representatives to Washington to consider the adjustment of the issue with respect to the unfulfilled provisions of the Treaty of Ancón. There resulted a protocol, and supplementary act concluded July 20, 1922,<sup>3</sup> whereby there was placed upon the President of the United States as arbitrator the following duty: first, to determine "Whether, in the present circumstances a plebiscite shall or shall not be held"; and secondly, in the event of a decision in favor of holding a plebiscite, "to determine the conditions for the holding of such plebiscite."<sup>4</sup>

An award by the Arbitrator (President Coolidge) of March 4, 1925, announced that the provisions of the second and third paragraphs of the Treaty of Ancón were still in effect; "that the plebiscite should be held," and "that the interests of both parties can be properly safeguarded by establishing suitable conditions therefor."<sup>5</sup> Conditions for a plebiscite were accordingly laid down by the Arbitrator.<sup>6</sup>

What subsequently served to frustrate the effort to hold a plebiscite was the fact that as Chile insisted upon the right derived from the Treaty of Ancón to continue administration over the disputed area, neither the Arbitrator nor the plebiscitary commission acting under him could establish a neutral zone or assert actual control in the area. The arbitration proved, nevertheless, to be a means of paving the way for an ultimate diplomatic settlement which the experience of previous years had shown to be impossible so long as the questions pertaining to the holding of a plebiscite remained open.<sup>7</sup>

<sup>3</sup> *Am. J.*, XVII, *Supplement, Official Documents*, 11-12.

<sup>4</sup> See Opinion and Award of the Arbitrator, March 4, 1925, Washington, 1925, 4, *Am. J.*, XIX, 393, 395.

<sup>5</sup> *Am. J.*, XIX, 393, 415.

<sup>6</sup> *Id.*, 415.

The burden of the final opinion and award of the President as Arbitrator, in accordance with the common practice, fell upon the Secretary of State, Mr. Hughes, a circumstance anticipated by the States at variance, and in fact productive of the choice of the Arbitrator who was agreed upon.

<sup>7</sup> The paragraph is taken from the Sketch of Mr. Hughes by this author in *American Secretaries of State and Their Diplomacy*, X, 354.

"A question having arisen as to the possibility of holding a free and fair plebiscite, a resolution for the termination of the proceedings of the Commission was adopted by it on June 14, 1926, the Chilean Commissioner not voting. On June 21, following the Commission declared itself adjourned." (Hackworth, *Dig.*, I, 748.)

"On October 3, 1928, pursuant to a suggestion of the Secretary of State of the United States, the two parties resumed direct negotiations on the subject after they had renewed diplomatic relations — broken off since 1910. As a result of these negotiations, the President of the United States (Herbert Hoover), not as arbitrator but in the exercise of good offices, at the request of both countries submitted a proposal for the final settlement of the Tacna-Arica dispute. The proposal was accepted by the two countries and a treaty for the settlement of the dispute was signed by them at Lima on June 3, 1929. Article 1 of the treaty states that the dispute arising out of article III of the Treaty of Ancón 'is hereby finally settled.' . . . In accordance with article 4 of the treaty of 1929, the final act of demarcation of the boundary between Peru and Chile was signed at Lima on August 5, 1930."<sup>8</sup>

(dd)

§ 109C. **The Stimson Declaration of 1932.** It will be recalled that the United States was a party to the so-called Nine Power Treaty relating to the Principles and Policies to be followed in matters concerning China, which was concluded on February 6, 1922, at the Washington Conference on Limitation of Armament.<sup>1</sup> The other parties were Belgium, the British Empire, China, France, Italy, Japan, The Netherlands, and Portugal. As a beneficiary of rights thereunder, the United States seemingly invoked it when Secretary Stimson in the course of the Sino-Japanese conflict in Manchuria, declared in a note addressed to both the Chinese and Japanese Governments on January 7, 1932, that

In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese

<sup>8</sup> Statement in Hackworth, Dig., I, 748-749. For the text of the Treaty of June 3, 1929, see League of Nations Treaty Series, XCIV, 406.

§ 109C. <sup>1</sup> U. S. Treaty Vol. III, 3120.

According to Art. I, the Contracting Powers other than China, agreed:

(1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China;

(2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government;

(3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China;

(4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from countenancing action inimical to the security of such States.

According to Art. II of the same treaty: "The Contracting Powers agree not to enter into any treaty, agreement, arrangement, or understanding, either with one another, or, individually or collectively, with any Power or Powers, which would infringe or impair the principles stated in Article I."

A declaration by China respecting non-alienation and leasing of Chinese territory was "made at the first meeting of the committee on Pacific and Far Eastern questions November 16, 1922; reiterated at the fourth meeting of the committee November 22, 1922; spread upon the records of the Conference on the Limitation of Armament at the sixth plenary meeting February 4, 1922." (*Id.*, 3125.)

See Stanley K. Hornbeck, "Policy and Action in Relation to the Current Situation in the Far East," Department of State Press Releases, Oct. 22, 1932.

Republic that it can not admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, or to the territorial policy relative to China, commonly known as the open-door policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.<sup>2</sup>

The success of the effort of Japan in bringing about by force a situation that resulted in the carving out of Chinese territory an area in Manchuria which was to be the seat of a new State — Manchukuo, which Japan proceeded to set up and recognize as such, is well known.<sup>3</sup> It is here sought merely to advert to the reluctance of the United States to acknowledge the lawfulness of the achievement.<sup>4</sup>

Obviously an announcement indicative of unwillingness to recognize the legality of territorial accessions or achievements because they are regarded as contrary to the requirements of the conventional or customary law constitute merely declarations of policy. They may be useful if they serve in fact to

<sup>2</sup> Dept. of State Press Releases, Jan. 9, 1932, 41.

See documents in Hackworth, Dig., I, 334, footnote.

See also Resolution adopted by the Assembly of the League of Nations, March 11, 1932, declaring it to be "incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations, or to the Pact of Paris," *Official Journal, Spec. Supp.*, No. 101, 1932, Vol. I, p. 87.

<sup>3</sup> See Manchuria: Report of the Commission of Enquiry appointed by the League of Nations (known as the Lytton Report and of which the Earl of Lytton, Chairman, and Count Aldrovandi, General of Division, and Henri Claudel, Major-General Frank McCoy, and Dr. Heinrich Schnee were members), Sept. 4, 1932, League of Nations Document — C. 663. M. 320. 1932. VII, Dept. of State Publication No. 378. In Chap. VI of the Report the Commission announced "the conclusion that there is no general Chinese support for the 'Manchukuo Government,' which is regarded by the local Chinese as an instrument of the Japanese," *id.*, 111.

See also wireless address by Lord Lytton from Geneva, Nov. 20, 1932, published in *New York Times*, Nov. 21, 1932, in the course of which it was said: "The Japanese claimed that the military force they used was only a defensive measure, and that the establishment of the new State was the result of a genuine independent movement on the part of the people of Manchuria themselves. This contention was not, in our view, supported by the facts. . . . The present situation in Manchuria cannot be regarded as consistent with existing treaties."

See Efforts to Restrict Freedom to Embark Upon War. The Briand-Kellogg Pact, *infra*, § 596A.

<sup>4</sup> See in this connection, Lauterpacht's 5 ed. of Oppenheim, I, § 75i, with bibliography in which reference is made (in part) to Arnold D. McNair, "The Stimson Doctrine of Non-Recognition," *Brit. Y.B.*, 1933, 65; Sir John Fischer Williams, "The New Doctrine of 'Recognition,'" *Grotius Society*, XVIII, 109; same writer, "*La Doctrine de la Reconnaissance en Droit International et ses Développements Récents*," *Recueil des Cours*, 1933, II, 199, 265; F. A. Middlebush, "Non-Recognition as a Sanction of International Law," *Proceedings, Am. Soc. Int. Law*, 1933, 40; Quincy Wright, "The Stimson Note of January 7, 1932," *Am. J.*, XXVI, 342; Chesney Hill, "Recent Policies of Non-Recognition," *Int. Conciliation*, Oct., 1933, No. 293.

See also Kimon A. Doukas, "The Non-Recognition Law of the United States," *Mich. Law Rev.*, 1937, XXXV, 1071.



deter the commission of acts which are deplored. They may also prove to be an embarrassment to a State which subsequently decides to acknowledge the legal value of acts which it previously condemned. The Stimson declaration was perhaps a desirable token of American disapproval of conduct such as that to which the Secretary of State made reference.

Elsewhere are noted American governmental utterances condemning acts which were destructive of the political independence of Czechoslovakia and Poland in 1939, and which embraced the forcible seizure of the territories of those countries. In those cases it was the danger lest statehood be demolished through territorial aggression that was of chief concern to the United States, and which caused its Government to make announcement of unwillingness to recognize the legality of what had taken place.<sup>5</sup> The stern denunciation by President Roosevelt of the treatment which Russia accorded Finland in the same year was partly attributable to the methods by which the former State undertook to jeopardize "the rights of mankind to self-government" as possessed by the latter.<sup>6</sup>

(ee)

§ 109D. **Bolivia and Paraguay. The Chaco Dispute.** On August 3, 1932, the representatives of nineteen American Republics, including the United States, declared to the Governments of Bolivia and Paraguay in relation to the existing Chaco dispute, that they would "not recognize any territorial arrangement of this controversy which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms."<sup>1</sup> By this process it was doubtless sought to fortify either Republic in challenging the demand of its adversary, however victorious, that rights of sovereignty be ceded, or territorial claims be relinquished, as the penalty of defeat or the reward of victory.

In the final adjustment of the controversy which had to await the termination of a protracted war between the contestants and even survive the resumption of peace,<sup>2</sup> the arbitrators (comprising the Presidents of the Republics of Argentina, Chile, the United States, Peru and Uruguay, through the plenipotentiary delegates representing those officials) found themselves clothed by the treaty concluded by Bolivia and Paraguay on July 21, 1938, with authority to exercise their functions as "arbitrators in equity, who acting *ex aequo et bono*," were to "give their arbitral award in accordance with this and the following clauses."<sup>3</sup> Those "following clauses" laid down certain geographical

<sup>5</sup> See The Equality and Similarity of Independent States, Observance of the Principle, *supra*, § 11.

<sup>6</sup> See *id.*

§ 109D. <sup>1</sup> Dept. of State Press Releases, Aug. 6, 1932, 100.

Concerning objections made by the Argentine Government to the declaration in November, 1932, see *New York Times*, Nov. 19, 1932; also *Republica Argentina Ministerio de Relaciones Exteriores y Culto, Memoria presentada al Honorable Congreso Nacional*, 1932-1933, I, 41.

<sup>2</sup> See Technical Aspects of the Termination of War, Modes of Termination, Agreement, *infra*, § 908.

<sup>3</sup> Dept. of State Press Releases, July 23, 1938, 44.

limits of arbitral freedom.<sup>4</sup> The unanimous award of October 10, 1938, fixed a boundary in the Chaco which, however equitable in the opinion of the arbitrators, was not and could not, in view of the terms of the treaty of peace, be heedless of the military achievement of Paraguay.<sup>5</sup>

(ff)

§ 109E. **Recent Pan American Agreements.** In 1933, the American Republics embracing the United States acknowledged "as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which may have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure."<sup>1</sup> They reaffirmed that acknowledgment in 1936.<sup>2</sup> They did so again at the Habana Conference of 1940.<sup>3</sup> By this process the American Republics agreed to respect a self-imposed obligation that was to become the conventional rule by which they should test the propriety of their conduct with respect to each other. Without failing to note the character of the final settlement of the controversy between Bolivia and Paraguay pertaining to the Chaco Boreal,<sup>4</sup> it may be said that the American Republics have made distinct progress in laying down the rule which they have proclaimed. It is believed to be a deterrent of territorial acquisitions by any of their number that are defiant of the relation of American republican soil to the sovereign to which it belongs.

(gg)

§ 109F. **Some Conclusions.** Events of the past few years in Manchuria, Ethiopia, Czechoslovakia, Albania, Poland, Danzig and Finland have served to

<sup>4</sup> See P. C. Jessup and Bryce Wood, "The Chaco Award," *The Independent Journal of Columbia University*, Dec. 9, 1938, 2, where it is said: "The six Presidents were by no means free to apply historical judgment and legal doctrine; for Paraguay had won, and they were required by the peace treaty to give precision to the boundaries of that conquest, although within those limits they were authorized to decide as 'arbitrators in equity,' *ex aequo et bono*."

<sup>5</sup> Dept. of State Press Releases, Oct. 15, 1938, 263.

See also Hackworth, Dig., I, 754, and documents there cited.

Declares L. H. Woolsey, in the course of an editorial comment on "The Settlement of the Chaco Dispute," *Am. J.*, XXXIII, 126, 128: "Notwithstanding the assiduous application of peaceful methods on all sides, it must be admitted that the final result was largely determined by the military victory of doughty Paraguay."

§ 109E. <sup>1</sup> Art. 11 of Convention on Rights and Duties of States, concluded at the Seventh International Conference of American States, Dec. 26, 1933, U. S. Treaty Vol. IV, 4807, 4809, where it is added: "The territory of a State is inviolable and may not be the object of military occupation nor of other measures of force imposed by another State directly or indirectly or for any motive whatever even temporarily."

<sup>2</sup> Art. 1 of Treaty for Fulfillment of Existing Treaties between the American States, U. S. Treaty Vol. IV, 4831, 4833, where it was declared that as between the Contracting States "they will not recognize any territorial arrangement not obtained by pacific means, nor the validity of the occupation or acquisition of territories brought about by force of arms."

<sup>3</sup> In the Convention on the Provisional Administration of European Colonies and Possessions in the Americas, concluded July 30, 1940, it was declared: "That the American Republics consider that force cannot constitute the basis of rights, and they condemn all violence whether under the form of conquest, of stipulations which may have been imposed by the belligerents in the clauses of a treaty, or by any other process." (Dept. of State Bulletin, Aug. 24, 1940, 145.)

<sup>4</sup> See Bolivia and Paraguay, The Chaco Dispute, *supra*, § 109D.

accentuate the extent of the difference of thought prevailing in certain non-American countries and that which welds together the Republics of the western hemisphere. If Japan, Italy, Germany and Russia have evinced no sense of legal obligation to refrain from territorial aggrandizement by measures that were contemptuous of the rights of States to which particular areas belonged, they were following a pattern cut out by those who were responsible for settlements that marked the termination of the World War of 1914–1918. At the present time the announcement of pious resolutions by a single State and the renunciatory declarations of an important group of States within a particular region, may not be deemed to be as impressive as the circumstances that under sufficient provocation, and in varying situations, States do not as yet generally acknowledge a sense of legal obligation not to exact from a defeated foe or even from a weak neighbor which has not become a belligerent, the transfer of rights of sovereignty over territory that is its own.

The definite removal of this sense of freedom calls for the support and acquiescence of States that are called upon to accept the restriction. That removal has not been wrought by the conventional arrangements of the American Republics (except in so far as they impose restrictions upon the contracting States). Hence their conduct will be regarded in non-American lands as mere proposals looking to the modification of the requirements of international law.

General acknowledgment that a principle roughly described as that of self-determination, with all that it implies, should obtain among the several members of the international society, and safeguard any one of them against the sacrifice of its territory at the behest of an implacable foe or of a ruthless neighbor, would seem to necessitate consideration of and agreement concerning two cognate questions: first, whether under all circumstances, despite its own laches or misconduct, a State is to be regarded as incapable of territorial dismemberment; and secondly, whether the opposition of the occupants of a particular area to their existing territorial sovereign in respect to the matter of the cession of that area is to be deemed to suffice to thwart a valid transfer, or to express it more bluntly, whether a plebiscite is to be regarded as a condition precedent to a valid transaction.

It may be doubted whether the international society is, or will soon be prepared to acknowledge that the individual State need not pay a substantial price for assurance of respect for its territorial integrity, or that it pays the requisite price when its conduct in special relation to its own domain is persistently contemptuous of the requirements of international law. That foreign disrespect for ethnographical or other factors which unite the occupants of a particular area in opposition to the transfer of it to a foreign State is a breeder of discord in the realm of international relations is no longer beyond the vision of responsible statesmen. It is only through careful examination and appraisal of the significance of these considerations that interested States are to be expected to find a common and workable basis enabling them to accept the principle of self-determination as a part of the law that governs their relations with each other.

## (ii)

§ 110. **Dependent States as Grantors.** A dependent State, by reason of the relationship which it bears to the State on which it depends, normally lacks the right, without the consent of the latter, to cede territory. The agreement establishing that relationship may definitely refer to this fact. Such was the case in the treaty of May 22, 1903, declaratory of the fundamental relations to exist between the United States and Cuba, and fixing the status of the latter.<sup>1</sup> It is highly improbable that an arrangement fixing the terms of dependency would yield latitude to a dependent State in this regard as by clothing it with capacity to make a valid transfer according to its own and sole discretion.<sup>2</sup>

While the United States by reason of its relationship to Panama, has evinced a sense of obligation to enquire into the merits of any controversies relating to the boundaries of that Republic, and concern respecting the due observance of arbitral awards marking the solution of them, it is not understood to interfere with the freedom of Panama to agree through appropriate terms to the adjustment of disputes of such a character by recourse to arbitration.<sup>3</sup> The results thereof are obviously not productive of acts of transfer of sovereignty, but rather of authoritative indications of correct territorial limits.

## (iii)

§ 111. **Belligerent States as Grantors.** A State engaged in war does not necessarily lack the right to cede territory to a neutral.<sup>1</sup> There may be circumstances where, as between the neutral grantee and the enemy of the grantor, there are no equities in favor of the latter. This would appear to be true where the transfer of rights of property and control offers no interference with the military or naval operations of the belligerents. A different situation would

§ 110. <sup>1</sup> Art. I, Malloy's Treaties, I, 363; *cf.* McNair's 4 ed. of Oppenheim, I, § 215, note (1), p. 442. On November 28, 1907, a treaty was concluded in behalf of Belgium and the Independent State of the Congo, providing for the cession of the latter to the former. *Am. J.*, III, *Supp.*, 73. See, also, a decree suppressing the foundation of the Crown, March 5, 1908, *id.*, III, 87; Belgian laws of Oct. 18, 1908, approving treaty of cession, and act additional thereto. *Arch. Dip.* CVII, 291 and 293. It will be remembered that both the grantor and the grantee, at the time of the conclusion of the treaty, were neutralized States.

<sup>2</sup> Tibet, itself a tributary to China, by a convention with Great Britain of Sept. 7, 1904, undertook that no portion of Tibetan territory should "be ceded, sold, leased, mortgaged or otherwise given for occupation, to any foreign Power." Brit. and For. St. Papers, XCVIII, 148, 150. China, by a convention with Great Britain of April 27, 1906, confirmed the convention of Sept. 7, 1904, Great Britain engaging on its part not to annex Tibetan territory or to interfere in the administration thereof. China undertook also not to permit any other foreign State to interfere with the territory or internal administration of Tibet. Brit. and For. St. Papers, CXIX, 171, 172. See W. K. Lee, *Tibet in World Politics (1774-1922)*, New York, 1931, Chap. I.

<sup>3</sup> See Panama, *supra*, § 20.

§ 111. <sup>1</sup> "That the right of a neutral to procure for itself by a *bona fide* transaction property of any sort from a belligerent power ought not to be frustrated by the chance that a rightful conquest thereof might thereby be precluded. A contrary doctrine would sacrifice the just interests of peace to the unreasonable pretensions of war, and the positive rights of one nation to the possible rights of another." Mr. Madison, Secy. of State, to Messrs. Livingston and Monroe, Plenipotentiaries to France, May 28, 1803, *Am. State Pap.*, For. Rel., II, 562.

arise, however, if the territory concerned were occupied by the enemy of the grantor, or were in its grasp, or were within the zone of hostilities. In such case the lands sought to be transferred by virtue of a treaty of cession would doubtless not be deemed to acquire a neutral character, and would continue to be regarded for belligerent purposes as hostile territory.

(c)

§ 112. **Protection of Territory Pending Cession.** No right of sovereignty is transferred by virtue of a treaty of cession prior to the ratification of the agreement by both the grantor and the grantee embracing an exchange of ratifications.<sup>1</sup> The question may arise, however, whether the prospective grantee, after having entered into negotiations for the cession, and having authorized the signature of an appropriate treaty which has been duly ratified by the grantor, acquires any right to protect the territory concerned against external aggression. The United States appears to have taken the stand that where the grantor has, by its act of ratification made known to the grantee, placed it within the power of the latter to accept the contract by taking appropriate steps, it may, within the period of time allotted for ratification, share with the grantor the right of protection.<sup>2</sup> Such a claim is based on the theory that it lies within the power of the contingent grantee to accept an unrevoked offer, and that at least before the expiration of a reasonable interval, outside interference tending to impair the value of the territory concerned may be justly thwarted.<sup>3</sup>

§ 112. <sup>1</sup> But see special message of President Tyler, May 15, 1844, respecting the nature of the right of the United States to protect Texas by virtue of a treaty which ultimately failed to receive the necessary approval of the Senate. Senate Doc. No. 341, 28 Cong. 1 Sess., 74-81, Moore, Dig., I, 274-275.

<sup>2</sup> On November 18, 1903, a convention was signed in behalf of the United States and Panama, providing for the grant to the former in perpetuity of the use, occupation and control of a zone of territory in Panama, in order to facilitate the construction of an interoceanic ship canal. The convention was ratified by Panama Dec. 2, 1903; ratification was advised by the Senate of the United States Feb. 23, 1904; and the treaty was ratified by the President Feb. 25, 1904. For. Rel. 1904, 543. On December 11, 1903, Mr. Hay, Secretary of State, in the course of a communication to General Reyes of Colombia, said: "Although the treaty has not yet become law by the action of the Senate, there are already inchoate rights and duties created by it which place the responsibility of preserving peace and order on the Isthmus in the hands of the Government of the United States and of Panama, even if such responsibilities were not imposed by the historical events of the last fifty years." For. Rel. 1903, 279. See President Polk, Annual Message, Dec. 2, 1845, Senate Doc. No. 1, 29 Cong., 1 Sess., 5. Moore, Dig., I, 277; also other documents, *id.*, I, 274-280.

<sup>3</sup> It must be clear that under the circumstances stated in the text the grantor must be regarded as free to withhold its final approval of the agreement and incidentally to terminate all negotiations and abandon the transaction. When, however, the grantor remains indisposed to do so, and is ready at the appropriate time to exchange ratifications with the grantee when it shall have availed itself of the opportunity to perfect the arrangement, there arises a situation when, with respect to other States, the position of the contingent or prospective grantee appears to be fortified.

It should be observed that the Permanent Court of International Justice, in construing the provisions of Article 256 of the Treaty of Versailles in the Seventh Judgment concerning German interests in Upper Silesia (the merits), found occasion to declare that: "Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement." (Publications, Permanent Court of International Justice, Series A, No. 7, p. 30.)

## (d)

§ 113. **Property Passing by Cession.** It is believed that on principle all public property of the grantor, and which by reason of its nature or use is to be fairly regarded as belonging within the territory ceded, should pass to the grantee. This would embrace property of whatsoever kind, whether movable or immovable, corporeal or incorporeal.

The matter is commonly adjusted by the terms of the treaty of cession. As these have oftentimes been of narrow scope, the omissions have given rise to controversy as to what the law of nations prescribed. The treaties of the nineteenth century in which the United States was the grantee of territory, always acknowledged that various forms of public immovable property such as buildings, wharves, barracks, docks and other like structures, together with the public domain to which they were attached, were embraced in the cession.<sup>1</sup> Doubt remained, however, as to the fate of heavy ordnance such as fixed cannon.<sup>2</sup> Moreover there appears to have been no design to include generally public movable property.

§ 113.<sup>1</sup> See, for example, Art. VIII of the treaty of peace with Spain, Dec. 10, 1898, Malloy's Treaties, II, 1692. Cf. also Art. II of treaty with France for the cession of Louisiana, April 30, 1803, *id.*, I, 509; Art. II of treaty with Spain respecting the cession of the Floridas, Feb. 22, 1819, *id.*, II, 1652; Art. II of treaty with Russia for the cession of Alaska, March 30, 1867, *id.*, 1522. In all of the foregoing Articles the cession embraced documents or archives referring exclusively to the sovereignty over the territory ceded. See especially the provisions in this regard in Art. VIII of the treaty with Spain of Dec. 10, 1898.

The same Article further provided that neither relinquishment nor cession, as the case might be, could "in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be." Cf. Articles V and IX of the Russo-Japanese Treaty of Portsmouth, Aug. 23 (Sept. 5), 1905, For. Rel. 1905, 824.

<sup>2</sup> Art. II of the treaty of April 30, 1803, with France, contained no specific provision with reference to cannon, which, according to the subsequent action of the contracting parties, were not deemed to pass to the grantee. Moore, Dig., I, 281, and documents there cited. After the cession of the Floridas to the United States, the grantee permitted the removal of cannon. Permission was given in consideration of the release by Spanish authorities of the duty of provisioning the troops whose transportation to Spain had been undertaken by the United States. See documents, *id.*, 282-284, especially, Mr. Adams, Secy. of State, to Mr. Nelson, Minister to Spain, April 28, 1823, MS. Inst. U. S. Ministers, IX, 183, 227. The treaty of cession of Feb. 22, 1819, made no provision as to the matter. The inventories of property delivered to the United States in pursuance of Art. II of the treaty with Russia of March 30, 1867, providing for the cession of Alaska (which embraced all public buildings, fortifications and barracks), included certain forts with their armaments. Moore, Dig., I, 285, and documents cited. The Commissioners who negotiated the Spanish-American treaty of peace of Dec. 10, 1898, were unable to agree as to the disposition of certain public property of Spain in the Island of Cuba and adjacent Spanish Islands, consisting of artillery and fixed batteries and fortifications, as well as fixtures and other property thereto belonging. *Id.*, 287. The treaty contained no provision as to the matter. With respect, however, to heavy guns and armaments in the Philippines it was agreed that "Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, livestock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain. Pieces of heavy ordnance, exclusive of field artillery, in the fortifications and coast defences, shall remain in their emplacements for the term of six months, to be reckoned from the exchange of ratifications of the treaty; and the United States may, in the meantime, purchase such material from Spain, if a satisfactory agreement between the two Governments on the subject shall be reached." Art. V, Malloy's Treaties, II, 1692. Cf. also, Moore, Dig., I, 288-289, and documents cited.

See Sullivan v. Kidd, 254 U. S. 453.

As a matter of expediency, in the normal case of a cession the terms of which are not dictated by the exigencies of war between the parties to the transaction, it is useful that the agreement should have the broadest possible scope, embracing all forms of the public property of the grantor, subject to such reservations as are specified. The convention between the United States and Denmark providing for the cession of the Danish West Indies, and concluded August 4, 1916, is illustrative. It was there announced that

This cession includes the right of property in all public, government, or crown lands, public buildings, wharves, ports, harbors, fortifications, barracks, public funds, rights, franchises, and privileges, and all other public property of every kind or description now belonging to Denmark together with all appurtenances thereto.

In this cession shall also be included any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the islands ceded, and which may now be existing either in the islands ceded or in Denmark. Such archives and records shall be carefully preserved, and authenticated copies thereof, as may be required, shall be at all times given to the United States Government or to the Danish Government, as the case may be, or to such properly authorized persons as may apply for them.<sup>3</sup>

It was agreed, however, by way of reservation, that the arms and military stores existing in the islands at the time of the cession and belonging to the Danish Government, should remain its property, and be removed by it, unless part of it were sold to the United States.<sup>4</sup> It was likewise agreed that the movables, especially silver plate and pictures which might be found in the government buildings in the islands ceded and belonging to the Danish Government, should remain its property and be duly removed.<sup>5</sup>

§ 114. **The Same.** According to the treaty of peace concluded with Germany at Versailles, June 28, 1919, the Powers to which German territory was ceded were to acquire "all property and possessions situated therein belonging to the German Empire or to the German States." The value of the acquisitions was to be fixed by the Reparation Commission, and paid by the State acquiring the territory to that Commission for the credit of the German Government on account of the sums due for reparation. The property thus described was to be deemed to include all the property of the Crown, the Empire or the States, and the private property of the former German Emperor and other royal per-

<sup>3</sup> Art. I, Treaty Series, No. 629, U. S. Treaty Vol. III, 2558.

<sup>4</sup> It was declared to be understood, however, that flags and colors, uniforms and such arms or military articles as were marked as being the property of the Danish Government should not be included in such purchase.

<sup>5</sup> Art. III. Also Art. II, where it was announced that "this cession does not in any respect impair private rights which by law belong to the peaceful possession of property of all kinds by private individuals of whatsoever nationality, by municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the islands ceded.

"The congregations belonging to the Danish National Church shall retain the undisturbed use of the churches which are now used by them, together with the parsonages appertaining thereunto and other appurtenances, including the funds allotted to the churches."

sonages.<sup>1</sup> In a word, a cession was to embrace every form of property within the category of public property, but subject to payment to be credited in diminution of the immense sums which by way of reparation Germany was obliged to undertake to pay. Such payments or credits were excepted, however, in the case of property in Alsace-Lorraine, in view of the terms on which that territory had been ceded to Germany in 1871, and in the case of property or possessions in lands ceded under the peace treaty to Belgium.<sup>2</sup> It was also provided that all property and possessions belonging to the German Empire or to the German States, within any of the former German territories, including colonies, protectorates or dependencies, administered by a mandatory (under the terms of the Covenant of the League of Nations), should be transferred with the territories to the Mandatory Power in its capacity as such, and that no payment should be made or credit given to Governments in consideration of the transfer.<sup>3</sup> Thus in general, while the terms of the several cessions were rendered broadly comprehensive, and that regardless of the various forms of property concerned, the duty to make compensation for what was transferred was made to depend upon, or arranged according to, the nature of the equities of the particular grantee as against the grantor, especially derived from the relation of such grantee to the territory ceded.<sup>4</sup>

It may be observed, however, that the amount of reparations chargeable to Germany was so vast as to render insignificant the value of credits to be allowed on account of any public property to be yielded as such to a grantee of territory. Again, the inclusion of the property of "other royal personages" with that of the German Emperor, as within the category of property to be deemed to belong to the German Empire or German States, was a vague description of the limits or extent of what was designed to pass to a grantee.<sup>5</sup>

§ 114. <sup>1</sup> Art. 256. Also Art. 107, relative to property situated within the City of Danzig. See, in his connection, Seventh Judgment (Case concerning certain German interests in Polish Upper Silesia), Permanent Court of International Justice, Publications, Series A, No. 7, 29-30, 41.

<sup>2</sup> Art. 256.

<sup>3</sup> Arts. 257, 120. Cf. Art. XXII of the Covenant of the League of Nations.

It should be observed also that in Art. 92 of the treaty it was provided that in fixing under Art. 256 the value of the property and possessions belonging to the German Empire and to the German States within specified territory transferred to Poland, the Reparation Commission should exclude from the valuation, buildings, forests and other State property which belonged to the former Kingdom of Poland. These Poland was to acquire free of all costs and charges.

See also, the provision in Art. 130 respecting the cession to China of various forms of public property belonging to the German Government other than diplomatic or consular residences or premises, and situated in the German concessions at Tientsin and Hankow or elsewhere in Chinese territory. Also the specifications relative to German Governmental property in Shantung, and expressed in Arts. 156-158.

<sup>4</sup> It may be observed that certain clauses of the treaty made special provision for the surrender by the grantor to the grantee of archives and documents of every kind relative to the several forms of administration of the territory transferred. See, for example, Art. 38 relative to territory to be transferred to Belgium, Art. 52 relative to Alsace-Lorraine, and Art. 158 relative to Shantung.

According to Art. 250, Germany confirmed the surrender of all material handed over to the Allied and Associated Powers in accordance with the Armistice of November 11, 1918, and subsequent Armistice agreements, and recognized the title of the Allied and Associated Powers to such material. For certain material, as of non-military value, provision was made for the allowance of credit.

<sup>5</sup> In Art. 208 of the Treaty of Saint Germain-en-Laye with Austria of Sept. 10, 1919,



The treaties of Saint-Germain-en-Laye, with Austria, of September 10, 1919<sup>6</sup> of Neuilly-sur-Seine, with Bulgaria, of November 27, 1919,<sup>7</sup> and of Trianon, with Hungary of June 4, 1920,<sup>8</sup> reflected generally like purposes and methods on the part of the Allied and Associated Powers.<sup>9</sup>

When, prior to their final consummation, the terms of the treaties of peace became known to certain personages who had reason to believe that their own connection with a royal family jeopardized the safety of their private property variously located and of differing forms, effort was made, in at least one instance, to effect a transfer thereof to third persons, nationals of a neutral State, and ultimately through them to those of American nationality. Moreover, this action was followed by the effort of such American nationals to cause the United States to interpose and offer objection to the subjection of such property, after the transfers thereof, to confiscatory measures by one or more of the succession States. The Government of the United States, conscious of possible clouds upon the title of transferees that the circumstances of transfer might disclose, and unwilling also to pass upon the interpretation of treaties to which the United States was not a party, as by intimating that there had been a violation thereof, was indisposed to do more than offer a friendly suggestion touching the desirability of a judicial determination by a Mixed Arbitral Tribunal, contemplated by the treaties of the validity of the measures that had been taken.

It must be borne in mind that the several treaties of peace registered the design of those responsible for the provisions thereof not only to divest the grantor States of public property belonging within, and seemingly associated with, territory that was being ceded for the benefit of the new sovereigns as such, but also to cause the defeated States to make appropriate transfer of certain public property not necessarily connected with ceded territory, and in favor of specified beneficiaries.<sup>10</sup> Some Articles were expressive, moreover, of a determination to cause the defeated States, on demand of the Reparation Commission, to become possessed of the rights or interests of their respective nationals in any public utility undertaking or in any concession operating in specified countries (embracing even those whose territory was not ceded, such as Russia or Turkey), and to yield such acquisitions to the Reparation Commission.<sup>11</sup>

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and in Art. 191 of the Treaty of Trianon with Hungary, of June 4, 1920, the language employed is: "all property of the Crown, and the private property of members of the former Royal Family of Austria-Hungary." In Art. 142 of the Treaty of Neuilly-sur-Seine, with Bulgaria, of Nov. 27, 1919, the property and possessions "of the Bulgarian Government shall be deemed to include all the property of the Crown." The corresponding Article (60) of the Treaty of Lausanne with Turkey, of July 24, 1923, simply refers to "all the property and possessions of the Ottoman Empire situated therein."

See *Archduke Frédéric c. Etat roumain*, T. A. M., VII, 128.

<sup>6</sup> Arts. 93, 115, 193, 199 and 208.

<sup>7</sup> Arts. 136, 142, 203.

<sup>8</sup> Arts. 99, 177, 178, 182 and 191.

<sup>9</sup> Obviously there could not be complete uniformity of treatment. The treaties, for example, with Austria and with Hungary were complicated by the circumstances that they necessarily embraced arrangements applicable to the dismemberment of the Austro-Hungarian Empire.

<sup>10</sup> See, for example, Arts. 136 and 153 of the Treaty of Versailles, concerning, respectively, German public property in Siam, and in Egypt; also, Art. 259 in relation to the transfer of certain Turkish gold.

<sup>11</sup> See Art. 260, Treaty of Versailles; Art. 211, Treaty of Saint Germain-en-Laye; Art.

In the elaborate process of exhausting their enemies of public property in or associated with ceded territory, of declaring what was to be deemed within that category, of causing the defeated States to agree to transform certain private property of their nationals into public property, and to transfer it as such, and of demanding the surrender by those States of certain public property within or pertaining to foreign countries, as well as claims against the same, the Allied and Associated Powers appear to have been governed primarily by considerations of policy of which the outstanding feature was the acquisition of reparation from all available sources.

## (2)

§ 115. **Relinquishment.** Relinquishment is a process by which a State gives up its rights of property and control over territory, without simultaneously attempting to transfer them as by grant, to another, or to designate its successor. Relinquishment is perfected by the appropriate act of the relinquisher.<sup>1</sup>

In a broad sense it may be said that a State relinquishes its rights of sovereignty over territory whenever, by any means, it gives them up as, for example, by abandonment, or by the recognition of the independence of a former colony which has established by force its dominion over lands in its possession and won independent statehood. The term relinquishment is believed, however, in so far as it refers to the succession to rights of sovereignty, to have a narrower and technical signification. In negotiations for peace with Spain in 1898, the Commissioners of the United States took the position that relinquishment occurs solely when a State or a country regarded as capable of exercising rights of property and control is the immediate successor to the title or thing relinquished. In this respect the process appears to differ sharply from that known as abandonment, which, as will be seen, is one whereby such rights become extinct.<sup>2</sup>

The relinquishing State may claim to be the sovereign of the territory concerned until the act of relinquishment is formally perfected. The value of such a claim must depend upon the facts of the particular case. The treaty that

194, Treaty of Trianon. Arrangements were there made for the indemnification of nationals "so dispossessed" by the State that possessed itself of their property, and for the appropriate crediting on account of reparations of the value of the property thus acquired and transferred. See in this connection, Sir John Fischer Williams, "A Legal Footnote to the Story of German Reparations," *Brit. Y.B.* 1932 (XIII), 9, 12-13.

See also, Art. 261 of the Treaty of Versailles respecting the transfer of certain claims of Germany against Austria, Hungary, Bulgaria or Turkey, to the Allied and Associated Powers.

§ 115.<sup>1</sup> The distinction between relinquishment and cession was sharply drawn in the protocol of armistice between the United States and Spain of Aug. 12, 1898, as well as in the treaty of peace of Dec. 10, 1898, which provided for the Spanish relinquishment of the sovereignty over Cuba, and the cession to the United States of Porto Rico and other islands. Malloy's *Treaties*, II, 1688 and 1690. See, also, position taken by the American Peace Commissioners at Paris, in Annex to Protocol No. 5, of the Conference of Oct. 14, 1898, quoting *Escríbe, Diccionario de Legislación y Jurisprudencia*, as follows: "The relinquishment differs from the cession in that the latter requires for its completion the concurrence of the wills of the grantor and the grantee and a just cause for the transfer, while the former is perfect with only the will of the relinquisher. The effect of the relinquishment is confined to the abdication or dropping of the right or thing relinquished. The effect of the cession is the conveyance of the right to the grantee." Sen. Doc. 62, 55 Cong., 3 Sess., 1, 46, 47.

<sup>2</sup> Abandonment, *infra*, § 119.

registers a surrender by relinquishment may mark an understanding of the contracting parties, however undisclosed by the text of the instrument, that the relinquisher is to be deemed to be the sovereign of the territory concerned until the arrangement becomes binding upon those parties.<sup>3</sup> On the other hand, a treaty may betoken a mere yielding of a claim to an area of which the sovereignty has been previously transferred as by a successful revolution itself productive of a new State. In such case the arrangement that embodies the phrases of relinquishment indicates a mere taking cognizance of the significance of events that have previously shorn the relinquisher of its rights of property and control.<sup>4</sup>

## (3)

§ 116. **Prescription.** By operation of the principle known as that of prescription, the uninterrupted exercise of dominion by a State for a sufficient length of time over territory belonging to another, and openly adverse to the claim of that other, suffices in itself to transfer the right of sovereignty over the area concerned.<sup>1</sup> The procedure is thus applicable only when a right of sovereignty is already in existence, and when the attempts to transfer it mark an initial and constant defiance of the claims of the possessor, and when also the conduct of that possessor reveals long-continued toleration of, or acquiescence in, the process of deprivation.<sup>2</sup> Prescription is thus not a mode by which rights of property and control come into being, and, therefore, no instance of it is apparent when dominion is asserted over an area to be regarded at the time as *res nullius*.<sup>3</sup>

<sup>3</sup> See, for example, Art. XVI of the Treaty of Lausanne, of July 23, 1924, *Am. J.*, XVIII, *Official documents*, 9.

Also, the Relation of the United States to the Mandatory System, *supra*, § 26A.

<sup>4</sup> There would appear to be no reason to advert in terms to relinquishment in a treaty expressing the bare acknowledgment by a former sovereign of a previous transfer of rights of property and control. See Revolution, *infra*, § 117.

§ 116.<sup>1</sup> See, generally, Dana's Wheaton, 239, also Dana's Note No. 101; Hall, Higgins' 8 ed., § 36; Westlake, 2 ed., I, 94-96; McNair's 4 ed. of Oppenheim, I, §§ 242-243; Eugène Audinet, "*De la Prescription Acquisitif en Droit International*," *Rev. Gén.*, III, 313; J. H. Ralston, in *Am. J.*, IV, 133; Rhode Island v. Massachusetts, 4 How. 591, 639; Handy's Lessee v. Anthony, 5 Wheat. 374, 376; Indiana v. Kentucky, 136 U. S. 479, 509-512; Virginia v. Tennessee, 148 U. S. 503, 522-524; Louisiana v. Mississippi, 202 U. S. 53-54; Maryland v. West Virginia, 217 U. S. 1, 41-44; State of Arkansas v. State of Mississippi, 250 U. S. 39; Michigan v. Wisconsin, 270 U. S. 295; Louisiana v. Mississippi, 282 U. S. 458. Also, H. Lauterpacht, *Private Law Sources*, 116-119.

*Cf.* Mr. Olney, Secy. of State, to Sir Julian Pauncefote, British Ambassador, June 22, 1896, *For. Rel.* 1896, 232, 236, Moore, Dig., I, 297; Opinion of Mr. Ralston, Umpire in the Gentini Case, before the Italian-Venezuelan Commission, Ralston's Report of Venezuelan Arbitrations of 1903, 724; Opinion of Mr. Little, Commissioner, in Williams v. Venezuela, No. 36, United States and Venezuelan Commission, Convention of Dec. 5, 1885, Moore, Arbitrations, IV, 4181.

"The doctrine of prescription is impliedly recognized in the various treaty stipulations which have been made for the joint occupation of disputed territory, one of their objects in such case being to negative the inference of title from long-continued possession by either party of a particular portion of such territory. See, as illustrations, the treaties between the United States and Great Britain of Oct. 20, 1818, Art. III, and Aug. 6, 1827, Art. I, in relation to Oregon." Moore, Dig., I, 296, note.

<sup>2</sup> *Cf.* Creation of Rights of Property and Control, In General, *supra*, § 98.

<sup>3</sup> British Guiana-Venezuela Boundary Arbitration, Counter-Case of Great Britain, British Blue Book, Venezuela, No. 2 (1899) [Cd. 9337], p. 114; Printed Argument presented on behalf of Venezuela, British Blue Book, Venezuela No. 6 (1899) [Cd. 9501], pp. 34-54.

Respect for the principle prevents a State which may have long slept upon its rights, from retaining the privilege of reviving them as against a foreign occupant whose constant and long-continued possession satisfies certain requirements that practice has demanded. The strength of the equities of the latter lies in the implied acquiescence in the condition of affairs which its own conduct in relation to the land concerned has produced.<sup>4</sup> Obviously, a State may actively challenge the encroachments of a neighbor upon its soil, and by so interrupting the continuity of the adverse claim, prevent the perfecting of a transfer of sovereignty that might otherwise result. It is believed that diplomatic protest might suffice for that purpose, even though unsupported by the use of force.<sup>5</sup>

Recognition of the principle of prescription has been due to the importance attached to the maintenance of a stable condition of affairs among States. It has been deemed more desirable to the family of nations that an adverse occupant long in possession should be suffered to remain in unmolested control, than that the existing sovereign, although unjustly deprived of possession, should retain its rights of such, at least when it has failed to make constant and appropriate effort to keep them alive, as by ceaseless protests against the acts of the wrongdoer.<sup>6</sup> It may be observed that the Supreme Court of the United States found occasion in 1940, to apply the doctrine of prescription.<sup>7</sup> It should be borne in mind that prior to the World War initiated in 1914, neither the flagrancy of the injustice perpetrated through the acts of an ag-

<sup>4</sup> Declared Field, J., in *Indiana v. Kentucky*: "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." 136 U. S. 479, 510. See, also, Argument of the United States before the Alaskan Boundary Tribunal (quoting Field, J., in *Indiana v. Kentucky*, 136 U. S. 479, 509-510, and Memorial of British Agent, June 11, 1817, in Proceedings of Commission under Article IV of the Treaty of Ghent, relating to the title to the islands in Passamaquoddy Bay), *Proceedings*, Alaskan Boundary Tribunal, V, 201-204; Oral Argument of Hon. Jacob M. Dickinson, in behalf of the United States, *id.*, VII, 831; Opinion of American Members of Tribunal, Messrs. Root, Lodge, and Turner, on Fifth Question, *id.*, I, 49 and 62-64. Cf. opinion of Lord Alverstone on Fifth Question, *id.*, I, 42.

<sup>5</sup> Don Luis de Onís, Spanish Minister, in a communication to Mr. Adams, Secretary of State, Jan. 5, 1818, concerning the disputed boundary of Florida, said in part: "The dominion of Spain in these vast regions being thus established, and her rights of discovery, conquest, and possession, being never disputed, she could scarcely possess a property founded on more respectable principles, whether of the law of nations, of public law, or any others which serve as a basis to such acquisitions as all the independent kingdoms and states of the earth consist of. . . . The French themselves never disputed the rights of the Spaniards to possession and property, nor laid claim to these parts of the territories of the Spanish monarchy." Brit. and For. State Pap., 1817-1818, 425, 427, 436; Am. State Pap., For. Rel., IV, 455, 459.

<sup>6</sup> Grotius, *De Jure Belli ac Pacis*, Lib. II, Cap. IV, §§ 1 and 9, Moore, Dig., I, 293; Vattel, *Law of Nations*, Lib. II, Cap. XI, § 149; Moore, Dig., I, 294.

Declares Hall: "Instead of being directed to guard the interests of persons believing themselves to be lawful owners, though unable to prove their title, or of persons purchasing in good faith from others not in fact in legal possession, the object of prescription as between states is mainly to assist in creating a stability of international order which is of more practical advantage than the bare possibility of an ultimate victory of right." Higgins' 8 ed., § 36.

"In the law of nations it is a well established principle that it is necessary to refrain as far as possible from modifying the state of things existing in fact and for a long time." (Award of Oct. 23, 1909, in Swedish-Norwegian Maritime Frontier Arbitration, Permanent Court of Arbitration at The Hague, Wilson, *Hague Arbitration Cases*, 103, 129.)

<sup>7</sup> *Arkansas v. Tennessee*, 310 U. S. 563.

gressor, nor the methods by which it achieved its end, appeared to diminish ultimate respect for its claims, provided it crushed opposition and silenced protest for a protracted period of time.

It must be clear that it is uninterrupted and undisturbed possession implying full acquiescence on the part of the foreign and dispossessed claimant, which in theory serves to rob it of its rights and to lodge them in the actual occupant. What constitutes such possession must depend upon the circumstances of the particular case.<sup>8</sup> In the Chamizal Arbitration with Mexico, under convention of June 24, 1910, the United States invoked without success the principle of prescription.<sup>9</sup> In the Island of Palmas Arbitration, it vigorously opposed the applicability and invocation of that principle by The Netherlands.<sup>10</sup>

Article V of the treaty between Guatemala and Honduras of July 16, 1930, providing for the arbitration of their existing boundary dispute, after declaring that the line of the *uti possidetis* of 1821 was the only juridical line that could be established between the two Republics, and that such line should be determined by the arbitral tribunal, announced that if the tribunal should find that one or both parties, in their subsequent development had established beyond that line "interests which should be taken into account in establishing the definitive boundary," the tribunal should modify, as it might see fit, the line of the *uti possidetis* of 1821, and should "fix the territorial or other compensation" which it might deem just that either party should pay to the other. By this process the contracting States prevented, in one sense, respect for the acquisition by either after 1821, of territory at the expense of the other by virtue of sheer prescription, yielding, however, to the tribunal discretion to heed and permit the retention of accessions technically wrongful at time of their origin if appropriate compensation were made therefor. The mere length of a protracted period of possession acquired after 1821, was thus not to obliterate the obligation to make compensation.

There appears to be as yet no general and definite understanding among States concerning the length of time requisite for the establishment of a title by prescription. Grotius deemed a "possession beyond memory" (*possessio memoria excedens*) essential.<sup>11</sup> Possibly at the present day a possession well within the memory of living men might suffice. It has been wisely observed that, in view of the differing circumstances arising in the various cases where the

<sup>8</sup> "Everything depends upon the merits of the individual case. As long as other Powers keep up protests and claims, the actual exercise of sovereignty is not undisturbed, nor is there the required general conviction that the present condition of things is in conformity with international order. But after such protests and claims, if any, cease to be repeated, the actual possession ceases to be disturbed, and thus under certain circumstances matters may gradually ripen into that condition which is in conformity with international order." (McNair's 4 ed. of Oppenheim, I, § 243.)

<sup>9</sup> See Award, *Am. J.*, V, 785, 805-807.

<sup>10</sup> Counter-Memorandum of United States, 1926, 84-95. Judge Huber, sole Arbitrator, did not in his award feel it necessary to give more than passing reference to the matter, possibly for the reason that he was inclined to the opinion that the Netherlands claim to sovereignty was hardly indicative of an assertion in the teeth of and adverse to an existing right of sovereignty to be deemed worthy of respect as such. See award, in *Am. J.*, XXII, 867, 877, 909; also P. C. Jessup, "The Palmas Island Arbitration," *id.*, 735, 748.

<sup>11</sup> *De Jure Belli ac Pacis*, Lib. II, Cap. IV, § 9; Moore, Dig., I, 293.

doctrine is not unjustly invoked, no precise period of time can be fixed by international law.<sup>12</sup> In the rules agreed upon by Great Britain and Venezuela in 1897, in the adjustment of the boundary between British Guiana and Venezuela, it was declared that an adverse holding for a period of fifty years would establish a good title.<sup>13</sup>

Events leading up to the World War, 1914–1918, sufficed to raise grave doubt whether respect for successions or transfers that were contemptuous of the interests and desires of the inhabitants of certain territories could serve as a generally stabilizing influence conducive to peace. The terms of final adjustment of that conflict revealed the determination of the successful belligerents to restore much that was deemed to have been unjustly taken by any process from a former sovereign and held by the enemy. The interval from 1871 to 1914 was all too brief to change the color of German sovereignty over Alsace-Lorraine; and the injustice wrought by the third and final partition of the Kingdom of Poland in 1795 was as keenly felt and as vigorously dealt with as if it had occurred a century later.<sup>14</sup> Nevertheless, it will be observed that until the principle of self-determination is incorporated in the law of nations, treaties that are deemed lawfully to register the transfer of rights of sovereignty are not technically to be regarded also as evidencing the assertion of essentially wrongful claims entitled to respect only if acquiesced in for a sufficiently long time. In a word, a right to territory by way of prescription can not be founded upon a treaty of which the validity is not to be impugned.<sup>15</sup>

<sup>12</sup> "It is equally obvious and much more important to note that, even if it were feasible to establish such arbitrary period of prescription by international agreement, it would not be wise or expedient to do it. Each case should be left to depend upon its own facts." Mr. Olney, Secy. of State, to Sir Julian Pauncefote, June 22, 1896, For. Rel. 1896, 232, 236. "There is no enactment or usage or accepted doctrine which lays down the length of time required for international prescription; and no full definition of the degree of control which will confer territorial property on a nation has been attempted." Lord Salisbury to Sir Julian Pauncefote, May 18, 1896, *id.*, 228, 230.

<sup>13</sup> Art. IV, treaty between Great Britain and Venezuela, Feb. 2, 1897, Brit. and For. St. Pap., LXXXIX, 57; Moore, Dig., I, 297.

In the Memorial, dated June 11, 1817, of the British Agent before the Commission under Article IV of the Treaty of Ghent, relating to the title to the Islands in Passamaquoddy Bay, it was said (p. 129): "The further uncontroverted fact, that under this mutual understanding of the treaty, the United States as well as the State of Massachusetts in the words of the late Agent of the United States before quoted '*remained silent spectators*' of the settlements and improvements made by His Majesty's Subjects upon these Islands with the above exception, during a period of more than twenty-three years with regard to one of them, and of more than thirty years with regard to all the others, will justly furnish an argument, that the United States have *no claim* at this day to any of those Islands." *Proceedings, Alaskan Boundary Tribunal*, V, 203.

<sup>14</sup> Thus in the formal reply of the Allied and Associated Powers of June 16, 1919, to the German counter-proposals relative to the treaty of peace, it was said in relation to the eastern frontiers of Germany, that two cardinal principles had been followed: first, the special obligation to reestablish the Polish Nation in the independence of which it had been deprived more than a century before, and which, it was declared, was one of the greatest wrongs of which history had a record, and of which the memory and result had for a long time poisoned the political life of a large part of Europe, and was one of the essential steps by which the military power of Prussia had been built up, and the whole political life, first of Prussia and then of Germany, perverted. The second principle was that there should be included in the restored Poland those districts inhabited by an indisputably Polish population. Misc. No. 4 (1919) Cmd. 258, p. 12. See summary of text in *Current Hist. Mag.* X, Part 2, 32–33. See also Art. 92 of the Treaty of Versailles with Germany of June 28, 1919, U. S. Treaty Vol. III, 3379.

<sup>15</sup> Obviously, the situation would be otherwise were the principle of self-determination to

Dissatisfaction with and contempt for its terms, although productive of ultimate revision, do not, therefore, disclose disrespect also for the principle of prescription as a mode of transferring rights of sovereignty, simply because the method of transfer technically robs the original transaction of the sinister character that is and must be and always is apparent when a right of territory is acquired strictly by virtue of that principle.<sup>16</sup>

Opportunities for territorial encroachments not validated by treaty, and that are to suffice to beget transfers of rights of sovereignty by prescription may be expected to diminish in number. Increasing knowledge of the extent and character of territorial limits and pretensions, sensitiveness to, and early knowledge of the commission of acts defiant of them, alertness on the part of aggrieved States to voice protest under the slightest provocation, as well as a willingness to adjust territorial differences by judicial process or conciliation that is sustained by strong and common inducements to have recourse to such procedure, unite in creating highly useful deterrents which bid fair to become increasingly effective as time goes on.

(4)

§ 117. **Revolution.** When by virtue of a successful revolution a new State comes into being, it necessarily succeeds to the rights of sovereignty over the territory which it occupies and which previously belonged to the parent State.<sup>1</sup> No act on the part of the latter is required in order to validate the succession. The new State is regarded as having perfected by its own achievement the transfer of rights of property and control. Thus ultimate recognition of its independence by the parent State, even if expressed in a treaty of peace and friendship, may not be deemed to constitute a cession or grant of the territory concerned. Through the operation of the American Revolution, the United States acquired for itself the rights of sovereignty previously exercised by Great Britain over the territories of its revolting colonies.<sup>2</sup>

Declarations of independence which usually accompany the struggle to at-

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be grafted into international law, so as to cause a treaty defiant of that principle to be regarded as the voidable if not invalid instrument of fortifying and perpetuating an adverse and illegal claim.

<sup>16</sup> Although the condition of international law compels such a conclusion, it does not allay resentment on the part of States that are obliged to accept treaties that serve to despoil them of territory. The persistence and growth of their sense of outrage that may bring about ultimate conflict is likely to be quite uninfluenced by the legal quality or aspect of the transaction productive of the loss of sovereignty. In a word, what the law permits and may appear to confirm through the terms of a sacrificial treaty, becomes itself the breeder of what the law must regard with disapproval, and of what possibly other treaties may even brand as illegal.

§ 117. <sup>1</sup> "The United States regard it as an established principle of public law and of international right that when a European colony in America becomes independent it succeeds to the territorial limits of the colony as it stood in the hands of the parent country." Mr. Marcy, Secy. of State, to Mr. Dallas, July 26, 1856, MS. Inst. Great Britain, XVII, 1, 11, Moore, Dig., I, 303.

<sup>2</sup> Declared Johnson, J., in *Harcourt v. Gaillard*: "It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain by that treaty [of 1783]. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their acknowledged limits, were as much theirs, at the declaration of independence as at this hour." 12 Wheat. 523, 527. Also, Hen-

tain freedom from political bonds are likely to precede the final military or other achievements that are requisite for the creation of a new State. They are in such cases tokens of expectant statehood rather than certificates of birth.<sup>3</sup>

(5)

§ 117A. **Annexation.** Annexation is a process by means of which a State proceeds to acquire sovereignty over a portion or all of the territory of another, with or without its consent, and without the aid of treaty. Recourse to annexation may thus reveal the fruition of subjugation,<sup>1</sup> or the achievement of a powerful State which although avoiding recourse to war overrides the will of another and by eliminating substantial opposition seeks to enlarge its own domain,<sup>2</sup> or the complete harmony of purpose between the States concerned.<sup>3</sup> The fact of annexation may betoken the ending of the life of the State whose territory is taken over by the acquirer, a result which inevitably ensues when sovereignty over the entire territory of the former is transferred.<sup>4</sup>

On October 27, 1939, the Polish Ambassador at Washington informed the Secretary of State of the receipt of information that the German Reich had decreed the annexation, from November 1, 1939, of part of the territory of the Polish Republic, creating two new provinces called West Prussia and Posen and enlarging the existing provinces of German Silesia and East Prussia.<sup>5</sup> In acknowledging the receipt of this information, Secretary Hull stated that he had "taken note of the Polish Government's declaration that it considers this act as illegal and therefore null and void."<sup>6</sup>

c

## Extinction

(1)

§ 118. **Operation of Nature.** The loss by a State of its rights of property and control rarely involves their extinction. Commonly a State or a country deemed to possess the requisite capacity succeeds to what is given up. Under certain circumstances, however, these rights may become extinct. Such is the case

derson v. Poindexter's Lessee, 12 Wheat. 530; United States v. Repentigny, 5 Wall. 211; McIlvaine v. Coxe's Lessee, 4 Cranch, 209, 212.

See also United States v. Curtiss-Wright Export Corp., 299 U. S. 304.

<sup>3</sup> See Recognition, In General, *supra*, § 36.

"In the confusion of post-war Europe, revolutionary movements led to the establishment of several independent régimes, among them Azerbaijan, Armenia, Fiume, Georgia, and Ukraine, each of which enjoyed only brief existence." (Hackworth, Dig., I, 445, footnote.)

§ 117A. <sup>1</sup> See Conquest, *supra*, § 106.

<sup>2</sup> Possibly the annexation of Austria by Germany in 1938 is illustrative. See Dept. of State Press Releases of March 19, 1938, 374, and of April 9, 1938, 465. Also Hackworth, Dig., I, § 66.

<sup>3</sup> The annexation of Texas by the United States is illustrative. See Certain Effects of Change of Sovereignty, Total Absorption of a State, *infra*, § 128.

<sup>4</sup> On March 17, 1938, the Minister of the Republic of Austria at Washington informed the Department of State that as a result of developments which had occurred in Austria, "that country has ceased to exist as an independent nation and has been incorporated in the German Reich." (Dept. of State Press Release, March 19, 1938, 375.)

<sup>5</sup> Dept. of State Bulletin, Nov. 4, 1939, 458.

<sup>6</sup> *Id.*



when, for example, territory over which sovereignty has been exercised is, through the operation of nature, blotted out of existence or rendered forever uninhabitable by man.<sup>1</sup>

## (2)

§ 119. **Abandonment.** Rights of property and control become extinct when, by a process known as abandonment, a State, as an incident of losing possession, gives them up, and no immediate successor is at hand to keep them alive. In such case the territory becomes *res nullius*, and is thereupon open to occupation by any other State.<sup>1</sup> In this respect abandonment differs, as has been observed, from relinquishment.<sup>2</sup> Circumstances indicating abandonment rarely occur.<sup>3</sup>

In 1895, the occupation by Great Britain of the Island of Trinidad was made the subject of protest by the Government of Brazil, on the ground that the latter's right of ownership of the island had never been given up. Abandonment, it was declared by the Brazilian Minister of Foreign Affairs:

Depends on the intention of relinquishing, or on the cessation of physical power over the thing, and must not be confounded with simple neglect or

§ 118. <sup>1</sup> McNair's 4 ed. of Oppenheim, I, § 245.

§ 119. <sup>1</sup> Hall, Higgins' 8 ed., § 34; Robert Lansing, "A Unique International Problem," *Am. J.*, XI, 763, in which there is discussed the legal situation applicable to the archipelago of Spitzbergen.

<sup>2</sup> At the Conference of Oct. 11, 1898, at Paris, of the Commissioners of the United States and Spain, appointed to conclude a treaty of peace, the Spanish Commissioners filed a memorandum maintaining that it was "imperative that the President of the United States should accept the relinquishment made by Her Catholic Majesty of her sovereignty over the Island of Cuba." Sen. Doc. No. 62, 55 Cong., part I, 40. This contention was based on the fact that the United States by the preliminary Protocol of Aug. 12, 1898, embodying the basis of the terms for the establishment of peace, had required Spain to agree to "relinquish" her title to Cuba, and had not demanded that she "abandon" it. *Id.*, 40. In their reply of Oct. 14, 1898, the American Commissioners said in part: "A distinction is thus made between a *relinquishment* and an *abandonment*; and it is argued that while '*abandoned territories*' become derelict, so that they may be acquired by the first occupant, '*relinquished territories*' necessarily pass to him to whom relinquishment is made. The American Commissioners are unable to admit that such a distinction between the words in question exists either in law or in common use. . . . The distinction thus drawn [by the Spanish writer, Escriche], not between *relinquishment* and *abandonment*, which are treated both in English and in Spanish as practically the same, but between *relinquishment* and *cession*, is written upon the face of the Protocol." *Id.*, 46, 47. It was the sole object of the American Commissioners to emphasize the fact that relinquishment and abandonment were alike, in that neither process required the acceptance of title by a grantee, and that in this respect both differed from cession. The Spanish Commissioners thereupon proceeded to argue that the relinquishment demanded by their adversaries involved all of the legal consequences of abandonment. *Id.*, 78-84. In later memoranda, however, the American Commissioners were careful to point out the fact that Cuba, upon the relinquishment of the Spanish title, would not become derelict and *res nullius*, and thus would not wholly resemble abandoned territory. *Id.*, 98-99. By implication, therefore, they recognized a distinction between abandonment and relinquishment, which was not shown in their earliest statement, quoted above. This distinction seems important.

<sup>3</sup> Concerning the dispute between France and Great Britain as to the Island of Santa Lucia, see Phillimore, 2 ed., I, 308, quoted in Moore, Dig., I, 298; Hall, Higgins' 8 ed., § 34. As to the controversy between Great Britain and Portugal, relating to territory at Delagoa Bay, see Hall, Higgins' 8 ed., § 34; also Award of Marshal MacMahon, July 24, 1875, Moore, Arbitrations, V, 4984-4985.

Respecting the claims against the United States by reason of its breaking up a piratical colony on the Falkland Islands in 1831, *cf.* Moore, Dig., I, 298-299, and documents there cited.

See also statement in Hackworth, Dig., I, 442.

desertion. A proprietor may leave a thing deserted or neglected and still retain his ownership. The fact of legal possession does not consist in actually holding a thing, but in having it at one's free disposal. The absence of the proprietor, neglect, or desertion does not exclude free disposal, and hence *animo retinetur possessio*. . . . Possession is lost *corpore* only when the ability to dispose of a thing is rendered completely impossible, after the disappearance of the status which permits the owner to dispose of the thing possessed.<sup>4</sup>

Evidence of either a definite intention of giving up the right of property and control with respect to territory at the disposal of the sovereign, or of a complete cessation of the effort to regain a control wrested from it by an uncivilized people not deemed capable of exercising such a right, would, on principle, seem to be necessary in order to prove abandonment. When the authorities of a State are expelled from territory belonging to it by the superior force of a native and uncivilized population, the loss of control doubtless minimizes the legal significance of intention. The hope and expectation entertained by the State of effecting a lodgment and regaining the mastery may not long suffice to keep alive any right of sovereignty. Even in such a case, however, a certain interval of time might fairly be allowed for the reestablishment of actual dominion before regarding the right as extinct.

When a State appears voluntarily to have deserted territory the control of which constantly remains within its grasp, abandonment should not be deemed to have taken place without ample proof of a design to give up all rights of property and control.<sup>5</sup>

It should be clear that the bare relinquishment of possession on the part of a claimant seeking to fortify a claim adverse to the rights of an existing territorial sovereign, as by prescription, might fairly be deemed to mark abandonment of the claim and to destroy the continuity of it.<sup>6</sup> Again, it should be apparent that as abandonment calls for conduct on the part of the possessor of a right of sovereignty as such, there is no room for such action by a State not regarded as enjoying such a possession.<sup>7</sup>

<sup>4</sup> Mr. Carvalho, Brazilian Minister of Foreign Affairs, to Mr. Phipps, July 21, 1895, For. Rel. 1895, I, 65, 66-67, Moore, Dig., I, 299-300. The acts on the part of Brazil indicating the continuance of its assertion of dominion over the Island, justified the concession of its rights therein by Great Britain.

<sup>5</sup> "But when occupation has not only been duly effected, but has been maintained for some time, abandonment is not immediately supposed to be definitive. If it has been voluntary, the title of the occupant may be kept alive by acts, such as the assertion of claim by inscriptions, which would be insufficient to confirm the mere act of taking possession; and even where the abandonment is complete, an intention to return must be presumed during a reasonable time. If it has been involuntary, the question whether the absence of the possessors shall or shall not extinguish their title depends upon whether the circumstances attendant upon and following the withdrawal suggest the intention, or give grounds for reasonable hope, of return." Hall, Higgins' 8 ed., § 34.

<sup>6</sup> In his treatise on the Struggle for the Falkland Islands, Professor Julius Goebel, Jr., suggests that the acts of Great Britain in giving up possession of those Islands in 1771, amounted to the relinquishment of a mere adverse claim sought to be established in the face of and in opposition to the existing rights of the Spanish Crown to be regarded as then the territorial sovereign, p. 425.

<sup>7</sup> Thus with respect to the Islands of Palmas, if Spain had failed to acquire a right of sovereignty over the territory concerned there was no room for contending that an abandon-

It has recently been observed that "jurists seem to be in agreement that an intention to abandon must clearly appear but that this intention need not be expressed and may be gathered from the circumstances surrounding the purported withdrawal of State authority."<sup>8</sup> Abandonment as a process of law is not, however, believed to be wholly dependent upon the design of the State acknowledged to have been the territorial sovereign of a particular area. Its action or inaction may have been such as to convince the impartial mind that that sovereign is not in a position to deny that it has given up its rights. Nevertheless, the conditions that would compel such a conclusion must depend upon the circumstances of the particular case, and must be expected to be influenced by the geographical relationship of the territory concerned to that of the alleged abandoner, and also by the existence or non-existence of its power at all times to assert unmolested supremacy within the area concerned. Where the retention of such power is obvious, long-continued, and uninterrupted, evidence of affirmative action indicative of a design to surrender might be fairly regarded as essential in order to produce an extinction of the right of sovereignty.<sup>9</sup> Nor would this requirement be necessarily lessened by the exacting conditions to be met by the State charged with abandonment in order, at the present time, to acquire an initial right of sovereignty over such area in case it were regarded as *res nullius*. They would not appear to affect the matter of the retention or continuity of the right of sovereignty that had once by any process been solidly acquired by the State whose conduct was scrutinized for evidence of abandonment.<sup>10</sup>

## 2

## CERTAIN EFFECTS OF CHANGE OF SOVEREIGNTY

## a

§ 120. In General. The phrase "change of sovereignty" is here employed to describe the situation where one State succeeds to the right of exclusive control within and supremacy over territory possessed by another. Succession implies that rights of sovereignty are already in existence prior to the change,

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ment by Spain ever took place. In his award as sole Arbitrator in the case between the United States and the Netherlands concerning the sovereignty over that Island, Judge Huber was seemingly not prepared to go so far as to hold that Spain had never acquired such a right, but was rather of opinion that any such right that Spain might have acquired had sunk into desuetude and finally disappeared. The process of disappearance was regarded by him as attributable to a lack of continued affirmative effort to keep alive and sustain what he looked upon as otherwise incapable of long-continued existence. See Award of April 4, 1928, *Am. J.*, XXII, 867, 888.

<sup>8</sup> Hackworth Dig., I, 442.

See also Award of the King of Italy in the Clipperton Island Case between France and Mexico, Jan. 1, 1931, *Am. J.*, XXVI, 393, 394.

<sup>9</sup> See Memorandum of the United States in Island of Palmas Arbitration, 1925, 98-104; also P. C. Jessup, in *Am. J.*, XXII, 735, 741.

<sup>10</sup> The significant dicta of the learned Arbitrator in the Island of Palmas Arbitration do not controvert the statement in the text, because they concern a different situation. See award in *Am. J.*, XXII, 867, 883-884, 886.

and their lodgment in a State, or a political community regarded as capable of exercising them, and whose title thereto is respected. When a State asserts dominion over territory occupied by an uncivilized people deemed to lack such capacity, no change of sovereignty is apparent. The occurrence is rather illustrative of the coming into being of rights of property and control through the act of an occupant.<sup>1</sup>

It is believed to be important to distinguish between the legal effect produced by a change of sovereignty and that resulting from the acquisition of what is gained by the transfer. Thus, for example, the question whether or not the cession of territory serves to terminate the operation of any laws within the ceded domain is wholly unrelated to that concerning the extent of the power of the grantee to legislate at will for the territory acquired. The one has reference to the direct consequence of the change of sovereignty itself, the other to the use of something attributable to what that change has already accomplished.

It is necessary to observe with care the extent to which a change of sovereignty serves directly to burden the transferee of territory with the obligations of its predecessor. This is a problem of international law in the solution of which States have been confronted with a variety of considerations the influence of which has varied according to the circumstances of the particular case. The examination of existing practices may, therefore, tend to fortify belief that, save under a few narrowly defined circumstances, discord rather than harmony of view is still prevailing, and that there is lack of evidence of general agreement indicative of the nature and scope of duties to be regarded as possessing the character of law. The scientific value of any conclusions with respect to what interested States have deemed to be burdens legally imposed upon a new sovereign, or concerning the basis upon which rules of conduct should be formulated for future guidance, is believed to depend in no small degree upon the directness and persistence with which the attempt is made to perceive the immediate effect of a change of sovereignty, as distinct from that produced by other events.

§ 120.<sup>1</sup> Said Lord Kingsdown in the case of the Advocate General of Bengal *v.* Raneesurnomoye Dossee: "Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of and subject to the same laws." 2 Moore's Privy Council, n. s. 22, Beale's Cases on Conflict of Laws, ed. of 1900, I, 67, 68.

"The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that so far as consistent with paramount necessities our first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain. By the organic Act of July 1, 1902, Ch. 1369, Sec. 12, 32 Stat. 691, all the property and rights acquired there by the United States are to be administered 'for the benefit of the inhabitants thereof.' It is reasonable to suppose that the attitude thus assumed by the United States with regard to what was unquestionably its own is also its attitude in deciding what it will claim for its own." Holmes, J., in *Cariño v. The Insular Government of the Philippine Islands*, 212 U. S. 449, 458-459.

## b

§ 121. **Effect on Legislative and Political Power.** A change of sovereignty serves directly to transfer to the new sovereign all legislative and political power with respect to the territory concerned.<sup>1</sup> Its predecessor is rendered incapable of performing any valid act in defiance of the supremacy of the transferee. Thus the former cannot lawfully alienate public lands or grant public franchises.<sup>2</sup> No valid disposition thereof can be made except in pursuance of the authority of the new sovereign.<sup>3</sup> In applying this principle it may become expedient to provide in a treaty of cession that certain valid acts of the grantor prior to the transfer be not robbed of the effect which they were designed to produce, in consequence of circumstances attending or following the change of sovereignty.<sup>4</sup>

After the conclusion of a treaty of cession, and pending the actual transfer of possession to the grantee, the grantor is doubtless permitted to exercise authority necessary to maintain order and safeguard economic conditions within the territory concerned. During that interval (at least in the case of a treaty which is to take effect from the date of signature, and is ultimately confirmed by both parties) it may be regarded as burdened with the duty of impairing in no manner the value to its successor of its new domain. The Supreme Court of the United States has declared that while in such case "full sovereignty" does not pass to the State to which it is transferred until actual delivery, "it is also true, that the exercise of sovereignty by the ceding country ceases, except for strictly municipal purposes, especially for granting lands."<sup>5</sup>

§ 121.<sup>1</sup> "The mere acquisition by one country (A, for example) of the sovereignty over another country (B, for example) produces no other legal effect upon the latter than to give it a new sovereign, and consequently to substitute the legislature and the chief executive of A for those of B; but A and B will still be in strictness foreign to each other, each having its own government, laws, and institutions; and though the legislature and chief executive of each will be the same, yet they will act in an entirely different capacity when acting for B from that in which they act when acting for A." "The Status of Our New Territories," by Christopher C. Langdell, *Harv. Law Rev.*, XII, 365, 387.

<sup>2</sup> *Harcourt v. Gaillard*, 12 Wheat. 523; *More v. Steinbach*, 127 U. S. 70, 81; *Ely's Administrator v. United States*, 171 U. S. 220, 231; *Alexander v. Roulet*, 13 Wall. 386; opinion of Mr. Griggs, Attorney-General, 22 Ops. Attys.-Gen., 574, 577, where there is strangely attributed to the Supreme Court of the United States, in the case of *Harcourt v. Gaillard*, language not there employed by that tribunal.

"It needs no reference to international law to say that any exercise of authority by the ceding sovereignty, after cession, could not have force with reference to such things as grants of land, or the bestowal of special franchises, such as the construction of roads, the keeping of ferries, and the erection of bridges with the right to collect toll upon them." (Howry, J., in *The Philippine Sugar Estates Development Company (Limited) v. The United States*, 39 Ct. Cl. 225, 247.)

<sup>3</sup> *More v. Steinbach*, 127 U. S. 70, 81.

<sup>4</sup> See, for example, Art. VIII of treaty between the United States and Spain, of Feb. 22, 1819, providing for the cession of the Floridas, Malloy's Treaties, II, 1654.

<sup>5</sup> *Davis v. Police Jury of Concordia*, 9 How. 280, 289; *United States v. Reynes*, 9 How. 127; *United States v. D'Auvergne*, 10 How. 609; *Montault v. United States*, 12 How. 47.

Concerning the authorization by the War Department, February 11, 1899, of persons holding the office of notary public in territories subject to military government by the military forces of the United States, to continue to hold such offices and perform the functions thereof, cf. Mr. Adey, Second Assist. Secy. of State, to Mr. Rooker, February 24, 1899, 235 MS. Dom. Let. 131, cited in Moore, Dig., I, 306, note.

Concerning the authorization of foreign consuls to continue to exercise their functions in the Hawaiian Islands, upon their acquisition by the United States, see Mr. Hay, Secy. of State,

According to the Permanent Court of International Justice, when, on June 28, 1919, the Treaty of Peace and the Minorities Treaty were signed, "although Poland was recognised as exercising sovereignty over portions of the former Russian Empire, the cession and occupation of the German territories were left to be effected by the coming into force of the Treaty of Peace, and the German Government as well as the Prussian State is to be considered as having continued to be competent to undertake transactions falling within the normal administration of the country during that period."<sup>6</sup> Such transactions were deemed to embrace certain contracts for purchases of land concluded by the Prussian State with settlers of German origin.<sup>7</sup> Again, the same tribunal concluded that "Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement."<sup>8</sup> The Court accordingly held that there had been no evasion by Germany of Article 256 of the Treaty of Versailles when, subsequent to the signature, but prior to the taking effect thereof, the transfer had been made by the Reich of a certain factory belonging to a private concern in which the Reich possessed a preponderant interest.<sup>9</sup>

## c

§ 122. Effect on Law. "Law once established continues until changed by some competent legislative power. It is not changed merely by change of sovereignty."<sup>1</sup> This principle has been recognized by American tribunals in its

to Mr. Grip, Swedish Minister, November 17, 1898, MS. Notes to Swedish Legation, VIII, 109, Moore, Dig., I, 308. As to the provisional recognition of consuls in the Philippines and Porto Rico, upon their cession to the United States, *cf.* Moore, Dig., I, 309, note.

See also Iloilo Claims Case, American-British Claims Tribunal, under special agreement of Aug. 18, 1910, Nielsen's Report, 403, 404, where it was declared that "there was no duty upon the United States under the terms of the Protocol, or of the then unratified treaty, or otherwise, to assume control at Iloilo; *de jure* there was no sovereignty over the islands until the treaty was ratified."

<sup>6</sup>Sixth Advisory Opinion of Sept. 10, 1923, on "certain questions relating to settlers of German origin in the territory ceded by Germany to Poland," Publications, Permanent Court of International Justice, Series B, No. 6, 28.

<sup>7</sup>"Under the Council's Resolution, the case before the Court relates only to two classes of settlers; first, those holding under *Rentengutsverträge*, concluded prior to November 11th, 1918, where there was no *Auflassung* before that date; and secondly, those holding under leases (*Pachtverträge*) contracted before November 11, 1918, for which *Rentengutsverträge* were substituted after that date." (*Id.*, 16.)

See Effect on Private Rights, *infra*, § 132.

<sup>8</sup>Seventh Judgment of May 25, 1926, Case concerning certain German interests in Polish Upper Silesia (The Merits), Publications, Permanent Court of International Justice, Series A, No. 7, 30.

<sup>9</sup>*Id.*, 41.

According to Article 256 of the Treaty of Versailles, "Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States, and the value of such acquisitions shall be fixed by the Reparation Commission, and paid by the State acquiring the territory to the Reparation Commission for the credit of the German Government on account of the sums due for reparation." (*Id.*, 27.)

§ 122. <sup>1</sup>Joseph H. Beale, Cases on Conflict of Laws, III, Summary, Sec. 9, *citing* Commonwealth v. Chapman, 13 Metc. 68.

application to laws protecting the private rights of the inhabitants of the territory concerned.<sup>2</sup> It is not believed that even the public laws of the former sovereign form an exception and are directly affected by the transfer. It is doubtless true that such laws as are at variance with the constitution and laws of the new sovereign cease to operate,<sup>3</sup> but the reason for such cessation is not to be ascribed to the bare change of sovereignty. It is attributable rather to conditions which are in themselves consequences of that change. The very disappearance of the former sovereign with its distinctive and possibly arbitrary

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"There can be no break or interregnum in law. From the time law comes into existence with the first-felt corporateness of a primitive people it must last until the final disappearance of human society. Once created, it persists until a change takes place, and when changed it continues in such changed condition until the next change, and so on forever. Conquest or colonization is impotent to bring law to an end; in spite of change of constitution, the law continues unchanged until the new sovereign by a legislative act creates a change." J. H. Beale, *Treatise on the Conflict of Laws*, Cambridge, 1916, Sec. 131.

See also *Occupation of Crete Case*, McNair and Lauterpacht, *Annual Digest*, 1925-1926, Case No. 69; *Fischer v. Einhorn*, Poland, March, 1926, *id.*, Case No. 71; *Clements v. Texas Company* (273 S. W. 993), *id.*, Case No. 73; *Succession in Taxes (Czechoslovakia)* Case No. 11, McNair and Lauterpacht, *Annual Dig.*, 1927-1928, Case No. 53; *Succession of Rizcallah Gazalé Case*, Syria, 1928, *id.*, Case No. 65; *Philippine Sugar Estates Development Co. v. United States*, 39 Ct. Cl. 225, *Dickinson's Cases*, 978.

It must be clear that the construction placed upon the statutory law of the former sovereign by its tribunals prior to a change of sovereignty should be respected by those of its successor after the change. In this connection see *Kealoha v. Castle*, 210 U. S. 149.

<sup>2</sup> *Marshall, C. J.*, in *American Insurance Co. v. Canter*, 1 Pet. 511, 542; *Strother v. Lucas*, 12 Pet. 410, 438; *United States v. Power's Heirs*, 11 How. 570, 577; *Chicago & Pacific Ry. Co. v. McGlinn*, 114 U. S. 452; *Ortega v. Lara*, 202 U. S. 339, 342; *Vilas v. Manila*, 220 U. S. 345, 357; *Opinion of Mr. Griggs, Attorney-General*, 22 Ops. Attys.-Gen., 526; *In re Chavez*, 149 Fed. 73; *Note in Harv. Law Rev.*, XIX, 131. *Cf.*, also, *Calvin's Case*, 4 Coke, Part VII, 3, 39; *Blankard v. Galdy*, 2 Salkeld, 411; *Campbell v. Hall*, 1 Cowp. 204.

"We take it to be a well-settled principle, acknowledged by all civilized States governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws regulating their social relations, duties, and rights are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority." *Shaw, C. J.*, in *Commonwealth v. Chapman*, 13 Metc. 68, 71.

A law the operation of which is, in point of time, expressly or by implication limited to the life of a particular treaty, obviously ceases to exist upon the termination of the compact. That such termination may be brought about by a change of sovereignty over territory of one of the contracting parties, rather than by any other occurrence, is without significance. Doubtless it is possible for a law providing for the enjoyment of special privileges by a class of nationals of a foreign contracting party (such as its consular officers) to survive a treaty itself terminated through the operation of a change of sovereignty. *Cf. For. Rel.* 1896, lxvii, 117-135; *id.*, 1897, 152-154, respecting the steps taken by France, upon its annexation of Madagascar, to establish its judicial system in that Island and thereby to stop the exercise of judicial functions by American consular officers.

<sup>3</sup> "The doctrine invoked by the defendants, that the laws of a conquered or ceded country, except so far as they may affect the political institutions of the new sovereign, remain in force after the conquest or cession until changed by him, does not aid their defense. That doctrine has no application to laws authorizing the alienation of any portion of the public domain, or to officers charged under the former government with that power." *Field, J.*, in *More v. Steinbach*, 127 U. S. 70, 81.

"Of course, in case of cession to the United States, laws of the ceded country inconsistent with the Constitution and laws of the United States so far as applicable would cease to be of obligatory force; but otherwise the municipal laws of the acquired country continue." *Fuller, C. J.*, in *Ortega v. Lara*, 202 U. S. 339, 442.

"That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution, or institutions of the substituted sovereign lose their force, is also plain. *Alvarez v. United States*, 216 U. S. 167. But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler." *Lurton, J.*, in *Vilas v. Manila*, 220 U. S. 345, 357. See also, *Holmes, J.*, in *Panama R. R. v. Bosse*, 249 U. S. 41, 44.

form of government leaves no room for the operation of laws designed to uphold it and contemplating its existence.<sup>4</sup> Again, the fundamental law of the new sovereign may prevent it from accepting a grant of territory without either subjecting it to the application of certain organic institutions, or rendering inoperative existing statutes hostile to the spirit thereof.<sup>5</sup>

In such cases the change is due to circumstances which, operating simultaneously with the cession, produce an effect not unlike that of an amendatory legislative enactment; and it is to be assigned to the operation of the will of the new sovereign rather than to any other cause.<sup>6</sup>

The revenue laws of ceded territory do not appear to be affected by a change of sovereignty.<sup>7</sup> When, however, such territory is by some domestic process incorporated into or united with the country of the grantee, those laws may be in fact changed. This is obviously due to the fact of incorporation however accomplished, rather than to the transfer of sovereignty.

In the case of *Dooley v. United States*, a majority of the Supreme Court of the United States concluded that the authority of the President as Commander in Chief of the Army, to exact duties in 1899, on imports from the United States to Porto Rico, ceased with the perfecting of the treaty of peace

<sup>4</sup> See also *People v. Perfecto*, 43 Philippine R. 887.

<sup>5</sup> A majority of the Supreme Court (consisting of Justices Gray, Brown, Shiras, White, and McKenna), in the case of *Downes v. Bidwell*, 182 U. S. 244, concurred in the proposition that — "The mere acquisition or cession of a region does not 'incorporate' it into the United States so as to subject it generally to those clauses of the Constitution which restrain and prohibit certain action by the Congress of the United States; but such regions may be temporarily governed, in some respects, at least, as seems most suitable for their own interests and those of the United States." James B. Thayer, "The Insular Tariff Cases in the Supreme Court," *Harv. Law Rev.*, XV, 164, 165. See *Balzac v. People of Porto Rico*, 258 U. S. 298.

See, also, the language of Mr. Justice White in *Downes v. Bidwell*, 182 U. S. 244, 306, 310-311, 314-315, 336; also that of Mr. Justice Brown, *id.*, 279, 285, 287; compare that of Chief Justice Fuller, *id.*, 373; and that of Mr. Justice Harlan, *id.*, 384.

Whether or not the constitution or public policy of a State which acquires territory by cession forbids the enforcement of a particular law of the former sovereign, is obviously not a question of international law, for the solution is dependent upon considerations wholly unrelated to the consequence of a change of sovereignty. *New Orleans v. United States*, 10 Pet. 662; *Ortega v. Lara*, 202 U. S. 339, 342.

<sup>6</sup> The supplanting of the Dutch control of Manhattan Island by that of the English in the seventeenth century was accompanied by a complete resettlement and change of laws by the latter in pursuance of the charter granted to the Duke of York by his brother, Charles II. Thus it became immaterial whether the Dutch possession was regarded as that of a military occupant temporarily suspending the common law of the *de jure* sovereign, or as that of an established government exercising fullest rights of sovereignty. *Mortimer v. New York Elevated R. R. Co.*, 6 N. Y. Supp. 898.

"If territory containing a small body of people, not constituting a separate social community, is annexed to another country, the law of the latter country at once takes effect, since the new territory and inhabitants are by the annexation itself incorporated with the old, *Chappell v. Jardine*, 51 Conn. 64; but if the annexed territory contained a separate political society, their old laws would continue, as in the case of the annexation of Florida." Beale's *Cases on Conflict of Laws*, Summary, Sec. 10. See also *Shapleigh v. Mier*, 83 F.(2d) 673.

<sup>7</sup> *Taney, C. J.*, in *Fleming v. Page*, 9 How. 603; *Mr. Griggs, Attorney-General*, 22 Ops. Atty.-Gen., 150. Compare *Cross v. Harrison*, 16 How. 164.

After France had acquired control over Madagascar in 1896, the new sovereign enacted a law declaring Madagascar and its depending islands a French colony, and announcing that after the promulgation of that law French products imported into the island from France or one of her colonies would pay no duty, and that until the adoption of the definitive customs regulations, foreign goods would pay a duty of 10 per cent *ad valorem*. It will thus be seen that it was by means of the act of the new sovereign and not as a consequence of a change of sovereignty, that the revenue laws of Madagascar were altered. U. S. For. Rel. 1896, 134-135.



with Spain, and that the right of free entry of goods into that island from the ports of the United States continued until Congress should properly legislate upon the subject.<sup>8</sup> The opinion of the Court made no reference to the legal effect of cession on the laws of ceded territory, although it was declared that the validity of the order of the President imposing duties upon goods imported into Porto Rico from foreign countries was not questioned.<sup>9</sup>

## d

## Effect on Public Debts

## (1)

§ 123. **In General.** Statesmen have found it an illusive task to determine what should be regarded as the effect produced upon the public debts of a State by a change of sovereignty over a part or all of its territory. Divergent practices have been reflected in treaties of cession. Respecting the significance of those by which the successor to the sovereignty has assumed any measure of the burden of its predecessor, there has been controversy.<sup>1</sup> Writers who have denied that such agreements prior to World War I were indicative of a practice acknowledging a legal duty, have, nevertheless, admitted that the transfer of sovereignty oftentimes begets a moral obligation which may still be disregarded without impropriety.<sup>2</sup> Such admissions reveal the course which the development of the

<sup>8</sup> 182 U. S. 222. See, also, dissenting opinion of Mr. Justice White, *id.*, 236.

<sup>9</sup> The decision was due to the opinion that the President could not, for constitutional reasons, continue the exaction of duties imposed by him during the military occupation of Porto Rico after that island had been ceded to the United States pursuant to the ratification of the treaty. See well-considered note in *Harv. Law Rev.*, XV, 220.

The important opinions of the several Justices of the Supreme Court of the United States in the group of cases known as the Insular Cases, concern generally the relation of the Constitution of the United States to the territory ceded by Spain in the treaty of Dec. 10, 1898. They relate specifically to the extent of the legislative and administrative power of the new sovereign (*Downes v. Bidwell*, 182 U. S. 244; *Dooley v. United States*, 183 U. S. 151); or of its executive (*Dooley v. United States*, 182 U. S. 222); or to the application of existing revenue laws of such sovereign on imports from the newly acquired lands (*De Lima v. Bidwell*, 182 U. S. 1; *Fourteen Diamond Rings v. United States*, 183 U. S. 176. In one case, *Dooley v. United States*, 182 U. S. 222, the scope of the right of the President to exercise the powers of a military occupant preceding the ratification of a treaty of cession of territory, became a matter of adjudication.

§ 123.<sup>1</sup> See, for example, Arthur B. Keith, *Theory of State Succession*, 60-65, in contrast to the views expressed by Max Huber in *Die Staatensuccession*. See, also, discussion in E. M. Borchard, *Diplomatic Protection*, § 83; Hall, *Higgins'* 8 ed., 116, note 1; Coleman Phillipson, *Termination of War and Treaties of Peace*, 322-326; Lauterpacht's 5 ed. of Oppenheim, I, §§ 80-85.

<sup>2</sup> Documents in Moore, Dig., I, 334-385. See, also, in general, Henri Appleton, *Des effets des annexes de territoires sur les dettes de l'État démembré ou annexé, et sur celles des Provinces, Départements, etc., annexés*, Paris, 1894; Bonfils-Fauchille, 8 ed., §§ 225-227; E. M. Borchard, *Diplomatic Protection*, § 83; Bluntschli, *Droit International Codifié*, 5 ed., French translation by Lardy, §§ 46-61; Arrigo Cavaglieri, *La Dottrina della Successione di Stato a Stato*, Pisa, 1910; Maurice Costes, *Des Cessions de Territoires*, Paris, 1914; Pasquale Fiore, *International Law Codified*, English translation by Borchard, §§ 157-158; Hall, *Higgins'* 8 ed., §§ 27-29; A. S. Hershey, "The Succession of States," *Am. J.*, V, 285; Max Huber, *Die Staatensuccession*, Leipzig, 1898, §§ 125-175; Arthur B. Keith, *Theory of State Succession*, London, 1907, Chap. VIII; Lauterpacht's 5 ed. of Oppenheim, I, §§ 80-84; Coleman Phillipson, *Termination of War and Treaties of Peace*, London, 1916, 40-44, 322-326; Westlake, 2 ed., I, 74-83.

Also, Thomas Baty, "Division of States: Its Effect on Obligations," *Transactions of The Grotius Society*, IX, 119; A. Cavaglieri, "Note in Materia di Successione di Stato a Stato,"

law should follow. When it is perceived that a moral obligation rests upon a State to accept a particular burden with respect to any other, there is at once apparent a solid reason for the claim that practice should shape itself accordingly and evolve a rule of law stamping evasion with an illegal character.<sup>3</sup> It is appropriate, therefore, at the present time to observe with care not only what appears to be the evidence of legal duties recognized as such, but also the nature of equities which ought to affect the consciences and therefore limit the freedom of action of the transferees of territory.

The existence and extent of any duty causing a new sovereign to assume the public debt of its predecessor must be examined with reference to distinct lines of inquiry. At the outset it is necessary to observe the relation which the territory subjected to transfer bears to the domain of the former sovereign; whether, for example, as in the case of the relinquishment by Spain of sovereignty over Cuba, the territory concerned is merely a part, and a minor part, of that domain; or whether it is one of several parts into which the territory of a State has been split or divided; or whether, as in the case of the annexation of Texas, the territory transferred embraces the entire national domain of a State whose life as such is thus brought to an end.

As the character and design of a fiscal obligation will be found to play an important part, attention must be directed to the purposes for which a debt is incurred and to the steps taken for the benefit of the creditor to impress a debt upon a particular territorial area.

It must be clear that the validity of a debt is not decisive of the existence or scope of any duty to be borne by the transferee of territory. On the other hand, the circumstance that the laws and policy of the latter forbid the creation of a fiscal undertaking by the methods employed by its predecessor is not necessarily indicative of the obligation which may rest upon the new sovereign.<sup>4</sup>

Throughout the examination of theory and practice the inquiry presents itself whether there is an underlying principle which, regardless of the extent of its influence heretofore, marks the path which should be followed hereafter.

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*Riv. Dir. Int.*, 3rd series, III, 26; E. H. Feilchenfeld, *Public Debts and State Succession*, New York, 1931; Gaston Jèze, "*L'Emprunt dans les Rapports Internationaux—La répartition des dettes publiques entre États au cas de démembrement du territoire*," *Revue de Science et de Législation Financières*, XIX, 59; "*La Répartition des Dettes Autrichienne et Hongroise entre les États Successeurs*," *id.*, XXI, 81; Paul Guggenheim, *Beiträge zur volkerrechtlichen Lehre vom Staatenwechsel (Staatensukzession)*, Berlin, 1925; H. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927, §§ 53–57; A. N. Sack, *Les Effets des Transformations des États sur leurs Dettes Publiques et autres Obligations Financières*, Paris, 1927, I; same author, "*La Succession aux Dettes Publiques d'État*," book review, *University of Pennsylvania Law Review*, LXXX, 608.

<sup>3</sup> See, in this connection, A. N. Sack, *La Succession aux Dettes Publiques d'État*, § 77; also, E. H. Feilchenfeld, *Public Debts and State Succession*, § 269.

<sup>4</sup> Memorandum of the American Peace Commissioners at Paris, Oct. 27, 1898, Senate Doc. No. 62, 55 Cong., 3 Sess., Pt. II, 96, 100; Moore, *Dig.*, I, 367.

Concerning the matter of validity see, "The Negotiation of External Loans with Foreign Governments," *Am. J.*, XVI, 523, 525–527.

## (2)

## CHANGE OF SOVEREIGNTY OVER PART OF THE TERRITORY OF A STATE

## (a)

§ 124. **General Debts.** Where the territory of which the sovereignty has undergone a change is but a part of the domain of the State from which it is separated, it is oftentimes declared that the new sovereign is not burdened with any portion of the general indebtedness of its predecessor, and that because the personality of the latter is not extinct.<sup>1</sup> Doubtless this statement stands uncontradicted by any widely accepted and hence authoritative practice, especially where the territory transferred constitutes, according to any standard of measurement, a minor part of the domain of the former sovereign; and this may be admitted in the face of numerous treaties burdening the new sovereign with a portion of the obligation.<sup>2</sup> It is believed, however, that the underlying principle respecting the course which the new sovereign should follow has a broader basis than is thus disclosed.

There may be no extinction of the personality of a State by disintegration or dismemberment when a substantial portion of its territory amounting to as much as one quarter, one third or one half of its domain passes to a successor. In such case the general indebtedness may be normally deemed to be as closely and beneficially connected with the territory transferred as with that retained by the old sovereign.<sup>3</sup> It would be unjust to permit the transferee to gain the

§ 124. <sup>1</sup>Hall, Higgins' 8 ed., § 27; Arthur B. Keith, *Theory of State Succession*, 60-62; Borchard, *Diplomatic Protection*, § 83; A. S. Hershey, "The Succession of States," *Am. J.*, V, 285, 289-291. Compare Fiore, *International Law Codified*, translation by Borchard, §§ 157-158.

*Cf.* A. N. Sack, *Les Effets des Transformations des États sur leurs Dettes Publiques*, 68-71.

<sup>2</sup>For collections of treaties since the beginning of the nineteenth century where there has been an apportionment of the indebtedness of the former sovereign, see Max Huber, *Die Staatensuccession*, § 127; Moore, *Dig.*, I, 339-343; Coleman Phillipson, *Termination of War and Treaties of Peace*, 324-326.

Among instances prior to World War I may be noted Art. X, of the Treaty of Lausanne, concluded between Italy and Turkey, Oct. 18, 1912, *Am. J.*, VIII, Supp. 58, 61, where it was declared that "The Italian Government pledges itself to pay annually to the treasury of the public debt for the Imperial Government a sum corresponding to the average of the sums which in each of the three years preceding that of the declaration of war have been assigned to the service of the public debt under the revenues of the two Provinces [Tripoli and Cyrenaica]."

The Swedish-Norwegian agreements of October, 1905, providing for the separation of Sweden from Norway, made no provision for the debts of those countries. The texts of the treaties are published in *Am. J.*, I, Supp. 167.

The Treaty of Portsmouth between Russia and Japan of Aug. 23, 1905, providing for the cession to Japan of the Russian lease of Port Arthur, Talien and adjacent territory (Art. V), and of the southern part of the island of Saghalin and the islands adjacent thereto (Art. IX), made no mention of any public obligations of the grantor relating to what was ceded. The text of the treaty is contained in *For. Rel.* 1905, 824.

<sup>3</sup>In the case of *Virginia v. West Virginia*, 220 U. S. 1, the Supreme Court of the United States in determining the mode of apportioning the debt of Virginia between that State and West Virginia, reached the significant conclusion that where all expenditures for which the debt of a State is created have the ultimate good of the whole State in view, the whole State, and not the particular locality in which the improvements are made, should equally bear the burden. Declared Mr. Justice Holmes in the course of the unanimous opinion of the Court: "It was argued, to be sure, that the debt of Virginia was incurred for local improvements and that in such a case, even apart from the ordinance, it should be divided according to the

benefits accruing to the territory acquired from the use of borrowed funds unless the obligation to make repayment were undertaken.<sup>4</sup> It will be seen that such a duty is acknowledged in certain cases where the debt is essentially a local one and the funds are employed for permanent improvements in the territory of which the sovereignty undergoes a change. This simply indicates that the evidence of the local benefit in a certain class of cases is sufficiently strong to make obvious the injustice of permitting the new sovereign to take the territory unburdened with the debt. It should not be admitted, that the evidence is necessarily inconclusive where the debt is a general rather than a local one. While there may be question as to which party should assume the burden of proof, it is believed that in the formulation of a rule of law designed to promote justice and, therefore, to command general approval, it should be laid down first, that the duty of the new sovereign to bear a portion of the debt of the old should be dependent upon the benefits accruing to the territory transferred; and secondly, that such benefits should not necessarily be deemed to be non-existent when the debt is general rather than local.<sup>5</sup>

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territory in which the money was expended. We see no sufficient reason for the application of such a principle to this case. In form the aid was an investment. It generally took the shape of a subscription for stock in a corporation. To make the investment a safe one the precaution was taken to require as a condition precedent that two or three fifths of the stock should have been subscribed for by solvent persons fully able to pay, and that one fourth of the subscriptions should have been paid up into the hands of the treasurer. From this point of view the venture was on behalf of the whole State. The parties interested in the investment were the same, wherever the sphere of corporate action might be. The whole State would have got the gain and the whole State must bear the loss, as it does not appear that there are any stocks of value on hand. . . . All the expenditures had the ultimate good of the whole State in view." 29-30.

Concerning the steps leading up to final payment by West Virginia, see Felix Frankfurter and J. M. Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," *Yale L. J.*, XXXIV, 685, 739.

Cf. also, Coleman Phillipson, *Termination of War and Treaties of Peace*, 322.

<sup>4</sup> This principle which is believed to be accountable for the disposition of grantees on numerous occasions to apportion the general debt of a grantor, was given apparent recognition in Art. VI of the treaty of peace between Denmark on the one hand and Sweden, Great Britain and Russia on the other, concluded at Kiel, Jan. 14, 1814, in which it was declared that "as the whole debt of the Danish Monarchy is contracted as well upon Norway as the other parts of the Kingdom, so His Majesty the King of Sweden binds himself . . . to be responsible for a part of that debt, proportioned to the population and revenue of Norway. By public debt is to be understood that which has been contracted by the Danish Government, both at home and abroad. The latter consists of royal State obligations, bank bills, and paper money formerly issued under royal authority, and now circulating in both Kingdoms." *Rec. Supp.*, V, 666, 668-669. The translation is that given in Coleman Phillipson, *Termination of War and Treaties of Peace*, 324.

<sup>5</sup> It may be doubted whether the contention that the creditor must look to the State with which he contracts for repayment so long as its personality as such exists, is fairly responsive to the understanding of the contracting parties, at least in cases such as are suggested in the text.

The credit of a contracting State rests upon the sum total of its economic and political assets, of which its territorial domain and the resources thereof constitute the foundation. As that domain is essential to the very existence of the borrower as a State, and as the magnitude of the former determines the fiscal strength of the sovereign, it seems arbitrary to impute to a creditor an intention to look merely to the personality of that sovereign as a debtor for the repayment of a loan, when it is another circumstance, namely, the territorial possessions of the State which induced the creditor to lend. He might be fairly said to lend to territory as such controlled by governmental agencies, and to rely in special degree upon the indestructibility of the territory enabling those agencies to maintain a social organization and economic and political life therein. In this respect a loan to a State may perhaps be regarded differently from one to an individual where reliance is placed upon his general credit. It seems hardly

Such a rule points itself to the situations where it would be inapplicable, and those, for sake of convenience, might well be agreed upon. Thus if a debt were incurred for a purpose essentially hostile to the interests of the territory transferred, as manifested by the opposition of a majority of the inhabitants or of the local authorities thereof to the creation of the fiscal obligation, or by the employment of the funds so obtained to hold in subjection those inhabitants, or to repress their endeavor to bring about the change of sovereignty actually resulting, the duty of apportionment would not arise. Again, where the territory transferred had previously been taken by the transferor from the transferee through conquest, there might be solid reason to contend that no part of the general indebtedness of that grantor incurred during the period while it was sovereign over the territory relinquished should be deemed necessarily beneficial to it.<sup>6</sup> In the case of a change of sovereignty over the territory of a distant colony or island constituting a relatively unimportant part of the domain of the parent State, or of which the fiscal system was an entity distinct from that of such State, it might be reasonable to deny that any part of the general indebtedness of the old sovereign should pass to the new.

These and other limitations, easily discernible and possibly susceptible of classification, do not weaken the applicability of the underlying principle, or rob of its inequitableness the contention that the general indebtedness of a former sovereign confers upon the territory transferred no appreciable benefit capable of fair appraisal or just apportionment.<sup>7</sup>

Since the American Revolution the United States has on several occasions succeeded to the sovereignty over territory constituting a portion of the domain of another State. Treaties of cession have been concluded with France (1803),

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reasonable to impute to a creditor a willingness to loan money to a State with no expectation of securing reimbursement from any source other than the original debtor in case a very large portion of its territory passes into the hands of a new sovereign.

In many cases the question as to the effect of a change of sovereignty does not enter the mind of the creditor at the time when the loan is concluded and the contract perfected. While this circumstance renders doubtful the wisdom of attempting to impute to him reasons which he did not then possess, although they might have exerted a decisive influence upon him had he been duly apprised of them, it does not forbid the inference that his conduct would have been surely affected in a definite way had he contemplated the contingency which later arose. It ought to be clear that it is unjust to presume that a creditor possessed an intention at the time the loan was contracted, both adverse to his interests, and one which in a particular case no prudent lender would have been likely to entertain. Illustrative of a contract indicating no contemplation of a change of sovereignty by the parties to the arrangement, see *Serralles' Succession v. Esbri*, 200 U. S. 103.

<sup>6</sup> This limitation would seem to apply in a case such as that respecting Alsace-Lorraine, especially in view of the fact that there was no apportionment of the national debt of France upon the cession of that portion of the French domain to Germany by the Treaty of Frankfurt of May 10, 1871. It should be observed, however, that by the additional convention of December 11, 1871, Brit. and For. State Pap., LXII, 92, "Germany agreed to assume all pensions, civil, military, and ecclesiastical, due to persons who should retain their domicile in the ceded territory; to repay moneys deposited as security; and to recognize and confirm concessions for ways, canals, and mines, as well as contracts for the renting or cultivating of demesial property." Moore, Dig., I, 341.

<sup>7</sup> According to the declaration of independence of the Czecho-Slovak Nation adopted by its Provisional Government at Paris, Oct. 18, 1918, it was announced that "Our nation will assume its part of the Austro-Hungarian pre-war public debt; the debts for this war we leave to those who incurred them." Official Bulletin, Oct. 19, 1918, Vol. II, No. 441, p. 3. See, also, in this connection *Board of Trade Journal*, London, Dec. 5, 1918, Vol. CI, new series, No. 1149, p. 720.

Spain (1819, 1898, and 1900), Mexico (1848 and 1853), Russia (1867) and Denmark (1916). No one of these has purported to impose upon the United States the obligation to assume any portion of the public debt of its predecessor.<sup>8</sup> In certain instances the grantee has undertaken to pay claims of its citizens against the grantor;<sup>9</sup> and in the treaty with Denmark providing for the cession of the Danish West Indies, the maintenance of certain specified concessions was undertaken.<sup>10</sup> The treaty with Panama of November 18, 1903, granting to the United States in perpetuity the use, occupation and control of a zone of land for the construction and maintenance of an interoceanic canal, declared that the rights and privileges conferred were understood to be free from all anterior debts, liens, trusts, or liabilities, or concessions, or privileges to other governments, corporations, syndicates, or individuals, and that consequently all claims arising therefrom should be preferred against the Government of Panama rather than against that of the United States "for any indemnity or compromise which may be required."<sup>11</sup>

It may be observed that "being desirous to remove all the misunderstandings growing out of the political events in Panama in November, 1903," the United States, through its treaty with Colombia of April 6, 1914, agreed to pay to the latter the sum of twenty-five million dollars, gold.<sup>12</sup> By the convention respecting a Nicaraguan Canal Route of August 5, 1914, the United States acquired

<sup>8</sup> Possibly a minor exception is to be noted in Article III of the convention with Denmark of Aug. 4, 1916, providing for the cession to the United States of the Danish West Indies, U. S. Treaty Vol. III, 2558. Art. III thereof contained a "Guarantee according to the Danish supplementary Budget Law for the financial year 1908-1909 relative to the St. Thomas Harbor's four percent loan of 1910." This is believed to be the only undertaking by the United States in reference to any local indebtedness pertaining to any portion of the ceded territory; and it hardly suffices to warrant the conclusion that the United States assumed local debts. A provision in the same article to the effect that "The Colonial Treasuries shall continue to pay the yearly allowances now given to heretofore retired functionaries appointed in the islands but holding no Royal Commissions, unless such allowances may have until now been paid in Denmark," is not to be regarded as the assumption of such a debt.

See, in this connection, letter of the Secy. of State to Senator Stone, with enclosed Memorandum, of Aug. 22, 1916, For. Rel. 1917, 659.

<sup>9</sup> See, for example, Art. IX, treaty with Spain, Feb. 22, 1819, Malloy's Treaties, II, 1654; Art. VII, treaty with Spain, Dec. 10, 1898, *id.*, 1692; Art. XIII, Treaty with Mexico, Feb. 2, 1848, *id.*, I, 1113.

<sup>10</sup> Art. III, convention of Aug. 4, 1916. It may be observed that Section 3 of this Article declared: "The pecuniary claims now held by Denmark against the colonial treasuries of the islands ceded are altogether extinguished in consequence of this cession and the United States assumes no responsibility whatsoever for or in connection with these claims. Excepted is, however, the amount due to the Danish treasury in account current with the West Indian colonial treasuries pursuant to the making up of accounts in consequence of the cession of the islands; should on the other hand this final accounting show a balance in favor of the West Indian colonial treasuries, the Danish treasury shall pay that amount to the colonial treasuries."

<sup>11</sup> Art. XXI, Malloy's Treaties, II, 1355.

"As distribution of government debts was not the rule after 1763, when a State lost only a part of its territory, the United States of America did not deviate either from law or from general practice when, on becoming independent, it did not take over any debts of the British government. If debts of a feudal character had existed which had been contracted by the King of England in his capacity of ruler of the American colonies, or, if debts had been specifically secured upon American revenues, a question might have arisen as to whether or not the United States should follow certain Continental precedents. But no such debts existed before the Revolution." (Feilchenfeld, Public Debts and State Succession, 53.)

In relation to the treaties of cession mentioned in the text, see *id.*, 108-109; 147; 257-258; 329-332, 343; 346-353.

<sup>12</sup> U. S. Treaty Vol. III, 2538.

from Nicaragua grants in perpetuity, "forever free from all taxation or other public charge," of exclusive proprietary rights necessary and convenient for the construction, operation and maintenance of an interoceanic canal through Nicaraguan territory. For these and certain other incidental privileges by way of leasehold, the United States agreed to pay to Nicaragua the sum of three million dollars United States gold coin, "to be applied by Nicaragua upon its indebtedness or other public purposes for the advancement of the welfare of Nicaragua, in a manner to be determined by the two High Contracting Parties."<sup>13</sup> The convention was not, however, an arrangement productive of a change of sovereignty.

It seems important to note that in the several instances where the United States has succeeded France, Spain, Mexico, Russia and Denmark as the sovereign of portions of their respective territories, the treaty that has registered the fact has, with one exception,<sup>14</sup> made provision for substantial payment to the former sovereign which in most instances has purported to be compensatory for the transfer.<sup>15</sup>

§ 125. The Same. The treaty of peace with Germany, of June 28, 1919, appeared to heed the principle of apportionment above advocated. According to Article 254, the Powers to which German territory was ceded undertook, subject to qualifications made in Article 255, to pay:

(1) A portion of the debt of the German Empire as it stood on August 1, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913, of such revenues of the ceded territory, and the average for the same years of such revenues of the whole German Empire as in the judgment of the Reparation Commission are best calculated to represent the relative ability of the respective territories to make payment;

(2) A portion of the debt as it stood on August 1, 1914, of the German State to which the ceded territory belonged, to be determined in accordance with the principle stated above.<sup>1</sup>

Such portions were to be determined by the Reparation Commission. The method of discharging the obligation, both in respect of capital and of interest, so assumed, was to be fixed by that Commission. It was declared that such method might take the form, *inter alia*, of the assumption by the Power to which the territory was ceded of Germany's liability for the German debt held by its nationals.<sup>2</sup> Article 255 provided for exceptions to the above provisions. Inasmuch

<sup>13</sup> U. S. Treaty Vol. III, 2740. See Art. III.

<sup>14</sup> The exception was the treaty with Spain, of Feb. 22, 1819, providing in Art. II for the cession of East and West Florida, Malloy's Treaties, II, 1651, 1652.

See, in this connection, statement in Moore, Dig., I, 439-445, and documents there cited.

<sup>15</sup> The undertaking of the United States in the treaty with Spain of Dec. 10, 1898, to pay to the latter the sum of twenty million dollars, although expressed as a final paragraph of Art. III, which provided for the cession to the United States of the Philippine Islands, did not in terms purport to be in the nature of compensation for the transfer.

§ 125. <sup>1</sup> Senate Doc. No. 49, 66 Cong., 1 Sess.

<sup>2</sup> It was provided, however, in this connection that in the event of the method adopted involving any payments to the German Government, such payments should be transferred to the Reparation Commission on account of the sums due for reparation so long as any balance in respect of such sums should remain unpaid.

as, in 1871, Germany had refused to undertake any portion of the burden of the French debt, it was declared that France should be, in respect of Alsace-Lorraine, exempt from any payment under Article 254.<sup>3</sup> In the case of Poland, that portion of the debt which, in the opinion of the Reparation Commission, was attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland was to be excluded from the apportionment. In the case of all ceded territories other than Alsace-Lorraine, it was provided that that portion of the debt of the German Empire or German States, which in the opinion of the Reparation Commission, represented expenditures by the Governments of that Empire or of those States upon government properties referred to in a later Article (256), should be excluded from the apportionment.<sup>4</sup> In the case of the former German territories, including colonies, protectorates or dependencies, to be administered by a Mandatory pursuant to the treaty, it was declared that neither the territory nor the Mandatory Power should be charged with any portion of the debt of the German Empire or States.<sup>5</sup>

It is not without significance that the principle of apportionment was applied to the general as well as local indebtedness of Germany, a result doubtless attributable to the opinion of the principal Allied and Associated Governments that both forms of obligation were to be deemed as closely and beneficially related to the territory transferred as to that retained by the former sovereign. The problem of making equitable distribution of the burden of the German pre-war debt, both imperial and state, was, however, essentially difficult and hardly capable of immediate solution. Therefore, it was left to the Reparation Commission.<sup>6</sup>

<sup>3</sup> "It should be added that it is easy to justify the exception made in favour of France to the general principle admitted in the Treaty, according to which the State receiving territory takes over part of the public debt of the ceding State and pays for the property of the said State in the ceded territory. In 1871, Germany, when she seized Alsace and Lorraine, refused to take over any part of the French debt; she paid nothing for any French State property, and Herr von Bismarck boasted of this in the Reichstag on May 25, 1871. Today the Allied and Associated Powers mean France to recover Alsace and Lorraine under exactly the same conditions, and consequently that she should take over no part of the German debt nor pay for any State property." (Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace, June 16, 1919, Misc. No. 4, 1919, [Cmd. 258], 11.)

<sup>4</sup> The reason for this last exclusion was that such properties were to pass to the grantees of territories ceded, and be paid for by them to the Reparation Commission for the credit of Germany, on account of the sums due by Germany for reparation Art. 256.

According to Art. XXI of the treaty signed in behalf of the United States, the British Empire, France, Italy, and Japan, on the one hand, and Poland on the other, of June 28, 1919, Poland agreed to assume responsibility for such portion of the Russian public debt and other Russian public liabilities of any kind as might be assigned to her under a special convention between the principal Allied and Associated Powers, on the one hand, and Poland on the other, to be prepared by a commission appointed by the above States. It was declared that should the Commission not arrive at an agreement, the point at issue should be referred to the League of Nations for immediate arbitration. British Treaty Series No. 8, 1919, [Cmd. 223], p. 12.

<sup>5</sup> Art. 257.

<sup>6</sup> In the Reply of the Allied and Associated Powers of June 16, 1919, to the Observations of the German Delegation at Versailles, on conditions of peace, it was said: "The partition of the pre-war debt of the German Empire and of the German States will be made in proportion to the contributory power of the various ceded territories. The determination of this contributory power is obviously very delicate, in view of the diversity of fiscal systems



According to Article 134 of the Treaty of Neuilly-Sur-Seine of November 27, 1919, between the Allied and Associated Powers and Bulgaria, the latter engaged to pay towards the charge for the service of the external pre-war Ottoman Public Debt, both in respect of territory ceded by Turkey under the Treaty of Constantinople, of 1913, for the period during which such territory was under Bulgarian sovereignty, and in respect of territory the cession of which was confirmed by the Treaty of Neuilly-Sur-Seine, such sums as might be determined thereafter by a Commission to be appointed for the purpose of determining to what extent the cession of Ottoman territory would involve the obligation to contribute to that debt.<sup>7</sup> According to Article 141 of the same treaty, any Power to which Bulgarian territory was ceded in accordance with that treaty "undertakes to pay a contribution towards the charge for the Bulgarian Public Debt as it stood on October 11, 1915, including the share of the Ottoman Public Debt attaching to Bulgaria in accordance with the principles laid down in Article 134."<sup>8</sup>

Article 46 of the Treaty of Lausanne, of July 24, 1923, between the Principal Allied Powers and Turkey made the following provision with respect to the Ottoman Public Debt:

The Ottoman Public Debt, as defined in the Table annexed to the present Section, shall be distributed under the conditions laid down in the present Section between Turkey, the States in favour of which territory has been detached from the Ottoman Empire after the Balkan wars of 1912-1913, the States to which the islands referred to in Articles 12 and 15 of the present Treaty and the territory referred to in the last paragraph of the present Article have been attributed, and the States newly created in territories in Asia which are detached from the Ottoman Empire under the present Treaty. All the above States shall also participate, under the conditions laid down in the present Section, in the annual charges for the service of the Ottoman Public Debt from the dates referred to in Article 53.

From the dates laid down in Article 53, Turkey shall not be held in any way whatsoever responsible for the shares of the Debt for which other States are liable.<sup>9</sup>

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in the different German confederated States. Therefore it has not been thought desirable to settle this question at present, and it has been left to the Reparation Commission to estimate which of Germany's revenues will make it possible to compare the resources of the ceded territories and those of the Empire." Misc. No. 4, 1919 [Cmd. 258], p. 38.

"Our nation will assume its part of the Austro-Hungarian pre-war debt; the debts for this war we leave to those who incurred them." (Czechoslovak Declaration of Independence, Oct. 18, 1918, U. S. Official Bulletin, Oct. 19, 1918, Hackworth, Dig., I, 543.)

<sup>7</sup> Great Britain, Treaty Series, 1920, No. 5 [Cmd. 522], p. 35.

<sup>8</sup> *Id.*, p. 36.

See also Art. VIII of treaty of Oct. 28, 1920, between France, Italy, Japan and Roumania, with reference to provisions for Bessarabia, *Nouv. Rec. Gén.*, 3 sér., XII, 849, 852.

<sup>9</sup> League of Nations, Treaty Series, XXVIII, No. 701, 13, 37.

The several financial clauses of the treaty are embraced in Section I of Part II, being Articles 46-57, together with an annex in the form of the Ottoman pre-war Public Debt as of Nov. 1, 1914.

"The point that special local benefits are not considered in its basis of repartition was

Regardless of the extent to which, if any, the foregoing treaties in termination of the World War point to or are indicative of requirements of international law, it is believed that they establish precedents that are likely to exercise a profound influence in the future.<sup>10</sup> Those treaties, notwithstanding the particular policies that were responsible for them, or the theories which they variously reflected, do not as a whole manifest opposition to the principle that the duty of the new sovereign to bear a portion of the debt of the old should be dependent upon the benefits accruing to the territory transferred, and that such benefits should not necessarily be deemed to be non-existent when the debt is general rather than local.

(b)

§ 126. **Local Debts.** It seems to be acknowledged that obligations which are impressed upon the territory transferred in such a way as to be specially associated with it, and as manifesting at least no unbeneficial connection therewith, pass to the new sovereign.<sup>1</sup> Difficulties arise, however, in determining what debts are to be deemed to possess such a character.

Where the proceeds of a debt are devoted to the erection of permanent improvements in the territory transferred, the connection with the place and the purpose of the expenditure suffice to indicate the reason for the assumption of the

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stressed both during the peace negotiations and in the opinion of Mr. Borel." (Feilchenfeld, *op. cit.*, 468.)

<sup>10</sup> From the treaties considered in the text, the two most faithful observers of, and commentators upon the practices of States for the past three centuries reach differing conclusions. Prof. E. H. Feilchenfeld, in his work on Public Debts and State Succession, published in 1931, appears to be of opinion that the treaties fail to establish a rule of international law applicable to the cessionary State. In his treatise entitled *Les Effets des Transformations des États sur leurs Dettes Publiques*, published in 1927, and in his subsequent writings (such as "Public Debts and State Succession," *Univ. Penn. Law Rev.*, LXXX, 608, Feb. 1932), Prof. A. N. Sack appears to take the opposite stand. To the researches and expositions of these scholars, statesmen as well as writers in every quarter are greatly indebted, and none more so than this author.

§ 126.<sup>1</sup> "It seems to be the consensus of opinion among authorities on international law, that, upon the separation of part of a country from the sovereignty over it, debts created for the benefit of the departing portion of the country go with it as charges upon its government." Opinion of Attorney-General Griggs, July 26, 1900, 23 Ops. Attys.-Gen., 181, 187, citing Hall's *Int. L.*, 4th ed., p. 98; Rivier, *Droit des Gens*, 1, pp. 70, 72; Calvo, *Le Droit Inter.*, 1, § 101; 4, § 2487; Phillimore's *Int. L.*, 2 ed., Vol. 1, Part 2, §§ 136, 137; The Tarquin, Moore on Arbitrations, V, 4617; Lawrence's Wheaton, pp. 53, 54; Wharton's *Int. L. Dig.*, § 5; *Anglo Saxon Review*, June, 1899, Mr. Reed's article concerning the Philippine debt, etc.; Dana's Wheaton's *Int. L.*, § 30, note; Glenn's *Int. L.*, § 28; Field's *International Code*, §§ 24 and 26; Gardner's *Institutes of Int. L.*, p. 52; Senate Doc. 62, 55 Cong., 3 Sess., Part 2, p. 50.

Mr. Frelinghuysen, Secy. of State, December 29, 1883, in a communication to Mr. Phelps, American Minister to Peru, declared that "The opinion of the United States heretofore has been that as the foreign obligations of Peru, incurred in good faith before the war, rested upon and were secured by the products of her guano deposits, Chile was under a moral obligation not to appropriate that security without recognizing the lien existing thereon." MS. Inst. Peru, XVII, 33, 35; Moore, *Dig.*, I, 335. Prof. Westlake, in commenting on this despatch says: "There was perhaps no necessity to qualify the obligation as moral, where the guano deposits had been pledged as security." *Int. L.*, 2 ed., I, 63.

See, also, Mr. Blaine, Secy. of State, to Mr. Cowie, June 15, 1885, 156 MS. Dom. Let. 1; Moore, *Dig.*, I, 336; correspondence between the British Minister in Chile and the Chilean Minister of Foreign Relations, contained in U. S. For. Rel. 1888, Part I, 182-186; Moore, *Dig.*, I, 336, note; text of Chilean-Peruvian treaty of peace of Oct. 20, 1883, For. Rel. 1883, 731.

obligation by the new sovereign.<sup>2</sup> In such case the mode by which the change of sovereignty is effected is believed to be unimportant.

A State may loosely associate a public debt with the territory of a particular portion of its domain over which sovereignty is subsequently relinquished, as a means of raising funds for purposes unrelated to any definite local interest. In such a case where the funds are not locally employed, the debt is not to be regarded as peculiarly a local one. Any duty on the part of the transferee of the territory concerned must depend upon whether this item as a portion of the general indebtedness of the former sovereign is to be regarded as subject to apportionment. There may be great difficulty in concluding that it should be so treated.

There would clearly be no fiscal burden imposed upon the new sovereign in case the debt were incurred for a purpose distinctly hostile to the interests of the inhabitants of the territory transferred. The United States so regarded the design with which Spain had incurred the so-called Cuban debt prior to the relinquishment of sovereignty over Cuba. It was contended by the Spanish peace commissioners at Paris in 1898, that the United States should not only accept the cession of Cuba, but also assume responsibility for the payment of the Cuban debt.<sup>3</sup> In denying that the debt passed to the successor to the sovereignty, still less to the United States, the American commissioners were able to show that:

The debt was contracted by Spain for national purposes, which in some cases were alien and in others actually adverse to the interests of Cuba; that in reality the greater part of it was contracted for the purpose of supporting a Spanish army in Cuba; and that, while the interest on it has been collected by a Spanish bank from the revenues of Cuba, the bonds bear upon their face, even where those revenues are pledged for their payment, the guarantee of the Spanish nation.<sup>4</sup>

<sup>2</sup> Lauterpacht's 5 ed. of Oppenheim, I, § 84; Coleman Phillipson, Termination of War and Treaties of Peace, 42, 326.

<sup>3</sup> Annex 2 to protocol 3 of conference of Oct. 7, 1898, Senate Doc. 62, 55 Cong., 3 Sess., Part II, 26; Moore, Dig., I, 351-352. In view of the terms of the peace protocol of Aug. 12, 1898, providing for the relinquishment rather than the cession of Cuba, the American commissioners had no difficulty in showing that the United States was under no obligation to become the grantee of that island.

<sup>4</sup> Senate Doc. 62, 55 Cong., 3 Sess., Part II, 100; Moore, Dig., I, 367. In the course of their memorandum the American commissioners declared that the finances of the island were exclusively controlled by the Spanish Government; that the debt was in no sense created by Cuba as a Province or Department of Spain, or by the people of the island; that the "debt-creating power, such as commonly belongs to communes or municipal corporations, never was delegated to Cuba." In examining the origin and history of the debt the American commissioners called attention to the fact that prior to 1861, no Cuban debt existed; that the surplus revenues of the island were not expended for its benefit but sent to Madrid; that from 1866 to 1868, a so-called Cuban debt had been created for imperial rather than for insular purposes, such as to meet the expenses of the attempt to reincorporate San Domingo into the Spanish dominions, and of the expedition to Mexico; that from 1868 to 1878, occurred the 10 years' war for Cuban independence, the expenses of which were imposed upon the island, so that in 1880, the so-called Cuban debt amounted to upwards of \$170,000,000; that an attempt to consolidate these debts resulted in the creation of the so-called "*Billetes hipotecarios de la Isla de Cuba*," amounting to \$124,000,000; that the Spanish Government undertook to pay the principal and interest of this out of Cuban revenues, but that on the face of the bonds "the Spanish nation" (*la Nación española*)

Replying to the contentions of the Spanish commissioners that the bonds were mortgage bonds, the American commissioners called attention to the distinction between a pledge of revenues yet to be derived from taxation, and a mortgage of property. They adverted to the fact that the Spanish Government had itself always regarded the pledge of Cuban revenues as within its own control and capable of modification or withdrawal at will, without affecting the obligation of the debt. In proof of this they quoted the language of a decree of autonomy signed by the Queen Regent on November 25, 1897. Therefore, they concluded:

No more in the opinion of the Spanish government, therefore, than in point of law, can it be maintained that that Government's promise to devote to the payment of a certain part of the national debt revenues yet to be raised by taxation in Cuba, constituted in any legal sense a mortgage. The so-called pledge of those revenues constituted in fact, and in law, a pledge of the good faith and ability of Spain to pay to a certain class of her creditors a certain part of her future revenues. They obtained no other security, beyond the guarantee of the "Spanish Nation," which was in reality the only thing that gave substance or value to the pledge, or to which they could resort for its performance.<sup>5</sup>

By reason of the nature of the debt, together with the known purposes for which it was created, it is believed that the position of the United States was unassailable.<sup>6</sup>

A State may endeavor to impress a debt upon territory of which the sovereignty subsequently undergoes a change, by making a definite pledge of revenues to be derived therefrom. The debtor may observe all of the requirements of its own law in the attempt to place irrevocably beyond its reach for any other purpose the source of revenue on which it is agreed that the creditor should rely as security for the loan. The creation of the lien may be in fact definitely manifested in the formal and valid undertaking of the obligor. The question presents itself whether upon the change of sovereignty such acts suffice

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guaranteed their payment; that the interest charge for the debt, amounting to \$7,838,200 annually, was collected through a Spanish fiscal agency in Cuba, collecting daily from the custom-house at Habana upwards of \$33,000; that in 1890, a new issue of bonds was authorized by the Spanish Government, amounting to \$175,000,000, and similarly guaranteed for the purpose of refunding the existing debt, and to incur new indebtedness contracted after 1886; that only a portion of this last issue had been disposed of when the insurrection broke out in 1895; that the Spanish Government then proceeded to issue these bonds in order to raise funds with which to overcome the revolution; that those outstanding on Jan. 1, 1898, amounted to \$171,710,000; that an additional war loan known as the "Cuban War Emergency Loan," amounting to \$169,000,000 of 5 per cent bonds, was thereupon floated; that although in these bonds no mention was made of the Cuban revenues, the issue was regarded as constituting a part of the Cuban debt, "together with various unliquidated debts, large in amount, incurred by the Spanish authorities in opposing by arms the independence of Cuba." Senate Doc. 62, 55 Cong., 3 Sess., Part II, 48-50; Moore, Dig., I, 356-359.

<sup>5</sup> See Senate Doc. 62, 55 Cong., 3 Sess., Part II, 201; Moore, Dig., I, 384.

<sup>6</sup> Declares Westlake: "When Cuba was emancipated from Spain by the Spanish-American War, it could scarcely be expected that either she or the United States should recognize the loans which Spain had charged on her for the cost of repressing the Cubans, during the long and intermittent struggle of which her emancipation was the close." Int. L., 2 ed., I, 78-79.

See discussion of the Cuban debt controversy in Feilchenfeld, *op. cit.*, 329-343.

to bind the transferee regardless of the purposes for which the funds are employed, and irrespective also of the consent of the inhabitants of the territory concerned. If it be admitted in a given case that such territory is sought to be utilized by the sovereign creating the debt because its resources offer a basis of credit, and without any design of employing the funds received within that territory, there is ground for the contention that the debt is a distinct detriment thereto. The detriment may be more obvious where those funds are used for a purpose sharply adverse to the interests of that territory, as in the attempt to suppress a revolution which proves successful and leads to the transfer of sovereignty which ensues. The issue in such cases is simply whether the endeavor to mortgage the resources of the territory subjects it to a burden otherwise not fastened upon it after the pledgor relinquishes its sovereignty.

The value of any pledge as such depends upon the success of the pledgor in putting beyond his own reach and contingently within that of the pledgee the valuable asset relied upon for the purpose of effecting the loan. A pledgor State necessarily encounters difficulty in following such a course, and that for the reason that its territory, if occupied by human beings, is not, like a mere chattel, to be subjected to such fiscal or other use as may suit the convenience or caprice of the existing governmental authority. On principle the resources of that territory should not be regarded as capable of complete hypothecation save under conditions which do not appear to be essentially adverse to the welfare of the occupants. Thus it is not believed that a pledgor State should be deemed to possess the power to fasten upon a portion of its own domain a financial burden admittedly hostile to the interests of the inhabitants thereof beyond the time when the territory ceases to be under the sovereignty of the pledgor.<sup>7</sup>

In applying such a principle great caution should be exercised in concluding that a pledge sought to be created is hostile to local interests. In each case the problem should be approached without bias. It must be assumed to be as reasonable for a sovereign to create a lien favorable to territory affected by it as to do otherwise. Possibly no habit on the part of impoverished States generally, if one should be found to exist, should suffice to justify any sinister presumption. Doubtless every circumstance shedding light on the fiscal policy of the pledgor State with respect to that portion of its domain upon which a lien was sought to be fastened, should be subjected to scrutiny, and particularly any evidence of the actual as well as avowed purpose of the borrower in incurring the debt.

It may be doubted whether a lack of proof of actual expenditures of the funds obtained within the territory burdened with payment should be regarded as a necessary indication of hostile design. It is conceivable that there might have been general local consent to a pledge of local revenues for the sake of the necessities of the country at large. Although it might be urged that in such case any local benefits derived from the pledge should be deemed to be limited in point of time to the period within which the burdened territory

<sup>7</sup> It is believed that this principle is likely to secure general recognition notwithstanding difficulties which may attend its application.

constituted a part of the domain of the pledgor, there might be reason for hesitation in acknowledging that the change of sovereignty should, in such a case, free the transferee of the territory from the obligation sought to be attached to it.<sup>8</sup>

It is not believed that the permanence of the association of a debt with a particular territory is necessarily affected by the mode by which a change of sovereignty is accomplished. In case a transfer is caused by the strong arm of a conqueror or by the success of a revolution, the principle applicable to the fiscal obligations of the new sovereign would not appear to differ from that obtaining in case of a cession not induced by force. The fact of conquest or revolution may, however, prove to be of significance as showing that a particular debt was incurred for the purpose of overcoming such manifestation of force, and should, therefore, be looked upon as adverse to the interests of the territory of which the sovereignty was changed by force. It may be that territory wrung by conquest from a weaker foe is burdened with a debt distinctly beneficial to local interests. In such event it is not believed that the new sovereign should escape the burden thereof.

(c)

§ 127. **Certain Conclusions.** The distinction frequently laid down between the general and local debts of a contracting State has not always served a useful purpose, for it has tended, in the case of the former, to encourage an assumption unduly favorable to the new sovereign, and in that of the latter, to suggest the imposition of an unjust or excessive burden. In neither case has it reflected closely the practice of States.

As the foregoing discussion has indicated, a general public debt may not unreasonably be deemed beneficial rather than otherwise to that portion of the national domain which is transferred by cession to a foreign State. Conversely, a public local debt may be distinctly hostile to the interests of the territory with which it is supposedly associated, and that regardless of the method employed to fix the burden of payment.

The conscience of the transferee of territory cannot be affected by fiscal burdens justly deemed harmful thereto; and whenever the evidence establishes that a public debt is of such a character, there is no solid reason for the assumption of the burden by the new sovereign. If the evidence shows that such a debt, however general, is not detrimental to the interests of the territory transferred, the situation is otherwise, and the transferee cannot evade the obligation without violating justice. In a word, the underlying reason for burdening the new sovereign with any portion of the fiscal obligation incurred by its predecessor depends upon proof of the benefits which have accrued to the territory transferred in consequence of the debt.

There is need of general agreement respecting the application of this funda-

<sup>8</sup> It would be logical in such a case, as has already been observed, to regard the debt as a part of the general debt of the former sovereign, and thereupon to inquire whether as a part of such an obligation there was evidence of such a local benefit as would give rise to a duty of apportionment.

mental test. There is required some understanding, possibly necessitating the formulation of rules for special guidance, indicative of what circumstances should be deemed to cause a debt to possess a character hostile to the interests of territory transferred, and what also should be regarded as certain tokens of a locally beneficial aspect.<sup>9</sup> The advantages derivable from an adequate response to this requirement, through the enhancement of the credit of borrowing States, and the safeguarding of the equities of prospective creditors, might be fully commensurate with the burden entailed by such an achievement.

It is probable that before the close of the present century the validity of changes of sovereignty over territory will be regarded as dependent in large degree upon the consent of the inhabitants of the areas concerned. Conditions of transfer will be those to which the inhabitants subscribe; and for their equities of whatsoever kind respect will be increasingly demanded. The relationship of these considerations to endeavors to burden the new sovereign with debts incurred by its predecessor will be close, and perhaps most obvious where colonies or other domestic entities break away by force or otherwise from a parent State, and attain independent statehood. Whenever they do so, contentions such as those advanced by the United States in the matter of the Cuban Debt controversy will be invoked anew and vigorously pressed as a means of preventing the assumption by the new State of such fiscal burdens as were sought to be imposed upon its territory as a means of retaining control over it, or with a view to exploiting it for purposes that might be deemed to be adverse to its interests. In such situations no obligation of succession is likely to be respected. In cases of cession, howsoever induced, fullest heed will doubtless be paid to the equities of all concerned. Whether the new sovereign should accept the obligations incurred by its predecessor, may be expected to be tested in the light of standards that scrutinize closely the beneficial or detrimental connection of particular debts with the area concerned. In passing upon the actual character of that connection, verbal distinctions will be flung aside as unhelpful and, therefore, valueless whenever they seem to obscure a clear comprehension of the inherent character of a national debt. In a word, with acknowledgment of the power of the inhabitants of territory to judge of the conditions on which a valid transfer of sovereignty may be effected, there appears to come into being a new forum not only inclined to apply realistic tests of the beneficial or detrimental aspect of previous fiscal undertakings, but also one that may prove to be possessed of a decisive voice in the matter, and whose decision touching any rules of succession will be governed by what those tests reveal.

<sup>9</sup> The success of the effort to formulate any rules worthy of general acceptance would seem to depend upon the opportunity offered to permit each factor in a particular case to be examined with reference to its bearing upon the question of local benefits. If there remains a tendency to place, for example, all so-called local debts in the same category, or to test the obligation of a new sovereign by the presence or absence of a single circumstance not itself decisive of the question of benefit, confusion of thought must result and grounds of disagreement be multiplied.

## (3)

§ 128. **Total Absorption of a State.** Where one State succeeds to territory constituting the entire domain of another, it is said that the new sovereign succeeds also to the general fiscal obligations of its predecessor.<sup>1</sup> The question arises, however, whether the liability so transferred is an unlimited one. Professor Westlake reached the conclusion that

If the territory changing masters is merged for revenue purposes in that of the annexing State the liability of the latter will be unlimited, but if it is maintained as a separate fiscal unit, the obligations of the extinguished State, or those of the ceding State connected with the territory, will not pass over beyond the value of the assets received, including such taxation of the territory as it can reasonably bear without reference to the political convenience of the annexing State.<sup>2</sup>

The soundness of this distinction may be tested by the case of the Texan bonds.

The independent State of Texas became incorporated into the United States on terms providing that Texas should retain all the vacant and unappropriated lands lying within its limits, which should be applied to the payment of its debts and liabilities; and the residue of the lands, after discharging such debts and liabilities, were to be disposed of as the State might direct, the debts and liabilities of the State in no event to become a charge upon the United States.<sup>3</sup>

§ 128.<sup>1</sup> Hall, Higgins' 8 ed., § 29, note 1, p. 123; A. S. Hershey, in *Am. J.*, V, 285, 286. Concerning the terms of the surrender of the forces of the South African Republic and the Orange Free State to the commander of the British forces in 1902, see Westlake, 2 ed., I, 80-82.

"It is almost universally admitted, that in case of *extinction* of the debtor State (by annexation of its whole territory by another State, or by division or dismemberment of its territory), its debts should be taken over by that State or those States which appropriated to themselves the territory of the debtor State." (A. N. Sack, in *Univ. Penn. Law Rev.*, LXXX, 608.)

HAWAIIAN DEBT: By a joint resolution of the Congress approved July 7, 1898, it was declared that—"The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States, but the liability of the United States in this regard shall in no case exceed \$4,000,000. So long, however, as the existing government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said government shall continue to pay the interest on said debt." Senate Doc. 231, 56 Cong., 2 Sess., p. 7, 1016. According to a report of the Senate Committee on Foreign Relations on May 14, 1900, it was said: "This obligation upon the Hawaiian government [to pay interest] ceases when the government of July 7, 1898, is superseded by the government provided for in 'An act to provide a government for the Territory of Hawaii,' approved April 30, 1900—that is to say, 45 days after the approval of said act, to wit, June 15, 1900. See § 104 of Act of April 30, 1900. The interest after that date is left unprovided for, and should be assumed by the United States, if, indeed, it is not assumed by fair construction of the act of July 7, 1898." *Id.*, 1018-1019.

<sup>2</sup> Int. L., 2 ed., I, 77. The Treaty of Brussels of Nov. 28, 1907, providing for the cession to and annexation by Belgium of the Independent State of the Congo, declared in Art. I that—"The Belgium State hereby accepts this cession, takes over and accepts the obligations of the Independent State as set forth in Schedule A, and undertakes to respect the existing interests in the Congo, together with the legally acquired rights of third parties, native and non-native." *Am. J.*, III, Supp., 74.

See For. Rel. 1910, 677-685, respecting the succession by Japan to the sovereignty of Korea pursuant to the treaty of Aug. 22, 1910.

<sup>3</sup> 5 Stat. 798; Moore, Dig., I, 455. The joint resolution was approved on March 1, 1845.



The then existing indebtedness of Texas comprised bonds for the payment of which the former Republic, by appropriate legislation between 1836 and 1840, had pledged its national faith and its revenues.<sup>4</sup> Obviously no arrangement between the new sovereign and the old could affect the duty of the United States to foreign bondholders. That duty, whatever might have been its scope, was fixed by the law of nations.<sup>5</sup> Legislation in the United States of 1850 and 1855, was an attempt, for the protection of bondholders, to shift for a valuable consideration, from the State of Texas to the Union, the direct burden of the debt.<sup>6</sup> The method by which this was sought to be accomplished is without international significance. The American commissioners at Paris were justified in declaring in their memorandum of October 27, 1898, that:

Texas was an independent State which yielded up its independence to the United States and became a part of the American Republic. In view of this extinction of the national sovereignty, the United States discharged the Texan debt.<sup>7</sup>

<sup>4</sup> See Act of Nov. 18, 1836, Laws of the Republic of Texas, 1836-1837, 32; Act of June 7, 1837, *id.*, 1836-1837, 241; Act of May 16, 1838, *id.*, 1838, Part II, 10; Act of Jan. 22, 1839, *id.*, 1839, 62; Act of Jan. 14, 1840, *id.*, 230; Joint Resolution of Feb. 1, 1840, *id.*, 406.

See in this connection The Public Debt of Texas, House Misc. Doc. No. 17, 33 Cong., 2 Sess., Jan. 16, 1855, embracing undated report of Mr. Corwin, Secy. of the Treasury, to the President (probably of 1851) in relation to the matter; also, Report of Senate Committee on Finance, of July 1, 1854, Senate Rep. Com. No. 334, 34 Cong., 1 Sess.

<sup>5</sup> Westlake, 2 ed., I, 79.

<sup>6</sup> Act of Sept. 9, 1850, 9 Stat. 446, Moore, Dig., I, 344. Concerning the difficulty in carrying this law into effect, see Opinion of Mr. Cushing, Attorney-General, 6 Ops. Attys.-Gen., 130, Moore, Dig., I, 344-346. Cf. Act of Congress of Feb. 28, 1855, 10 Stat. 617-619; Moore, Arbitrations, IV, 3591-3594.

The failure of an English holder of a Texan bond in 1854, to establish a claim against the United States before the mixed commission organized under the convention of February 8, 1853, signified little, as the umpire dismissed the claim on technical grounds, "it being for transactions with the independent Republic of Texas prior to its admission as a State of the United States." Moore, Arbitrations, IV, 3591, 3594.

<sup>7</sup> Senate Doc. 62, 55 Cong., 3 Sess., Part II, 96, 104; Moore, Dig., I, 367, 372.

Attorney-General Griggs, Sept. 20, 1899, in reply to an inquiry of the Secretary of State whether certain claims against Hawaii, arising prior to its annexation and thereafter presented to the United States, were claims against the United States, and whether they should be referred to the Court of Claims, expressed opinion to the effect that an exception to the general doctrine of international law imposing upon the new sovereign the debts of the absorbed territory exists "where the Federal idea obtains." He said in part: "Nor is the attribute of sovereignty to be regarded as the sole test throughout the whole situation of the nature of the relation to the General Government or the rest of the world. If there is a distinct and independent civilized government, potent and capable within its territorial limits, conducted by a separate executive, not acting as the mere representative by appointment of the distant central administration, I perceive no reason to doubt that such government rather than the central authority should respond out of its separate assets to any valid claims upon it, whether accruing in the past, presently accruing, or to accrue in the future. . . . And the dilemma by which, under the separated governmental entities, the Federal authority is not liable for the demand, and the State authority has no international relations and therefore escapes a perfect obligation, is apparent rather than real. The historic complaint as to this situation is not in reality well founded, and in the forum of nations the just liabilities to claimants and obligations to civilization of a State of this Union have been for the most part met by the State or recognized by the United States in its sovereign grace. But the legal liability is that of the inferior member of the federation rather than of the federation itself. . . . It is beyond question that a claim on foreign behalf against a State or Territory of the Union would be presented through, rather than to, the State Department; that is, it would be presented to the local and not to the Federal Government, and would be finally adjusted and recognized or denied by the former, although the Federal Government is the international representative, and in various ways, short of coercion of

The admission of Texas into the Union as a State thereof, subjected it to those provisions of the Constitution enjoining upon a State not to "lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."<sup>8</sup> By that instrument those powers were conferred on the General Government.<sup>9</sup> Thus, the scope of the duty of the United States to foreign creditors, was not determined by the "mere extinction of the national sovereignty of Texas," but rather by impressing upon that State a character which absolutely forbade its maintenance as a separate fiscal unit, and which resulted in the merging of its revenue system into that of the General Government. The liability, therefore, of the new sovereign, could not in justice be limited to the amount of duties paid in Texan ports.<sup>10</sup>

It may be urged that the duty of the new sovereign should be measured by the benefits accruing to the territory concerned in consequence of the debt. As between creditor and debtor the scope of the duty of the latter is always tested by the extent of the detriment sustained by the former in lending its funds. So long as the debt is validly contracted, the extent of the benefits accruing to the borrower, whether small or great, are of no concern, in estimating the scope of the duty to repay. There is no deviation from this principle in attempting a fair apportionment in the case where the territory transferred is but a part of the domain of the original debtor. The reason for the attempt is due to the equitableness of the claim that territory definitely benefited by a loan should bear its portion of the burden of payment when it is separated from the domain of the sovereign which incurred the debt. Where a State is completely absorbed by another, no question of apportionment can arise. There is no need of an endeavor to ascertain whether portions of the newly acquired domain have or have not gained in some special degree from the use of the funds received. Hence the full detriment to the lender or creditor as duly manifested by the

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a State — as unnecessary, ordinarily, as it is impossible — admits a certain international liability." 22 Ops. Attys.-Gen., 583, 585, 586, 587, given in part in Moore, Dig., I, 336-337.

The new sovereign may require the territory absorbed to satisfy directly from its own treasury the existing debt, or to reimburse the general government of that sovereign for paying it. The existence and exercise of such a right are matters of domestic law. It may be doubted, however, whether an exception to the general international liability of the new sovereign to a foreign obligee may be justly founded on the degree of freedom from control in domestic affairs retained by the governmental authorities of the country whose territory has been absorbed by the new sovereign, even in a case where the so-called "federal idea" obtains. Ultimate responsibility for any international obligation, fiscal or otherwise, rests upon the authority capable of dealing with the outside world. When a State becomes extinct through its absorption or annexation by another, such capacity is necessarily transferred to the new sovereign. With it alone foreign States may enter into negotiation. With respect to them it is alone accountable for the continued performance of any obligation undertaken by the former sovereign and which, according to international law, is deemed to pass to its successor.

<sup>8</sup> The Constitution, Art. I, § 10.

<sup>9</sup> *Id.*, Art. I, § 8.

<sup>10</sup> Dana's Wheaton, § 30, note 18; Lawrence's Wheaton (ed. 1863), 54, note; Scott's Cases on Int. L., 95, note.

See in this connection discussion in Feilchenfeld, *op. cit.*, 271-286.

It is urged with force that where a State absorbed by another is bankrupt, the extent of the fiscal obligation of the new sovereign should be limited by the actual value of the resources acquired through the transfer. Coleman Phillipson, Termination of War and Treaties of Peace, 322-323; Arthur B. Keith, Theory of State Succession, 60, 65.

terms of the original agreement affords the basis of estimating the extent of the burden passing to the new sovereign.

Nevertheless, there may be circumstances when that sovereign may fairly challenge the claim that it is burdened with the obligation assumed by its predecessor. Thus the former might contend that a debt incurred for the known and actual purpose of preventing by force or otherwise the transfer of the entire domain, and of which in spite of such attempt the sovereignty was changed, should be regarded as voidable. In such case it might be fairly contended by the transferee of the territory that the creditor assumed the risk that the design for which the debt was incurred would be achieved, and that the failure thereof was a contingency had in contemplation when the loan was made.<sup>11</sup>

It is possible for a State validly to incur a debt for a purpose which, in the estimation of the inhabitants thereof, is essentially hostile to the national interests although unrelated to any probable change of sovereignty.<sup>12</sup> Upon the absorption of the State by another there is difficulty in perceiving the ground on which the new sovereign can escape the burden created by its predecessor, unless it be admitted that any debt incurred without the consent or against the will of the inhabitants of the debtor State may fairly be regarded as voidable whenever they win control of the reins of government. Until, however, the right to annul a public debt on such a ground is firmly established,<sup>13</sup> the new sovereign would not seem to possess the privilege of exercising such a condition subsequent, even though it might sincerely profess the desire to respond fully to the popular will expressed within the territory acquired.

Following the absorption of Austria by Germany in 1938, the latter was informed in a note of April 6, 1938, that the Government of the United States would look to that of Germany for the discharge of the so-called relief indebtedness of the Austrian Government, pointing out that the lien of that

<sup>11</sup> "Those who lend money to a State during a war, or even before its outbreak when it is notoriously imminent, may be considered to have made themselves voluntary enemies to the other State, and can no more expect consideration on the failure of the side which they have espoused than a neutral ship which has entered the enemy's service can expect to avoid condemnation if captured." Westlake, 2 ed., I, 78, quoted in Coleman Phillipson, *Termination of War and Treaties of Peace*, 43. See, also, opinion of Lord Alverstone, C. J., in *West Rand Central Gold Mining Co. v. the King* (1905), 2 K. B. 398; *Am. J.*, I, 217.

<sup>12</sup> Thus, for example, a monarchical government might lawfully incur a debt for the purpose of raising funds to assist a foreign government in suppressing a revolution, and that directly against the will of the inhabitants of the territory burdened with payment. The debt might be fairly regarded as conferring no direct benefit whatever upon the State in whose name it was contracted. Nevertheless, the law of that State might be such as to impose no prohibition of such action and thus fortify the claim of a creditor that the transaction was not invalid.

<sup>13</sup> It is not intimated that the law of nations may not ultimately demand that the validity of a national debt should depend upon some recognized manifestation of popular approval on the part of and within the domain of the debtor State. See, however, memorandum of the American Peace Commissioners at Paris, Oct. 27, 1898, Senate Doc. 62, 55 Cong., 3 Sess., Part II, 96, 100, Moore, Dig., I, 367, where it was declared: "The American commissioners, therefore, are not required to maintain, in order that they may be consistent, the position that the power of a nation to contract debts or the obligation of a nation to pay its debts depends upon the more or less popular form of its government. They would not question that validity of the national debt of Russia, because, as the Spanish memorandum states, an autocratic system prevails in that country."

indebtedness upon the assets and revenues of Austria had been subordinated by the United States to the lien of the Austrian international loan of 1930 upon the same assets and revenues.<sup>14</sup> Non-payment of the June 1, 1938, monthly service installment on that loan, caused the Government of the United States to make the following statement to that of Germany on June 9, 1938:

The Government of the United States does not wish to omit, on the occasion of the failure of the German Government to make the contractual monthly payment due June 1, on the Austrian loan of 1930, in spite of the express charge which it enjoys on the assets and revenues of Austria taken over by the German Government, to state its dissent from the indicated position of the German Government as to its legal responsibilities in the premises, and to express the hope that Germany may yet undertake the payments encumbent on it both under international law and under equity.

It is believed that the weight of authority clearly supports the general doctrine of international law founded upon obvious principles of justice that in case of absorption of a State, the substituted sovereignty assumes the debts and obligations of the absorbed State, and takes the burdens with the benefits. A few exceptions to this general proposition have sometimes been asserted, but these exceptions appear to find no application to the circumstances of the instant case. Both the 1930 loan and the relief loans were made in time of peace, for constructive works and the relief of human suffering.<sup>15</sup>

It is believed that the character of these loans and the purposes thereof emphasized the strength of the American position.

In a communication from the German Foreign Office of November 17, 1938, it was declared that the German Government after careful study of the pertinent procedures and principles based upon international law, "was not of the opinion that it was under any legal obligation to assume the foreign debts of the former Austrian Federal Government," and that, supported by historical procedures, it took a negative stand with regard to the debts of the Austrian Government, "since they were brought about in order to support the incompetent Austrian State artificially created by the Paris Treaties."<sup>16</sup> Again, on January 3, 1939, the German Government reiterated the view that no obligation rested upon it "to assume the foreign debts of the former Austrian Federal Government."<sup>17</sup> In the course of a response of January 20, 1939, it was declared that "the Government of the United States cannot accept the legal interpretation that no obligation exists for the German Government to assume the foreign debts of the Austrian Federal Government, and perceives no reason why the inter-governmental relief debt should be left out of present consideration."<sup>18</sup> It is

<sup>14</sup> Dept. of State Press Releases, April 9, 1938, 465, 466.

<sup>15</sup> Dept. of State Press Releases, June 18, 1938, 694, 695.

See also note from the American Ambassador to Germany, to the German Foreign Office, Oct. 19, 1938, Dept. of State Press Releases, Dec. 3, 1938, 375.

<sup>16</sup> *Id.*, 376.

<sup>17</sup> *Id.*, Jan. 28, 1939, 53.

<sup>18</sup> *Id.*, 54. In the course of the note it was added that: "The Government of the United States has not ceased to protest against the principle then implicitly proposed that

not understood that a basis of accord was reached by the two Governments with respect to the applicability of the underlying legal principle.<sup>19</sup>

(4)

**§ 129. Extinction of the Personality of a State by Its Disintegration.**

In what Hall describes as "the rare case of a State so splitting up that the original State person is represented by no one of the fractions into which it is divided,"<sup>1</sup> the general indebtedness of the former sovereign is said to be divided among its several successors.<sup>2</sup> Even though the situation be regarded as one in which the personality of the original debtor State has become extinct, it may be doubted whether any one of its several successors should not be free to claim that it should be unburdened by any portion of the debt shown to have been incurred for a purpose adverse to its interests. Thus where a debt is incurred for the purpose of suppressing a revolution which results in the disintegration of the borrowing State, and there is pledged as security for repayment the revenues to be derived from a particular portion of the national domain constituting the territory of one of the new States so brought into being, it is not conceived that the change of sovereignty should serve to transfer also the debt.<sup>3</sup>

In a word, the extinction of the state life of the original obligor is not believed to deprive any of its successors of the right to invoke the principle that the duty to assume a portion of the burden of the old sovereign depends upon the existence of benefits locally resulting from the debt. Perhaps, however, it should be presumed that normally the general indebtedness of the former sovereign is locally beneficial, and hence subject to apportionment. Nevertheless, the new sovereign should not be denied the right to rebut the presumption.

**§ 130. The Same.** The provisions of the treaty of peace concluded between the Principal Allied and Associated Powers and Austria, at Saint Germain-en-Laye, September 10, 1919, are significant.<sup>1</sup> According to Article 203, each of the

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the responsibility of a debtor government for its debts can be made by the debtor to depend on the balance of trade between the debtor country and the country of residence or citizenship of the bondholder."

<sup>19</sup> See documents in Hackworth, Dig., I, 543-548. Also, J. W. Garner, "Questions of State Succession Raised by the German Annexation of Austria," *Am. J.*, XXXII, 421; same writer, "Germany's Responsibility for Austria's Debts," *id.*, 766.

§ 129. <sup>1</sup> Higgins' 8 ed., p. 116, note 1, citing with approval Halleck, I, 97.

A. B. Keith, in his *Theory of State Succession*, 99-100, while acknowledging that there is a "remarkable consensus of opinion" favorable to the proposition that there is a division of the debts of the original State, declares that he has been "unable to discover any evidence for the rule except in the case of special treaty arrangements." He adds: "There is no recent practice to show what would happen if a State broke up into two fragments, both not representing the real State. I am inclined to think that neither would be under any legal obligations to meet the debt of the old State."

<sup>2</sup> Declares Oppenheim: "When a State breaks up into fragments which themselves become States and International Persons, or which are annexed by surrounding States, it becomes extinct as an International Person, and the same rules are valid as regards the case of absorption of one State by another." Lauterpacht's 5 ed., I, § 83.

<sup>3</sup> Here again the creditor may be said to have assumed the risk of the disintegration of the debtor. As between him and a successor to the rights of sovereignty, the equities are not with one who knowingly sought to profit by the attempt to prevent the very coming into being of the State against which the claim for repayment is preferred.

§ 130. <sup>1</sup> U. S. Treaty Vol. III, 3149.

States to which territory of the former Austro-Hungarian Monarchy was transferred, and each of the States arising from the dismemberment of that Monarchy, including Austria, was to assume responsibility for a portion of the debt of the former Austrian Government which was specifically secured on railways, salt mines or other property, and which was in existence on July 28, 1914. The portion to be so assumed by each State was to be such portion as, in the opinion of the Reparation Commission, might represent the secured debt in respect of the railways, salt mines and other properties transferred to that State under the terms of the treaty or conventions supplementary to it.<sup>2</sup> Again, each of the States of the type and class above described, including Austria, was to assume, by the terms of the same Article, responsibility for a portion of the unsecured bonded debt of the former Austrian Government which was in existence on July 28, 1914, calculated on the basis of the ratio between the average for the three financial years 1911, 1912, 1913, of such revenues of the distributed territory and the average for the same years of such revenues of the whole of the former Austrian territories as, in the judgment of the Reparation Commission, should be best calculated to represent the financial capacity of the respective territories. In making such calculations, the revenues of Bosnia and Herzegovina were not to be included.<sup>3</sup> It was also provided that the Austrian Government should be solely responsible for all the liabilities of the former Austrian Government incurred prior to July 28, 1914, other than those evidenced by the bonds, bills, securities and currency notes which were specifically arranged for under the terms of the treaty.<sup>4</sup>

In case the new boundaries of any State, as laid down by the treaty, should

<sup>2</sup> It will be observed that the article referred to two classes of States which should supersede the former Austro-Hungarian Monarchy — those to which territory of that Monarchy was transferred, and those arising from the dismemberment of that Monarchy.

It was further provided that the amount of the liability in respect of the secured debt so assumed by each State, other than Austria, should be valued by the Reparation Commission, on such basis as it might deem equitable, and that the value so ascertained should be deducted from the amount payable by the State in question to Austria in respect of property of the former or existing Austrian Government which the State acquired with the territory. Each State was to be solely responsible in respect of that portion of the secured debt for which it assumed responsibility under the terms of Article 203, and the holders of the debt for which responsibility was assumed by States other than Austria were to have no recourse against the Government of any other State.

It was declared in the same Article that "any property which was specifically pledged to secure any debt referred to in this Article shall remain specifically pledged to secure the new debt. But in case the property so pledged is situated as the result of the present treaty in more than one State, that portion of the property which is situated in a particular State shall constitute the security only for that part of the debt which is apportioned to that State, and not for any other part of the debt."

It was added that for the purposes of the Article there should be regarded as secured debt, payments due by the former Austrian Government in connection with the purchase of railways or similar property; and it was provided that the distribution of the liability for such payments should be determined by the Reparation Commission in the same manner as in the case of secured debt. Careful provision was also made with respect to the currency in which debts for which the responsibility was transferred should be payable, as well as the basis of rates of exchange.

<sup>3</sup> The responsibilities in respect of bonded debt to be assumed under the terms of this Article were to be discharged according to the terms of an elaborate annex attached thereto.

<sup>4</sup> It was added that neither the provisions of the Article nor those of the annex attached to it should apply to securities of the former Austrian Government deposited with the Austro-Hungarian Bank as security for the currency notes issued by it.

divide any local area which had been a single unit for borrowing purposes and which had had a legally constituted public debt, it was agreed that such debt should be divided between the new divisions of the area in a proportion to be determined by the Reparation Commission in accordance with the principles previously announced for the reapportionment of government debts.<sup>5</sup> The States arising from the dismemberment of the Austro-Hungarian Monarchy, with the exception of Austria, were to be free from any obligation in respect of the war debt of the former Austrian Government, wherever that debt might be held; and neither the Governments of those States nor their nationals were to have recourse under any circumstances against any other States including Austria in respect of the war debt bonds of which they or their nationals might be the beneficial owners.<sup>6</sup>

Similar provisions were embodied in the corresponding articles of the Treaty of Peace between the Allied and Associated Powers and Hungary, concluded at Trianon, June 4, 1920.<sup>7</sup> They duplicated textually those contained in the Treaty of Saint Germain-en-Laye, of September 10, 1919.<sup>8</sup>

The foregoing provisions illustrate the mode by which the Principal Allied and Associated Powers dealt with the public debt of the Austro-Hungarian Monarchy. As has been observed elsewhere, that dismemberment does not appear to have been wrought through cessions of territory by the States which accepted the terms of the peace treaties. Accordingly, in relation to the treat-

<sup>5</sup> See Art. 204, where it was also provided that the public debt of Bosnia and Herzegovina should be regarded as the debt of a local area and not as part of the public debt of the former Austro-Hungarian Monarchy.

<sup>6</sup> Art. 205, where it was added that the war debt of the former Austrian Government which was, prior to the signature of the treaty, in the beneficial ownership of nationals or governments of States other than those to which territory of the former Austro-Hungarian Monarchy was assigned, was to be a charge upon the government of Austria only. It was declared, however, that this Article was not to apply to the securities of the former Austrian Government deposited by it with the Austro-Hungarian bank as security for its currency notes. It was declared also that the existing Austrian Government should be solely responsible for all the liabilities of the former Austrian Government incurred during the war, other than those evidenced by the bonds, bills, securities and currency notes which were specifically provided for under the terms of the treaty.

See, in this connection, Letter of the Allied and Associated Powers, Sept. 2, 1919, transmitting to the Austrian Delegation the treaty of peace with Austria, together with the reply of those Powers to the Austrian note of July 20, 1919, requesting certain modifications of the terms. Treaty of Peace with Austria, Senate Doc. No. 121, 66 Cong., 1 Sess., 25-27.

<sup>7</sup> See Articles 186 and Annex, and 187; also the special provisions of Articles 188 and 189, U. S. Treaty Vol. III, 3608-3615.

See, in this connection, Annex 3 to Note XXIX from the Hungarian Peace Delegation to the Allied and Associated Powers, Feb. 20, 1920, The Hungarian Peace Negotiations, published by the Royal Hungarian Ministry of Foreign Affairs, Budapest, 1922, II, 312; also, Reply of those Powers to the Observations of the Hungarian Delegation on the Conditions of Peace, *id.*, 551, 558-560.

<sup>8</sup> Art. 186 of the Treaty of Trianon contained a single sentence of which there was no equivalent in the corresponding Article (Art. 203) in the Treaty of Saint Germain. That sentence was: "Nevertheless, when there existed before July 28, 1914, financial agreements relating to the unsecured bonded debt of the former Hungarian Government, the Reparation Commission may take such agreements into consideration when effecting the division of this debt between the States mentioned above." There were differences also between the provisions of the Annex following Art. 203 of the Treaty of Saint Germain and the Annex following Art. 186 of the Treaty of Trianon. Art. 187 of the latter duplicated Art. 204 of the former. Articles 205 and 206 (and the Annex following it) of the Treaty of Saint Germain are identical with Articles 188 and 189 (and the Annex following it) of the Treaty of Trianon, except for an additional sentence at the end of Art. 189 of the latter.

ment of public debts, the case does not appear to resemble one where, by that process, a change of sovereignty was undergone with respect to part of the territory of a State.<sup>9</sup>

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§ 131. **Effect on Contracts and Concessions.** No problem arises concerning the effect of a change of sovereignty upon contracts or concessions alleged to have been concluded or granted, respectively, if, at the time of transfer, no contractual relationship was completed, or if for any reason, the arrangement was void.<sup>1</sup>

Doubtless a concessionaire may be required to take certain steps to establish the validity of a concession granted by a former sovereign. Non-compliance may be regarded as amounting to renunciation of any claim against its successor. Such a requirement does not involve inquiry into the legal effect of the change of sovereignty. Nor is it at variance with the principle on which rests the duty of the new sovereign to respect rights previously granted. The purpose is merely to enable that sovereign to ascertain the truth as to the foundation of the claim set up by the concessionaire.<sup>2</sup>

<sup>9</sup> See *The Dismemberment of the Austro-Hungarian Dual Monarchy*, *supra*, § 107A.

See also the corresponding provisions respecting contracts in paragraph 2 of Annex (following Art. 255) to Section V of Part X of the Treaty of Saint Germain-en-Laye of Sept. 10, 1919; and like provisions in paragraph 2 of Annex (following Art. 238) to Section V of Part X of the Treaty of Trianon of June 4, 1920.

See, in this connection, the provisions of Arts. 65 and 66 of the Treaty of Peace with Turkey concluded at Lausanne, July 23, 1924, League of Nations, Treaty Series, No. 701, Vol. XXVIII, 11, 55-57.

§ 131.<sup>1</sup> Opinion of Mr. Griggs, Attorney-General, July 27, 1899, in the Matter of the Application of Ramon Valdez for a revocable license to occupy and utilize the water power of La Plata River, Porto Rico, 22 Ops. Attys.-Gen., 546; also Magoon's Reports, 495; Opinion of Mr. Griggs, Attorney-General, July 28, 1899, concerning a concession for the construction of an electric tramway in Porto Rico, 22 Ops. Attys.-Gen., 551; also cases in Magoon's Reports, 448 and 630.

"We have come to the conclusion that the cancellation of a concession may properly be advised when—

"(i) The grant or the concession was not within the legal powers of the late government; or,

"(ii) Was in breach of a treaty with the annexing State; or,

"(iii) When the person seeking to maintain the concession acquired it unlawfully or by fraud; or,

"(iv) Has failed to fulfill its essential conditions without lawful excuse.

"In any case falling within these categories, where there has either been no 'duly acquired' right, or there has been a non-fulfillment of essential conditions by the concessionaire, cancellation or modification without compensation, appears to us, in the absence of special circumstances to be justifiable." Report of Transvaal Concession Commission, April 19, 1901, Blue Book, South Africa, June, 1901 [Cd. 623], 6-8, Moore, Dig., I, 411, 413.

<sup>2</sup> In the case of *Botiller v. Dominguez*, the United States Supreme Court, in sustaining an Act of Congress requiring presentation for confirmation to a board of land commissioners of grants in California completed by the former sovereign of that country, declared: "Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid. . . . Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all are equally subject to the laws, that whosoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them." 130 U. S. 238, 250.



It may be doubted whether a change of sovereignty necessarily serves in itself to terminate a contract concluded, or a concession granted, by the former sovereign.<sup>3</sup> If its successor endeavors to gain benefits derivable from the continuation of a contract concluded by that sovereign, it must be on the theory that the change did not produce such an effect, and that it permitted the substitution of the new sovereign for the old as a party to the agreement.<sup>4</sup> There may be, in the particular case, special reason to press for the application of this doctrine when the original contracting State in the process of transfer loses its life as well as its territory. When there is a transfer of a part of the territory of a State which retains its life as such, the succession of the transferee to the contract of the transferor may, in some cases, seemingly depend upon the special relation of contemplated acts to the territory which has undergone a change. If the exercise of the entire privileges of a concession requires the commission of acts by the grantee exclusively within that territory, such as the construction of permanent improvements or the operation of public utilities therein, there may be room for the contention that the arrangement contemplates such a substitution.<sup>5</sup>

In every case, however, the matter of the design of the parties at the time of the conclusion of their arrangement demands faithful consideration. There may be solid reason to think that there was no common intention that the agreement should survive the cessation of sovereignty by the contracting State over an area within which performance was to be effected by either or both parties. In such a case the contract must be deemed to subsist only so long as that State retains its sovereignty, and loss of sovereignty merely to mark the coming into being of a situation or condition when it was not designed that the agreement should be operative.

It may, on the other hand, be difficult in the particular case fairly to impute to the private contracting party a design that the arrangement should terminate

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See, also, *United States v. Clarke*, 8 Pet. 436; *Glenn v. United States*, 13 How. 250; *Ainsa v. New Mexico & Arizona Railroad Co.*, 175 U. S. 76; *Florida v. Furman*, 180 U. S. 402; *Barker v. Harvey*, 181 U. S. 481; *Mr. Root, Secy. of War, to Maj. Gen. Wood, Military Governor of Cuba*, June 21, 1901, *Magoon's Reports*, 602, 603; *Moore, Dig.*, I, 392-394.

Compare position of Mr. Sherman, Secy. of State, in 1897, with respect to the orders of the French Government for the establishment of the validity of concessions in Madagascar granted prior to the acquisition of that country by France. *For. Rel.* 1897, 154-157, *Moore, Dig.*, I, 387-389.

<sup>3</sup> "Concessions of the nature of those which were the subject of our enquiry presented examples of mixed public and private rights: They probably continue to exist after annexation until abrogated by the annexing State, and as matter of practice in modern times, where treaties have been made on the cession of territory, have been often maintained by agreement." Report of Transvaal Concession Commission, April 19, 1901, *Blue Book, South Africa*, June, 1901 [Cd. 623], 6-8, *Moore, Dig.*, I, 411, 412. See generally G. Gidel, *Des effets de l'annexion sur les concessions*, Paris, 1904.

<sup>4</sup> See opinion of the Attorney-General, July 24, 1908, in *Panama Railroad Company matter*, 27 Op. Atty.-Gen., 19.

<sup>5</sup> Cases may arise where the concessionaire is required to perform acts in territory of the grantor retained by itself, as well as in that which is transferred. These acts may involve the construction or operation of industrial plants and public utilities in both. In such a situation the problem arises whether the contract should be deemed to be divisible so as to justify the substitution of the new sovereign with respect to mutual undertakings concerning solely the territory transferred. This question is distinct from that relating to the effect of substitution when it is admitted to take place.

with the relinquishment of sovereignty by the contracting State over the territory within which performance was to be had. There may even be reason to conclude that it was in fact the expectation of that party that the life of the agreement should not be dependent upon the retention of sovereignty by the contracting State, and that the former might look to a possible transferee of the area concerned to go on with the arrangement for the period provided by its terms, on the assumption that the transferor could obligate its successor to do so. The soundness of that assumption would of course be dependent upon the solution of the question whether the contracting State could so bind its successor to the sovereignty; and that solution might, in the particular case, be expected to depend in turn upon the character of the concession and upon the circumstance whether it could reasonably be regarded by the transferee as detrimental to the area concerned. Obviously, therefore, the design of either or both of the parties to the arrangement might be frustrated by loose or incorrect assumptions as to the power of the contracting State. In a case where those assumptions are not to be regarded as loose or incorrect because of the character of what was sought to be agreed upon, the contracting party, in harmony with its original design, may in theory fairly look to the transferee of the territory concerned for deference for the continuity of the agreement. Such deference is generally, however, far from predictable.<sup>6</sup> Nor is there evidence of a

<sup>6</sup> The relation of the United States, upon the acquisition of the Philippine Islands, to a contract previously concluded between the Spanish Government and the Manila Railway Co. (Ltd.), a British corporation, and providing for the construction and operation of a railway in the Island of Luzon, became the subject of an opinion by Mr. Griggs, Atty.-Gen., July 26, 1900. See 23 Ops. Atty.-Gen., 181, Moore, Dig., I, 395; also Opinion of Mr. Knox, Atty.-Gen., 23 Ops. Atty.-Gen., 451. The Spanish Government had granted to the corporation a concession for 99 years, and had guaranteed 8 per cent. per annum on the total investment made, payable in quarterly installments. The entire sum guaranteed was to be paid from the Philippine treasury, two thirds of which, according to the understanding of the Attorney-General, were to be paid wholly from moneys belonging to the local funds of the Philippines and one third from the royal or peninsular funds of Spain in the Philippine treasury, as a subsidy recognized by the general policy of Spain as chargeable to itself. Upon the cession of the islands to the United States the company demanded of it payment of the quarterly installments of the guaranty, beginning with that due March 1, 1899. The Attorney-General was of opinion "that an identical contract between the United States and the company was not created by the ratification of the treaty of Paris," and did not then exist, for the following reasons: (a) that the agreement was the personal and indivisible contract of Spain and the concessionaire; (b) that it was of an executory character, "not concerning the public domain owned by Spain, but containing many personal obligations of Spain and of other parties"; (c) that it was entered into, not for the exclusive local benefit of the Island of Luzon, but also to enable the Spanish Government "to govern more easily and conveniently the subject colonies, for the general benefit of Spain as well as their own." The Attorney-General declared, however, that as the Provinces of the Philippines had retained and would continue to retain the chief benefits of the railway, and as the local revenues out of which the guaranty was to be paid were in the hands of the Philippine Government, and as the road was a most necessary piece of property, two thirds of which were bought, as it were, by a guardian for the use of his ward, the price to be paid as to two thirds from the funds of the ward, there was a "general equitable obligation" upon the Philippine Provinces to make some fair arrangement with the company as to the two thirds benefit. He declared that they could not justly take advantage of the disappearance of Spain to retain what she had procured for them on the credit of their funds, and deny all liability for the price.

The law officer, Division of Insular Affairs, War Department, was of opinion that the United States was not, in the absence of any stipulation in the treaty of peace, bound by the contract, because he regarded it as the personal obligation of Spain, and one which had not been made a lien upon the revenues of the Island of Luzon. Magoon's Reports, 177.

practice which in a variety of situations denounces as illegal the efforts of the transferee to decline to respect or to continue to perform the undertakings created by its predecessor.<sup>7</sup> It is difficult to assert with confidence that even where a contract is not to be regarded as detrimental to the welfare of the area concerned and is designed to run with the land, the new sovereign may not in many situations, if it so desires, rid itself of the burdens of the arrangement on what may be regarded as an equitable, although not a strictly contractual, basis.

It may be observed parenthetically that the contractual obligations of the former sovereign towards private parties within and especially associated with a particular portion of its domain may obviously be of a character such as to survive a change of sovereignty. This is true when, for example, a State becomes the trustee of funds for the benefit of religious or philanthropic work conducted by a particular organization within the bounds of territory ceded to a foreign State.<sup>8</sup>

When in consequence of a transfer the new sovereign is deemed to be substituted for the old, the problem presents itself respecting the terms on which the transferee may reasonably terminate the contract. The precise question is whether the new sovereign stands in this respect on a better footing than its predecessor.

The acceptance of the burden of an existing contract or concession implies that the exercise of any right to terminate the agreement is fettered with a

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The argument of the Attorney-General that because the railway was beneficial to Spain as an instrument for the retention of military control over the Philippines and not of exclusive benefit to the country traversed, there was reason to deny an obligation on the part of a new sovereign to accept the burden of its predecessor, is not convincing. The implication that a possible use of the line for a purpose deemed adverse to local interests made the railway a detriment rather than a benefit is not satisfactory. Nor is the circumstance that the concession possessed an executory character calling for the performance of acts by the grantor, believed to have been decisive of the question of substitution. It is difficult to accept the suggestion that the contract was one designed to impose upon the grantor any fiscal obligations in case of loss of sovereignty over the territory within which the railway was to be operated. An undertaking so obviously adverse to its own interests is one which it would hardly be reasonable to impute to Spain a willingness or purpose to have assumed.

<sup>7</sup> See *Eastern Extension, Australasia and China Telegraph Company v. United States*, 46 Ct. Cls. 646, 653; case between same parties, 48 Ct. Cls. 33, 49.

Concerning the Award of His Britannic Majesty, King George V, July 5, 1911, as *amiable compositeur* in the Alsop Case, between the United States and Chile, under protocol for arbitration of Dec. 1, 1909 (U. S. Treaty Vol. III, 2508), see Hackworth, Dig., I, 564-566, and documents there cited. For the text of the Award, see For. Rel. 1911, 38.

<sup>8</sup> In the so-called Pious Fund Case between the United States and Mexico, the arbitral award of Sir Edward Thornton as umpire, Nov. 11, 1875, was based upon the theory that the Mexican Government being the successor to a trust fund for the maintenance of Roman Catholic missions in the Californias was obliged, upon the cession of Upper California to the United States, to pay an equitable portion of the proceeds of the fund to the Bishop of Upper California, the successor within American territory to the previous beneficiary. See J. B. Scott, *Hague Court Reports*, 48-53; Moore, *Arbitrations*, II, 1348-1352. In the arbitration of the Pious Fund Case before a Court of Arbitration assembled at The Hague under the Convention of 1899, and pursuant to a protocol of May 22, 1902, counsel for the United States relied upon the same principle. See *Replication of the United States*, 12-13; also supplemental brief in behalf of the United States, by G. W. McEnerney, 33-34. The award of the Tribunal did not touch upon this point, inasmuch as the application of the principle of *res judicata* sufficed for the grounds of the decision. For the text of the award cf. J. B. Scott, *Hague Court Reports*, 3.

corresponding obligation to make full response to every equitable demand of the other contracting party. The measure of its loss due to the act of termination, whether or not to be deemed a breach of contract, would seem to require judicial or other impartial scrutiny and fair estimation.<sup>9</sup> The very scope of such a burden must raise doubt whether the transferees of territory have acknowledged a duty so to respect generally even those contracts and concessions which have been peculiarly associated with the newly acquired domain. Instances where the new sovereign has regarded itself free to terminate at will and on its own terms certain classes of concessions have their significance; and they raise the question whether there is to be found in practice or theory a reasonable and just basis for such freedom of action.<sup>10</sup> A Polish court did not hesitate to declare, by way of dictum, in 1922, that "there is no general international custom ordering a State which acquires property under an international treaty to respect contracts of lease concluded by the predecessor State, unless there is a special treaty stipulation to that effect."<sup>11</sup>

Numerous conventions concluded within the one hundred and twenty-five years prior to the World War, 1914-1918, announced the acceptance by the transferee of concessions and contracts granted or undertaken by the transferor.<sup>12</sup> These instances recorded a trend of opinion that may seem to be favor-

<sup>9</sup> In the estimation of damages the difficult question as to prospective losses may present itself. This gives rise to inquiry respecting the correct test to be applied in measuring the damages arising from a breach of contract, the sufficiency of evidence in support of an alleged loss, as well as the interpretation of the agreement.

<sup>10</sup> One aspect of American procedure may here be observed. In construing the relevant Acts of Congress (the Act of March 3, 1887, Ch. 359; 24 Stat. 505), the Supreme Court of the United States has declared that the Court of Claims is without jurisdiction in cases where the liability of the United States on a contract entered into by its predecessor as sovereign over territory transferred is asserted by a claimant as a result of an express provision of an assumption contained in a treaty, or is sought to be enforced as a necessary consequence of the cession made by a treaty. The latter tribunal is deemed, however, to possess jurisdiction of claims based on contracts originally made with the former sovereign of the ceded territory, and assumed by the United States after the transfer, either expressly or by implication. *Eastern Extension, Australasia and China Telegraph Co., Ltd. v. United States*, 231 U. S. 326, reversing 48 Ct. Cls. 33. Declared Mr. Justice Hughes in the course of the unanimous opinion of the court: "But, if the claim of the appellant were deemed to rest exclusively upon the transfer of sovereignty, upon the theory that thereby under the principles of international law an obligation in its favor was imposed upon the United States, the claim would still, in our judgment, be excluded by the statute from the consideration of the court below." (333.)

In the course of the opinion of the lower court it was declared by Chief Justice Peelle that "when the United States succeeded to the sovereignty of Spain over the [Philippine] islands they were under no more obligation to continue the contracts for public or private service of individuals or corporations than they were to continue in office officials appointed by the Spanish Government." 48 Ct. Cl 33, 45. Inasmuch as that tribunal lacked and did not seek to exercise jurisdiction to adjudicate on the question as to the effect of the change of sovereignty produced by the treaty of cession, the language quoted may be regarded as merely a dictum.

See also *Eastern Extension, Australasia & China Telegraph Company, Ltd. v. United States*, 251 U. S. 355, 362.

Concerning the inability of a British court to determine the effect of annexation of territory by Great Britain upon concessions granted by the prior sovereign, see *Cook v. Sprigg* (1899), A. C. 572; *Moore, Dig.*, I, 410.

<sup>11</sup> *State Treasury v. V. Osten*, Poland, Supreme Court, Fifth Division, 1922, *Williams and Lauterpacht*, Annual Dig., 1919-1922, Case No. 37; also, *Niedzielskie v. (Polish) Treasury*, Poland, Supreme Court, 1925, *McNair and Lauterpacht*, Annual Dig., 1925-1926, Case No. 53.

<sup>12</sup> See group of treaties from that of Campo Formio of October, 1797, to that of Constantinople of Sept. 16 (29), 1913, contained in *Coleman Phillipson*, *Termination of War and Treaties of Peace*, 326-330; also collection in *Moore, Dig.*, I, 385-387. Also see discussion

able to the contention that a sense of obligation has induced such action. Probably the reason impelling even a conqueror so to burden itself in a treaty of peace has been the belief that the public interests of the territory transferred would be thereby benefited rather than harmed, and that rights analogous to those of private property would likewise be respected.<sup>13</sup> There does not, however, appear to have been habitual recognition by treaty or otherwise of any duty to accept and maintain contractual obligations regarded by the new sovereign as certainly detrimental to the territory transferred. Practice has thus indicated soundly although roughly the basis of a useful distinction. Without attempting classification of the situations in which a contract has been regarded as locally detrimental, attention is called to the significance of various pleas by which a new sovereign may urge that an agreement possesses such a character.<sup>14</sup>

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in A. B. Keith, *Theory of State Succession*, 66-72; A. S. Hershey, in *Am. J.*, V, 285, 294-296; E. M. Borchard, *Diplomatic Protection*, § 83; *West Rand Central Gold Mining Co. v. the King* (1905), 2 K. B. 391; *Am. J.*, I, 217.

<sup>13</sup> After the Spanish-American War in 1898, the American peace commissioners at Paris rejected certain Articles tendered by the Spanish commissioners in respect to contracts entered into for public works and services. They did so for the reason that the "extent and binding obligation of these contracts are unknown," at the same time disclaiming any purpose of the Government "to disregard the obligations of international law in respect to such contracts as investigation may show to be valid and binding upon the United States as successor in sovereignty in the ceded territory." Senate Doc. 62, 55 Cong., 3 Sess., Part II, 240, 241, 262, Moore, Dig., I, 389-390.

The treaty of peace with Germany of June 28, 1919, sheds little light on the solution of the general problem, doubtless because of the circumstance that contracts and concessions granted by German authority within and with respect to territory ceded by Germany, were almost entirely held by nationals of Germany, or possibly by those of its allies in the war. Thus the provisions of that treaty permitting the Allied and Associated Powers to retain and liquidate the interests, rights and properties of German nationals within territories detached by cession, served to place those powers in the position of obligees as well as obligors, according to their election. Art. 297 (b); Section II of Annex following Art. 303; also paragraph 2 of the Annex to Section V (Contracts, Prescriptions, Judgments) of Part X, in relation to conditions for the maintenance of certain categories of contracts. It may be observed that Germany also, by Art. 258, renounced all rights of its own or its nationals by virtue of any agreement, to representation upon or participation in the control or administration of commissions, State banks, agencies or other financial or economic organizations of an international character, exercising powers of control or administration, and operating in any of the States of its enemies or in Austria, Hungary, Bulgaria or Turkey, or in the dependencies of those States, or in the former Russian Empire. Moreover, by Art. 260, Germany undertook, upon the demand of the Reparation Commission, to possess itself of any rights and interests of German nationals in any public utility undertaking or in any concession operating in Russia, China, Turkey, Austria, Hungary and Bulgaria, or in the possessions or dependencies of those States or in any territory formerly belonging to Germany or its allies to be ceded by it or them to any Power, or to be administered by a Mandatory under the Treaty, and within six months of such demand to transfer such rights and interests to the Reparation Commission. Provision was also made in the same Article for German indemnification of German nationals thus dispossessed, and for crediting Germany on account of sums due by it for reparation with the value of what might be transferred to the Commission. See also Arts. 211, 212 and 215; and, paragraph 2 of Annex (following Art. 255) to Section V of Part X of the treaty of peace with Austria, of Sept. 10, 1919; also Arts. 194, 195 and 198; and paragraph 2 of Annex (following Art. 238) to Section V of Part X of the treaty of peace with Hungary, of June 4, 1920.

<sup>14</sup> Numerous treaties of the nineteenth century containing provision for the maintenance of contracts and concessions of the old sovereign have made clear the design to confine the obligation of the transferee to bear burdens deemed beneficial to the territory concerned, by referring to the arrangements to be respected as those contracted for the "public interests" of what was ceded. See, for example, Art. VIII of the Treaty of Zurich of Nov. 10, 1859, Brit. and For. State Pap., XLIX, 366; Moore, Dig., I, 385. The numerous provisions for the maintenance of contracts relating to railroads seem to confirm the opinion that the construction and operation thereof is not to be regarded as other than beneficial to the territory

A contract or concession may be deemed adverse to the territory transferred because of the purposes of the undertaking, or by reason of the terms of the agreement, or on account of the method by which performance is contemplated. On any one of these grounds the new sovereign may differ from the opinion entertained by its predecessor in a given case. The reasonableness of such a difference may not, however, suffice to indicate the existence or scope of the duty to be imposed upon the transferee.<sup>15</sup> If the detriment to the territory concerned is to permit the transferee as a successor to the contract to enjoy complete freedom of action in the matter of cancellation, it must be due to the fact that the very nature of the agreement is such as to forbid the conclusion that it could be reasonably deemed beneficial if a change of sovereignty took place. The detrimental aspect of the contract must be an obvious and certain result of the change of sovereignty. In such case it is not unjust to charge the concessionaire with anticipation of the character which his concession would necessarily assume upon a transfer of the territory, and, therefore, with contemplation of the natural and logical attitude of any transferee. On the other hand, if the detriment to the territory is one attributable solely to the special public policy of the particular transferee, in contrast to that of the transferor, rather than to the failure of the latter to retain its sovereignty or to a circumstance indissolubly connected with the change thereof, the situation is otherwise.

The application of the foregoing distinction is easily illustrated. A contract the object of which is to frustrate or impede the attempt by force or otherwise to effect the change of sovereignty which actually results, is one which must be regarded as hostile to the territory transferred as soon as that change takes place. Doubtless other classes of agreements may be fairly placed in the same category.

A concession for a purpose distinctly beneficial to the territory transferred may have been lawfully granted on terms which in the judgment of the new sovereign appear to have been unduly advantageous to the concessionaire and correspondingly burdensome to the grantor. This circumstance may encourage the attempt to modify or cancel the arrangement. In such case it may be urged that the new sovereign ought not to be obliged to stand by the bad bargain of

which they traverse. *Cf.*, for example, Art. XVI, treaty between Turkey and Bulgaria Sept. 16 (29), 1913, *Am. J.*, VIII, Supplement, 27, 35; Coleman Phillipson, Termination of War and Treaties of Peace, 440, 445.

See Protocol Relating to Certain Concessions Granted in the Ottoman Empire, concluded by the British Empire, France, Italy, Greece, Roumania, the Serb-Croat-Slovene State, and Turkey, July 24, 1923, League of Nations, Treaty Series, Vol. XXVIII, p. 203 (being Protocol XII of the Treaty of Peace of Lausanne of that date); also in this connection, Judgment No. 2 concerning The Mavrommatis Palestine Concessions, Permanent Court of International Justice, Series A, No. 2, and Judgment No. 5, concerning The Mavrommatis Jerusalem Concessions, *id.*, Series A, No. 5; also Lighthouses Case between France and Greece, *id.*, Series A/B, No. 62.

<sup>15</sup> "In this last case, however [respecting the cancellation or modification of a concession deemed injurious to the public interest], the question of compensation arises, inasmuch as it would be inequitable that a concessionaire should lose without compensation a right duly acquired, and whose conditions he had duly fulfilled, because the new government differed from the old in its view as to what was, or was not, injurious to public interest, even though the opinion of the new government were obviously the true one." Report of Transvaal Concession Commission, Apr. 19, 1901, Blue Book, South Africa, June, 1901 [Cd. 623], 6-8, Moore, Dig., I, 411, 413.

its predecessor. It is believed, however, that if the good faith of the concessionaire was beyond question, and the terms of the contract not such as to indicate the perpetration of fraud, any termination of the agreement should still make provision for the existing equities of the concessionaire. Again, a concession for a reasonable purpose may have assumed the form of a monopoly which in the estimation of the new sovereign is essentially adverse to the economic interests of the territory concerned. In such case the divergence of opinion as to the propriety of the means of accomplishing what the concession was designed to achieve, ought not to justify cancellation save on terms responsive to the equities of the concessionaire.<sup>16</sup> Doubtless in every case the reality and extent of those equities should be judged by the actual or constructive knowledge of the concessionaire at the time when he acquired the concession, with respect to the precariousness of his venture if a change of sovereignty should occur.<sup>17</sup>

In the formulation of any general scheme indicative of a mode of determining the nature of concessions to be regarded as detrimental rather than beneficial to territory transferred, it is believed that care should be taken to permit no presumptions of a hostile or injurious purpose to be derived from or attributed to circumstances equally capable of sustaining an opposing inference.<sup>18</sup>

Inasmuch as there seems to be a solid foundation for the claim that a new

<sup>16</sup> Declared Mr. Griggs, Attorney-General, in an opinion of June 15, 1899, with respect to concessions for the operation of submarine cables: "The mere fact that the Western Union Telegraph Co. is enjoying, under a grant of exclusive right, what amounts to a monopoly is no reason of itself why it should be deprived of its concession. It is easy to say that monopolies are odious, but there are concessions which amount to monopolies which are lawful and cannot be disturbed except by a violation of public faith. . . . The granting of such concessions and their operation have, in many instances, been of great advantage to commerce and to the countries from which the concessions were derived. . . . Concessions of this kind, which carry with them exclusive rights for a period of years, constitute property of which the concessionary can no more be deprived arbitrarily and without lawful reason than it can be deprived of its personal tangible assets. In a case in the Supreme Court of the United States, 1 Wall. 352, Mr. Justice Field said: 'The United States have desired to act as a great Nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the Government they superseded.' If, therefore, the Western Union Telegraph Co. has an exclusive grant applicable to Cuba for cable rights, which grant has not expired, it would be violative of all principles of justice to destroy its exclusive right by granting competing privileges to another company." 22 Ops. Attys.-Gen., 514, 516, 518; Moore, Dig., I, 409-410. See, also, opinion of law officer, Division of Insular Affairs, War Department, concerning the concession to canalize the Matadero River from the Cristina Bridge to the Bay of Atares, Magoon's Reports, 571. Also decision by the Swiss Federal Court concerning the duty of a succeeding State to recognize the concessions granted by its predecessors, published in *Am. J.*, I, 235 (translated from *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1906); also opinion of Prof. Max Huber on the case, *id.*, I, 245 (translated from *id.*).

<sup>17</sup> This idea is emphasized in the Report of the Transvaal Concession Commission above cited.

<sup>18</sup> See, in this connection, the argument of Mr. Griggs, Attorney-General, in his opinion in the case of the Manila Railway Co., 23 Ops. Attys.-Gen., 181, Moore, Dig., I, 395.

A concession not unbeneficial to the territory transferred may involve consecutive payments by the original grantor which at the time of transfer was insolvent, and against which, therefore, the claims of the concessionaire for compensation pursuant to the contract were at that time of slight value. In such case it may be fairly contended that the new sovereign may set up in excuse for non-payment or partial payment, the disability of its predecessor, and in any scheme of rehabilitating the finances of the territory, may demand that its liability as transferee and as successor to the contract be measured by the actual power of the old sovereign to satisfy its obligation at the time of transfer. See, in this con-

sovereign should maintain and respect the locally beneficial contracts and concessions of its predecessor, and should oftentimes heed the equities of adverse parties, even when the arrangements are deemed in certain respects locally detrimental and subject to modification or cancellation, there is much reason why the treaty recording the transfer of sovereignty should specify the course to be followed. In order to safeguard the rights of all concerned, it should make announcement of the particular concessions to be maintained, or of the nature of those to be respected, or of the principle to be observed in effecting cancellation or modification.<sup>19</sup>

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§ 132. **Effect on Private Rights.** Rights of private property validly created remain unaffected by a change of sovereignty over the territory to which they may be said to belong. Declared Chief Justice Marshall in the case of the *United States v. Percheman*:

It may not be unworthy of remark, that, it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.<sup>1</sup>

In 1937, the Supreme Court of the United States, in an opinion through Mr. Justice Cardozo, in relation to the ownership of land that had once been a

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In his paper entitled "Change of Sovereignty and Concessions," *Am. J.*, XII, 705, 742-743, Prof. Francis B. Sayre expresses opinion that concessions, to be binding, must have been granted with a view to the general improvement or benefit of the *locus ceded*, and states that such a theory is the peculiar contribution of America.

<sup>19</sup> Thus, in the convention with Denmark of Aug. 4, 1916, for the cession of the Danish West Indies, the United States agreed to maintain nine specified grants, concessions and licenses, given by the Danish Government, in accordance with the terms on which they had been granted. Art. III, U. S. Treaty Vol. III, 2558, 2559. Denmark guaranteed that the cession was free and unencumbered by any reservations, privileges, franchises, grants or possessions other than were mentioned in the treaty. Art. II.

See also Protocol Relating to Certain Concessions Granted in the Ottoman Empire, concluded by the British Empire, France, Italy, Greece, Roumania, the Serb-Croat-Slovene State and Turkey, July 24, 1923, League of Nations, Treaty Series, Vol. XXVIII, p. 203 (being Protocol XII of the Treaty of Peace of Lausanne of that date).

§ 132. <sup>17</sup> Pet. 51, 86-87; Moore, Dig., I, 416. See, also, *Wilcox v. Henry*, 1 Dall. 69; *Mutual Assurance Society v. Watts's Ex'r*, 1 Wheat. 279; *De la Croix v. Chamberlain*, 12 Wheat. 599, 601; *United States v. Arredondo*, 6 Pet. 691; *United States v. Clarke*, 8 Pet. 436; *Delassus v. United States*, 9 Pet. 117, 133; *Mitchel v. United States*, 9 Pet. 711, 734; *Smith v. United States*, 10 Pet. 326; *Strother v. Lucas*, 12 Pet. 410, 436; *United States v. Heirs of Clarke*, 16 Pet. 228, 231-232; *United States v. Moreno*, 1 Wall. 400; *Coffee v. Groover*, 123 U. S. 1; *Astiazaran v. Santa Rita Land and Mining Co.*, 148 U. S. 80; *United States v. Chaves*, 159 U. S. 452, 547; *Rio Arriba Land and Cattle Company v. United States*, 167 U. S. 298, 309; *Ely's Adm. v. United States*, 171 U. S. 220, 223; *Ainsa v. New Mexico and Arizona Railroad Co.*, 175 U. S. 76, 79; *Barker v. Harvey*, 181 U. S. 481, 486; *Ponce v. Roman Catholic Church*, 210 U. S. 296, 324; *Panama R. R. Co. v. Bosse*, 249, U. S. 41, 44.

See, also, Mr. Bayard, Secy. of State, to Mr. Roberts, March 20, 1886, MS. Inst. Chili, XVII, 196, 200, Moore, Dig. I, 421, 422, where it was said: "The Government of the United States therefore holds that titles derived from a duly constituted prior foreign Gov-



part of the Mexican State of Chihuahua, declared: "Sovereignty was thus transferred, but private ownership remained the same. . . . To find the title to the land today we must know where title stood while the land was yet in Mexico."<sup>2</sup>

Cases may arise, however, where the underlying principle is inapplicable. Thus the right of property may take the form of a grant the duration of which by necessary implication is dependent upon the possession of political power by the existing sovereign. In such case it has been held that no property as such survives the loss of sovereignty.<sup>3</sup>

The United States has demanded that the private property of its nationals in countries not possessed of European civilization, and not belonging to States recognized as such, should, nevertheless, be respected, upon the establishment of rights of sovereignty therein by an acknowledged member of the family of nations.<sup>4</sup>

The general principle enunciated in the *Percheman* case has received repeated recognition in treaties of cession concluded by the United States, and pursuant to which it became the grantee of territory.<sup>5</sup> These agreements have been looked upon as merely declaratory of the law of nations.<sup>6</sup>

The same principle has also found support in the declarations of the Perma-

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ernment to which it has succeeded are 'consecrated by the law of nations' even as against titles claimed under its own subsequent laws. The rights of a resident neutral—having become fixed and vested by the law of the country—cannot be denied or injuriously affected by a change in the sovereignty or public control of that country by transfer to another Government. His remedies may be affected by the change of sovereignty, but his rights at the time of the change must be measured and determined by the law under which he acquired them."

<sup>2</sup> *Shapleigh v. Mier*, 299 U. S. 468, 470.

<sup>3</sup> *O'Reilly de Camara v. Brooke*, 209 U. S. 45, where it was held that the holder of a heritable office in Cuba which had been abolished prior to the extinction of Spanish sovereignty, but who, pending compensation for its condemnation, was receiving the emoluments of one of the grants of the office, "had no property that survived the extinction of the sovereignty of Spain." See, also, decision of Mr. Root, Secy. of War, Dec. 24, 1900, *Magoon's Reports*, 209, *Moore, Dig.*, I, 429; also *Magoon's Reports*, 194. See, also, *Alvarez y Sanchez v. United States*, 216 U. S. 167, *affirming* 42 Ct. Cl. 458. See in this connection *Percy Bordwell*, "Purchasable offices in ceded territory," *Am. J.*, III, 119; also *F. B. Sayre, id.*, XII, 705, 717-718.

See also *Paul Fuller*, "Are Franchises Affected by Change of Sovereignty?", *Columbia Law Rev.*, III, 241.

<sup>4</sup> *Mr. Bayard, Secy. of State, to Mr. Pendleton*, Feb. 27, 1886, *MS. Inst. Germany*, XVII, 602, *Moore, Dig.*, I, 422-423; same to *Mr. Morrow*, Feb. 26, 1886; 159, *MS. Dom. Let.* 177, *Moore, Dig.*, I, 423, note; same to the Portuguese Minister, Mar. 3, 1886, *For. Rel.* 1886, 772, *Moore, Dig.*, I, 424; same to *Mr. von Alvensleben*, German Minister, Mar. 4, 1886, *For. Rel.* 1886, 333, *Moore, Dig.*, I, 424; *Mr. Foster, Secy. of State, to Mr. White, Chargé at London*, Nov. 5, 1892, *For. Rel.* 1892, 237, 239, *Moore, Dig.*, I, 425-426. See, also, message of President Cleveland on Fiji Island claims against Great Britain, Feb. 14, 1896; report of *Mr. Olney, Secy. of State*, Feb. 14, 1896; report of *George H. Scidmore*, July 3, 1893, all contained in *For. Rel.* 1895, I, 739 *et seq.*

See also award in case of *George Rodney Burt*, Oct. 26, 1923, *American-British Pecuniary Claims Arbitration*, under special agreement of Aug. 18, 1910, *Nielsen's Report*, 588.

<sup>5</sup> See, for example, Art. III, treaty with France, April 30, 1803, providing for the cession of Louisiana, *Malloy's Treaties*, I, 509; Art. VIII, treaty with Spain, Feb. 22, 1819, *id.*, II, 1654; Arts. VIII and IX, treaty with Mexico, Feb. 2, 1848, *id.*, I, 1111-1112; Art. III, treaty with Russia, Mar. 30, 1867, *id.*, II, 1523; Arts. IX and XIII, treaty with Spain, Dec. 10, 1898, *id.*, 1693-1694.

It is believed that the following provision contained in Art. II of the convention between the United States and Denmark of Aug. 4, 1916, providing for the cession of the Danish

ment Court of International Justice. In the Sixth Advisory Opinion of September 10, 1923, on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland it was said:

Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice. . . .

It suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.<sup>7</sup>

Acknowledgment of the principle that a change of sovereignty does not in itself serve to impair rights of private property validly acquired in areas subjected to a change, does not, of course, touch the question whether the new sovereign is obliged to respect those rights when vested in the nationals of foreign States, such as those of its predecessor. Obviously, the basis of any restraint in that regard which the law of nations may be deemed to impose must be sought in another quarter. The loose form that it may assume in treaties of peace that embrace transfers of territory is likely to reflect the

West Indies, contains significant recognition of the underlying principle involved: "But it is understood that this cession does not in any respect impair private rights which by law belong to the peaceful possession of property of all kinds by private individuals of whatsoever nationality, by municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and to possess property in the islands ceded." (U. S. Treaty Vol. III, 2558, 2559.) See also, Art X, treaty of peace between Russia and Japan, Aug. 23 (Sept. 5), 1905, For. Rel. 1905, 826; Art. XI, treaty between Turkey and Greece, Nov. 1 (14), 1913, Coleman Phillipson, *Termination of War and Treaties of Peace*, 452; *Am. J.*, VIII, Supp. 49.

Cf. Report of Mr. Magoon, law officer, Division of Insular Affairs, War Department, Mar. 27, 1901, as to the protection under Arts. I and VIII, the treaty of peace with Spain, Dec. 10, 1898, of trade-marks in Cuba and the Philippines, previously registered at the Bureau for the Protection of Industrial Property at Berne, Magoon's Reports, 305. See, also, report of the same officer, April 16, 1901, on the "Right of the municipality of Habana to exercise over property owned by said city the rights which by law belong to the peaceful possession of the property." *Id.*, 541; report of same officer, April 20, 1901, on "Certain rights of municipalities in Cuba." *Id.*, 374; report of same officer, May 22, 1900, on "Mining claims and appurtenant privileges in Cuba, Porto Rico, and the Philippines." *Id.*, 351. See, also, *in re* certain revocable licenses in Porto Rico. *Id.*, 650.

<sup>6</sup> See *Soulard v. United States*, 4 Pet. 511; *Delassus v. United States*, 9 Pet. 117, 133; *Dent v. Emmeger*, 14 Wall. 308, 312; *Ponce v. Roman Catholic Church*, 210 U. S. 296, 324. Also Moore, *Dig.*, I, 416. See A. B. Keith, *Theory of State Succession*, 79-84, concerning British practice and certain difficulties incidental thereto.

See also *Eastern Extension, Australasia and China Telegraph Company v. United States*, 46 Ct. Cls. 646.

<sup>7</sup> Publications, Permanent Court of International Justice, Series B, No. 6, 36.

See, also, Case concerning certain German interests in Polish Upper Silesia (*The Merits*), Judgment No. 7, Publications, Permanent Court of International Justice, Series A, No. 7, 22; *Kulin, Emeric v. Roumanian State, Roumanian-Hungarian Mixed Arbitral Tribunal*, Jan. 10, 1927, *McNair and Lauterpacht, Annual Dig.*, 1927-1928, Case No. 59.

policies of the parties responsible for the terms of the instruments, rather than any other circumstance.

§ 133. **The Same.** By the treaty of peace with Germany of June 28, 1919, the Allied and Associated Powers reserved the right to retain and liquidate all property, rights and interests belonging, at the date of the coming into force of the treaty, to German nationals, or companies controlled by them, within territory detached from Germany by cession (as well as within the territories, colonies, possessions and protectorates of those Powers).<sup>1</sup> This action was based upon the theory that it was necessary to utilize enemy private property within places subject to the control of the Allied and Associated Powers as a means of enabling them to recover a part of their claim against Germany. The application of measures of liquidation to private property within ceded territory was merely incidental to the broader claim enforced against the grantor. Nor did it appear to have any bearing upon the principle of international law with respect to the effect of transfer of sovereignty. It should be observed that Germany undertook to compensate its nationals in respect of the sale or retention of their property, rights or interests "in Allied or Associated States,"<sup>2</sup> and that those States did not admit that their action was confiscatory.<sup>3</sup> In the course of the Sixth Advisory Opinion of the Permanent Court of International Justice, above quoted, the view was expressed that while the treaty did "not in terms formally announce the principle that, in the case of a change of sovereignty, private rights are to be respected"; that principle was "clearly recognised by the treaty."<sup>4</sup>

As the grantee of territory the United States has been regarded by the Supreme Court as having assumed the duty to treat as property requiring protection under the terms of appropriate treaties, equitable as well as legal titles to lands, and such as would have been a charge upon the conscience of the former sovereign.<sup>5</sup> Thus the absence of a legal title at the time of cession has not been

§ 133. <sup>1</sup> Arts. 297, 298, and Annex following the latter. Also Arts. 249, 250, and Annex following the latter, of the treaty of Saint Germain-en-Laye with Austria, of Sept. 10, 1919; and Arts. 232, 233, and Annex following the latter, of the Treaty of Trianon with Hungary, of June 4, 1920.

<sup>2</sup> Art. 297 (i) of treaty of peace with Germany.

<sup>3</sup> See Reply of the Allied and Associated Powers, of June 16, 1919, to Observations of the German Delegation on conditions of peace, Misc. No. 4, 1919, (Cmd.) 258, 51-54. Also provisions of Art. 253 saving from prejudice in any manner from the operation of previous provisions "charges or mortgages lawfully effected in favour of the Allied or Associated Powers or their nationals respectively, before the date at which a state of war existed between Germany and the Allied or Associated Power concerned, by the German Empire or its constituent States, or by German nationals, on assets in their ownership at that date." Cf. *infra*, §§ 621-622.

<sup>4</sup> The Court adverted to Art. 75 whereby contracts between the inhabitants of Alsace-Lorraine and the former German authorities were as a rule maintained, and if terminated by France in the general interest, equitable compensation should be accorded under certain conditions. It declared that if this rule prevailed in Alsace-Lorraine, which under Art. 51 was restored to French sovereignty, as from the date of Nov. 11, 1918, it was "hardly conceivable that it was intended by the Treaty to give discretionary powers as regards similar rights in territories the sovereignty of which was acquired only by cession." The Court also invoked paragraph 2 of the Annex to Section 5 (Contracts, Prescriptions, Judgments) of Part X where it was provided that, as between former enemies, some five categories of contracts were to be maintained. Publications, Permanent Court of International Justice, Series B, No. 6, 38.

<sup>5</sup> *Strother v. Lucas*, 12 Pet. 410, 436, where it was stated: "This court has defined property

fatal to a claimant, when he had received an unconditional grant, valid according to the law of the former sovereign, and from which he might have obtained a legal title had not the transfer taken place.<sup>6</sup> Where the former sovereign imposed a condition precedent which was not performed by the claimant either prior to the cession or thereafter, and no excuse for non-performance was shown, no equitable title has been deemed to survive the change of sovereignty and burden the grantee.<sup>7</sup> The situation has been otherwise regarded, however, where the condition imposed by the grantor State was a condition subsequent, of which performance was rendered impossible by the act of the grantor (through its cession of territory) and was a matter of no importance to the grantee State.<sup>8</sup>

The United States has been unwilling to admit that the cession to itself of territory has served to lessen the duty of the grantee of land, or so to diminish the burdens of an individual claimant as to transform an equitable into a legal title.<sup>9</sup> It has frequently been declared by the Supreme Court that the duty of providing a mode or system for the establishment of rights of private and immovable property, and of ascertaining thereby the extent of the obligation of the new sovereign, rests upon the political department of the Government,<sup>10</sup> and that that department may reasonably demand that the validity of a title derived from a prior sovereign be judicially determined.<sup>11</sup>

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to be any right, legal or equitable, inceptive, inchoate or perfect, which, before the treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign 'with a trust,' and make him a trustee for an individual, according to the law of nations, of the sovereign himself, the local usage or custom of the colony or district; according to the principles of justice, and rules of equity."

<sup>6</sup> *Delassus v. United States*, 9 Pet. 117, 133-135. See, also, *Mitchel v. United States*, 9 Pet. 711, 734; *United States v. Clarke*, 9 Pet. 168; *United States v. Heirs of Clarke*, 16 Pet. 228, 231-232.

<sup>7</sup> *United States v. Kingsley*, 12 Pet. 476, 485; also *United States v. Mills's Heirs*, 12 Pet. 215.

<sup>8</sup> *United States v. Arredondo*, 6 Pet. 691, 745-746.

"The true rule of law would seem to be that the receiving State should have the right at the time of cession to declare that it will not allow under its jurisdiction and law the further completion of title by the performance of unfulfilled conditions, and will therefore grant titles only to such claimants as are at the time of cession substantially owners of the interest claimed. Where no such declaration is made, however, it would seem that the receiving State should be compelled to perfect the titles of claimants who have in good faith performed after cession the unfulfilled conditions of their grants before the expiration of the time allowed in the conditions." Francis B. Sayre, "Change of Sovereignty and Private Ownership of Land," *Am. J.*, XII, 475, 488.

<sup>9</sup> Thus, it was said in *De la Croix v. Chamberlain*: "It may be admitted, that the United States were bound, in good faith, by the terms of the treaty of cession, by which they acquired the Floridas, to confirm such concessions as had been made by warrants of survey; yet, it would not follow, that the legal title would be perfected until confirmation. The Government of the United States has, throughout, acted upon a different principle in relation to these inchoate rights, in all its acquisitions of territory, whether from Spain or France. Whilst the Government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained, that the legal title remained in the United States, until, by some act of confirmation, it was passed, or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its right to establish tribunals to investigate and pronounce upon their fairness and validity." 12 Wheat. 599, 601. See, also, *Cessna v. United States*, 169 U. S. 165, 186-187.

<sup>10</sup> *De la Croix v. Chamberlain*, *supra*; *Astiazaran v. Santa Rita Land and Mining Co.*, 148 U. S. 80, 81; *United States v. Santa Fé*, 165 U. S. 675, 714; *Ainsa v. New Mexico and Arizona Railroad Co.*, 175 U. S. 76, 79.

<sup>11</sup> See *Ainsa v. New Mexico and Arizona Railroad Co.*, *supra*. The opinion of the court by Mr. Justice Gray contains a summary of the several acts of Congress providing for the con-

The validity of any act attributable to the former sovereign as such must be obviously tested according to its laws.<sup>12</sup> The new sovereign may, however, exercise its own judgment in determining what shall be required as proof of the validity of acts of its predecessor.<sup>18</sup>

The law of nations imposes no duty upon a State to permit non-resident aliens to retain title to immovable property within the national domain. The new sovereign may, therefore, not unreasonably demand that the retention of ownership of such property be dependent upon the continued residence of the owners therein, and upon the severing of any existing ties of allegiance to the former sovereign. Thus treaties of cession not infrequently provide that the existing owners of immovable property desirous of retaining their national character, be given reasonable opportunity to dispose of their holdings.<sup>14</sup> The terms of a treaty may not, however, intimate that residence within the territory transferred and allegiance to the new sovereign thereof are essential to the retention of title.<sup>15</sup>

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firmation of titles of claimants to lands in Louisiana, the Floridas, California and New Mexico, granted by the former sovereigns of those territories. See, also, *Florida v. Furman*, 180 U. S. 402; *Barker v. Harvey*, 181 U. S. 481.

<sup>12</sup> *Mr. Bayard, Secy. of State, to Mr. Roberts*, March 20, 1886, MS. Inst., Chili, XVII, 196, 200, Moore, Dig., I, 421-422; *United States v. Clarke*, 8 Pet. 436, 450, with reference to Art. VIII of the treaty with Spain of Feb. 22, 1819, providing for the protection of certain Spanish grants of land in the territories ceded. Also *Kealoha v. Castle*, 210 U. S. 149.

<sup>13</sup> *Hayes v. United States*, 170 U. S. 637, 647, with reference to the Act of Congress of March 3, 1891, creating a Court of Private Land Claims for the adjustment of land titles in Mexico and Arizona, as compared with certain earlier legislation of Congress; also *Ely's Admr. v. United States*, 171 U. S. 220, 224; *United States v. Elder*, 177 U. S. 104; *Whitney v. United States*, 181 U. S. 104, 114. Compare the statutes construed in *United States v. Arredondo*, 6 Pet. 691, with reference to grants by the Spanish Crown in Florida, and *United States v. Peralta*, 19 How. 343, with reference to prior grants in California.

In his paper on "Change of Sovereignty and Private Ownership of Land," *Am. J.*, XII, 475, 495, Prof. Francis B. Sayre concludes: "There can be no question that United States courts will not allow a mere cession of territory to the United States to injure or abrogate vested rights of land ownership, legal or equitable, held by individuals at the time of cession. It is equally clear that United States courts will feel free to disregard mere expectant rights which could not have been enforced as of right in the courts of the ceding State. Grants which were unenforceable before cession either because of unperformed conditions, or because of the indefiniteness of the grant, or because of the want of power in the granting officer or imperfection in the grant itself, will clearly not be upheld by United States courts."

<sup>14</sup> See, for example, Art. IX, treaty between the United States and Spain, Dec. 10, 1898, *Malloy's Treaties*, II, 1693. Cf. *United States v. Repentigny*, 5 Wall. 211.

<sup>15</sup> According to Art. VI of the convention between the United States and Denmark of Aug. 4, 1916, providing for the cession of the Danish West Indies: "Danish citizens residing in said islands may remain therein or may remove therefrom at will, retaining in either event all their rights of property, including the right to sell or dispose of such property or its proceeds; in case they remain in the islands, they shall continue until otherwise provided, to enjoy all the private, municipal and religious rights and liberties secured to them by the laws now in force. If the present laws are altered, the said inhabitants shall not thereby be placed in a less favorable position in respect to the above-mentioned rights and liberties than they now enjoy."

"Danish citizens not residing in the islands but owning property therein at the time of the cession, shall retain their rights of property, including the right to sell or dispose of such property, being placed in this regard on the same basis as the Danish citizens residing in the island and remaining therein or removing therefrom, to whom the first paragraph of this article relates." U. S. Treaty Vol. III, 2561.

In the treaty of peace with Germany of June 28, 1919, there was frequent provision that persons habitually resident in territory transferred, who elected to opt for the nationality of the transferor, and in consequence were obliged to transfer their residence to its domain, should still be entitled to retain their immovable property in the ceded territory. See, for example, Arts. 37 and 106.

## g

§ 133A. **Consequences of the Internationally Illegal Conduct of the Former Sovereign.** States do not appear to acknowledge that a change of sovereignty over territory serves to transfer to the successor thereto an obligation to make amends for the internationally illegal conduct of the former sovereign while itself supreme therein. Where the transfer is not incidental to the extinction of the statehood of the transferor, which despite its loss of territory, retains its existence and personality in the international society, there has been little or no concern with the inquiry whether its burden has been lessened if not shifted, or whether a considerable diminution of territory that might serve greatly to impair the ability of the transferor to make adequate redress for wrongs chargeable to it, should be regarded as a limitation upon the power to make a valid cession.

Where the transfer is incidental to the extinction of a State that has been guilty of internationally illegal conduct, the new sovereign does not seem to be regarded as necessarily succeeding to the responsibility of the old.<sup>1</sup> This is said to be true whether the loss of State life with the resulting change of sovereignty is attributable to the acts of a conqueror which by annexation seeks to reap the fruits of a military achievement, or is the result of a voluntary arrangement reflecting the common desires of the parties thereto.<sup>2</sup>

The prevailing theory that seemingly disassociates State responsibility from territory that undergoes a complete change of sovereignty, when the life of a State becomes extinct, leaves something to be desired. Obviously the territory of a State can do no wrong; but it may offer the means of satisfying one com-

§ 133A. <sup>1</sup>See Robert E. Brown Case, American-British Pecuniary Claims Arbitration, Convention of 1910, Nielsen's Report, 162, 187, 199, 200-201. The claim in this case was made by the United States on account of the denial of property rights alleged to have been acquired in the South African Republic by an American mining engineer prior to the annexation of that country by Great Britain in 1900. The Tribunal took occasion to observe that, "properly speaking," no question of State succession was involved because the United States had planted itself squarely on two propositions: "first, that the British Government, by the acts of its own officials with respect to Brown's case, has become liable to him; and, second, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic." The Tribunal also adverted to the fact that in its Reply, the United States took the stand that it did not follow from its contention that it was incumbent upon it "to show that there is a rule of international law imposing liability on His Majesty's Government," and also that the American Agent, in his oral argument, disclaimed any intention of maintaining "that there is any general liability for torts of a defunct State" (*id.*, 200). The statement of the Tribunal that the liability of the South African Republic, for what was referred to as "a real denial of justice," never passed to the British Government, was in the nature of a dictum. The decision was adverse to the United States on the two propositions noted.

See, in this connection, Sir Cecil J. B. Hurst, "State Succession in Matters of Tort," *Brit. Y.B.*, 1924, 163.

<sup>2</sup>See Hawaiian Claims Case, American-British Pecuniary Claims Arbitration, Convention of 1910, Nielsen's Report, 84, 160, where it was declared in the award: "It is contended on behalf of Great Britain that the Brown Case is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic as shown (so it is said) by the recitals of the Joint Resolution of Annexation. We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one state to another through conquest would be an exception. We think there is no such principle."

mitted by the human agencies that control it. The inquiry presents itself whether there should not be deemed to be such a connection between territory as such and certain forms of conduct committed thereon as to cause the former to afford under some conditions a means of redress regardless of a change of sovereignty that marks the extinction of the tortfeasor.

Supremacy over territory is a necessary basis of statehood, and sustains the exercise of governmental authority therein. Tortious acts that breed responsibility commonly find expression in conduct that grows out of that supremacy and purports to be attributable to it.<sup>3</sup> Assertions of governmental authority thus in one sense appear to run with the land because they are incidental to control over the land. When a State wrongs another through the treatment accorded its nationals, and the character of such conduct is duly established, the extinction of the statehood of the wrong-doer with the incidental loss of its entire domain is not believed equitably to divorce the territory from all connection with the consequences of what the functioning of government therein previously wrought.<sup>4</sup> Accordingly, it is suggested that the particular territory concerned, despite the extinction of the former sovereign, should, at least under certain conditions, be made to bear the burden of requiting wrongs due to, and growing out of, the assertion of supremacy therein. This requirement might diminish the interest of strong powers in seeking to annex and so obliterate the statehood of weaker and backward neighbors. On the other hand, it would bring home to the inhabitants of territory fresh consciousness of the fact that responsibilities derived from the control of territory were necessarily, and perhaps permanently, associated therewith. Above all, the unassailable equities of aggrieved States would not be destroyed through the operation of a technical rule. That territory should be made the means of redressing wrongs necessarily attributable to the exercise of sovereignty within it is, therefore, believed to be a proposition worthy of the faithful consideration of the international society.

<sup>3</sup> Obviously, acts of a State of internationally illegal aspect may be committed outside of its own territory. They attain their significance as manifestations of State conduct because of the fact that the entity responsible for them purports to be sovereign over some well-defined territorial area. Thus, in a broad sense, no conduct attributable to a State can be completely divorced from the territory through the possession or retention of which the statehood of the actor subsists.

<sup>4</sup> See Treaty Establishing Friendly Relations between the United States and Austria, of Aug. 24, 1921, U. S. Treaty Vol. III, 2493; also, Treaty Establishing Friendly Relations between the United States and Hungary, of Aug. 29, 1921, *id.*, 2693; Tri-Partite Agreement between the United States and Austria and Hungary for the determination of the amounts to be paid by Austria and by Hungary in satisfaction of their respective obligations under the foregoing treaties, of Nov. 26, 1924, U. S. Treaty Vol. IV, 3928; Administrative Decision No. 1 of Tri-Partite Claims Commission under Tri-Partite Agreement, of Nov. 26, 1924, U. S. Treaty Vol. IV, 3828. From the foregoing documents will be apparent the nature and scope of the undertakings of Austria and Hungary, respectively, to make compensation for damage done to the civilian population of the United States and to their property in consequence of the aggression of Austria-Hungary and her allies. It will be observed that the liability accepted by the contracting parties, Austria and Hungary, respectively, did not make reference to their predecessors, the Austrian Empire and the Kingdom of Hungary, but rather to the acts of an entity with which the United States had been at war — "the Imperial and Royal Austro-Hungarian Government," which, according to the treaties, "ceased to exist" and "was replaced in Austria by a republican government" and "in Hungary by a national Hungarian government." See *The Dismemberment of the Austro-Hungarian Dual Monarchy*, *supra*, § 107A.

## 3

## NATURE AND LIMITS OF RIGHTS

## a

## Extent of the National Domain

## (1)

§ 134. **In General.** The territory of a State consists in part of the area, both land and water, confined by definite boundaries, over which an exclusive right of sovereignty is claimed and enjoyed.<sup>1</sup> There is also an area of the air space which is regarded as belonging to the sovereign of the subjacent land and water;<sup>2</sup> and there is the subsoil which is regarded as belonging to the sovereign of the surface land and water.<sup>3</sup> There may be even more — the subsoil appurtenant to a coast and extending therefrom into an area beneath the sea.<sup>4</sup> The extent of the areas of land, water, and air which a State may fairly regard as belonging to itself and as constituting its domain is, in a broad sense, limited by the requirements of the law of nations.

In ascertaining what those requirements are, and how they mark the limits, in a geographical sense, of national pretensions, confusion of thought, has arisen. Two considerations are responsible for it. The first is the circumstance that the territorial sovereign is not regarded in practice as enjoying the same breadth of control in all portions of the areas that it may fairly deem to be its own. The second is the fact that adjacent to its domain, as, for example, on its marginal sea, there may be areas over which, although not its own, a State may take special measures in order to defend its territory or other interests. Thus, on the one hand, the limitation of control to which a State finds itself subjected in relation to its own domain, and, on the other, the restrictions which at times for limited purposes it applies to what is outside thereof, cause perplexity in seeking exact tests of territorial limits. Nevertheless, that task is simplified when it is observed that what may be described as extraterritorial

§ 134. <sup>1</sup> Hall, 5 ed., 100, quoted in Moore, Dig., I, 615. See, also, Fauchille, 8 ed., §§ 483-489; Calvo, 5 ed., I, 382-384; Lauterpacht's 5 ed. of Oppenheim, I, §§ 168-171 (with bibliography); Pradier-Fodéré, II, 144-151; Martens, I, 451-459; Woolsey, 6 ed., 67-68; Beale's Cases on Conflict of Laws, III, Summary, § 19.

See also *Cunard Steamship Co. v. Mellon*, 262 U. S. 100, 122.

<sup>2</sup> According to Article XXIX of the treaty of friendship, commerce and consular rights, between the United States and Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191: "Subject to any limitation or exception hereinabove set forth, or hereafter to be agreed upon, the territories of the High Contracting Parties to which the provisions of this Treaty extend shall be understood to comprise all areas of land, water and air over which the Parties respectively claim and exercise dominion as sovereign thereof, except the Panama Canal Zone."

<sup>3</sup> At the Hague Conference of 1930 for the Codification of International Law, it was submitted in behalf of the United States that "the territory of the coastal State includes the air above the territorial waters, the bed of the sea covered by those waters and the subsoil." See, Hunter Miller, "The Hague Codification Conference," *Am. J.*, XXIV, 674, 689, where that writer declares that "the United States proposal was finally accepted in principle by a vote of twenty-four to seven." Cf. text of Basis No. 2, *id.*, 689. See also, Hackworth, Dig., I, § 96, and documents there cited.

<sup>4</sup> See *infra*, § 145A.



assertions are not necessarily indicative of the extent of territorial limits, and when it is perceived that a right of sovereignty over a particular area is not necessarily to be denied because it does not embrace a control that is at all times and for all purposes exclusive. The outstanding factor which practice has revealed is the common understanding that a State may fairly regard as its own, areas which are under its exclusive control, and also others appurtenant to them yet within which, however, a slightly lesser degree of control is tolerated. Areas of both kinds are linked to a single sovereign. Moreover, their relationship to it is so intimate and close that the international society acknowledges the reasonableness of the claim of that sovereign to both as belonging to itself. It thus becomes important to observe to what extent the members of that society have generally been disposed to respect the connection and what geographical limits if any they have sought to establish.

The extent of the control which a State may exercise within its own domain is likewise so held in restraint by international law.<sup>5</sup>

The extent of both the right and the duty of a State to do justice within its own domain, as well as elsewhere, is also fixed by international law. Inasmuch, however, as the scope of what may be described as the privileges and obligations of jurisdiction is not always to be ascertained or measured by reference to the territorial limits of a State, or by the degree of control which it may lawfully exercise within those bounds, the subject is discussed elsewhere.<sup>6</sup>

## (2)

### VARIOUS TERRITORIAL LIMITS OR BOUNDARIES

#### (a)

§ 135. **Artificial Lines.** A treaty may provide that the boundary between two States shall follow certain imaginary lines, such as a parallel of latitude or a meridian of longitude, or a straight line connecting two given points.<sup>1</sup>

<sup>5</sup> *Cf.* *Reg. v. Keyn*, 13 Cox C. 403, 2 Ex. D. 63; *Beale's Cases on Conflict of Laws*, I, 1.

<sup>6</sup> *Rights of Jurisdiction, infra*, §§ 218-265; *Duties of Jurisdiction, infra*, §§ 266-269.

§ 135.<sup>1</sup> See, for example, Art. I of the treaty between the United States and Mexico, Dec. 30, 1853. This Article also provided for the survey and establishment of the boundary line by a mixed commission, and declared that "the dividing line thus established shall in all time be faithfully respected by the two Governments." *Malloy's Treaties*, I, 1121. Mr. Cushing, Attorney-General, was of opinion that in view of the language of the treaty, the monuments and other descriptions of the line as established by the Commission should be regarded as the true line of demarcation, even though it should afterwards appear that "by reason of error of astronomical observations or of calculation, it varied from the parallel of latitude where that was the line, or in the other part did not make exactly a straight line." (8 Ops. Attys.-Gen., 175-176, Moore, Dig., I, 615.)

Concerning the error in the original demarcation of the Northeastern Boundary of the United States at Rouse's Point, see Moore, Dig., I, 615, note, *citing* Moore, *Arbitrations*, I, 70-71, 80, 112, 119, 129, 135-136, 149-153.

See *United States v. Texas*, 162 U. S. 1; also Moore, Dig., I, 616, concerning the interpretation of Art. IV, of the treaty between the United States and Spain of Feb. 22, 1819. See treaty between the United States and Great Britain, April 11, 1908, providing for the more complete definition and demarcation of the international boundary between the United States and the Dominion of Canada, *Malloy's Treaties*, I, 815, *Am. J.*, II, *Supplement*, 306. Also Lord Curzon of Kedleston, "Frontiers," Roumanes Lecture, Oxford, 1907; S. W. Boggs,

When a parallel of latitude is utilized as a boundary between two States, as in the case of that between the United States and Canada from Lake of the Woods to the summit of the Rocky Mountains, where the 49th parallel serves such a purpose, it may be found impracticable to determine the course of the line of boundary having the requisite curvature of such parallel on the ground between adjacent monuments indicative of the line; and it may be found preferable to define the boundary as consisting of a series of right or straight lines joining adjacent monuments established at appropriate intervals.<sup>2</sup>

(b)

§ 136. **Mountains and Hills.** A range of mountains or hills may be the boundary line between two States. In such case the line of demarcation follows the watershed.<sup>1</sup> Professor Moore has observed that "this rule, while simple enough in principle, is often exceedingly difficult of application."<sup>2</sup>

According to an eminent American geographer: <sup>3</sup>

Three extremely instructive points have been made. (1) Mountain boundaries are much more numerous in Europe than river boundaries. (2) Mountain boundaries persist for the greatest periods of time. (3) Where

"Boundary Functions and Principles of Boundary Making," Dept. of State Press Release, Jan. 2, 1932, Publication No. 268; Paul de Lapradelle, *La Frontière*, Paris, 1928.

<sup>2</sup> See Art. II of treaty between the United States and Great Britain in respect of Canada, pertaining to the boundary between the United States and Canada, Feb. 24, 1925, U. S. Treaty Vol. IV, 3988. Also in this connection, statements in Hackworth, Dig., I, § 106, together with documents there cited. As is there stated: "Article IV of the treaty provided that in order to maintain an effective boundary line between the United States and Canada and between Alaska and Canada, as established or to be established, the commissioners appointed under the treaty of 1908 and their successors should maintain an effective boundary line and should submit at least annually a joint report accompanied by such plats, tables, and other information as may be necessary to keep the boundary maps and records accurately revised." (*Id.*, I, 765.)

§ 136. <sup>1</sup> Mr. George Canning, British Foreign Secretary, wrote to Mr. S. Canning, Dec. 8, 1824, with reference to the establishment of a line of demarcation between British and Russian Possessions in Alaska: "It is quite obvious that the boundary of mountains, where they exist, is the most natural and effectual boundary." *Proceedings*, Alaskan Boundary Tribunal, Appendix to *Case of the United States*, Vol. II, 210. See line of demarcation between the Russian and British Possessions in North America, contained in the Anglo-Russian Convention of February 28 (16), 1825, and embodied in Art. I of the Convention between the United States and Russia of March 30, 1867, providing for the cession of Alaska, Malloy's *Treaties*, II, 1521.

<sup>2</sup> Moore, Dig., I, 616, note. As evidence of the truth of his statement Professor Moore refers to the question as to the "Highlands" in the Northeastern Boundary dispute between the United States and Great Britain, *citing* Moore, *Arbitrations*, I, 65-68, 78, 100, 109, 114, 131, 158-161.

Concerning the controversy between Chile and the Argentine Republic, whether the boundary between their respective territories should, according to existing conventions, be determined by the watershed or by the highest peaks of the Andes, and the agreement to adjust the difference by arbitration, see *For. Rel.* 1896, 32-34; also Moore, *Arbitrations*, V, 4854-4855.

See, also, award of the arbitrator January 30, 1897, in the Manica Arbitration between Great Britain and Portugal, where the boundary followed a plateau, the watershed of which was not, for reasons given, regarded as the true line of demarcation, Moore, *Arbitrations*, V, 4985-5015.

<sup>3</sup> Col. Lawrence Martin, in Chapter XIV of *Reply of Guatemala to Counter Case of Honduras*, Guatemala-Honduras Boundary Arbitration, under treaty of July 16, 1930, in which attention is called to Prof. S. C. Gilfillan's "European Political Boundaries," *Pol. Sc. Quar.* XXXIX, 458-484.

mountains are unavailable, the Europeans use divides in plains, even if rivers are present nearby, and these boundaries on divides persist for centuries. A fourth point of the highest significance may be gleaned from Professor Gilfillan's map. *When rivers are chosen as boundaries they do not continue very long as boundaries.*

\* \* \* \*

A study of mountain boundaries and river boundaries in the United States of America furnishes data which are even more instructive and pertinent.

The external boundaries of the United States are of three types: (a) Mountain boundaries, (b) boundaries in rivers, lakes, and straits, and (c) straight-line boundaries like the parts of the Canadian boundary on the 45th and 49th parallels of latitude and the parts of the Mexican boundary west of the Rio Bravo del Norte.

The boundaries in rivers, lakes, and straits have been a source of great bother and expense to the Government of the United States, beginning in 1782, when the Canadian frontier was first defined, and continuing to the present time.

Thus there have been disputes regarding (a) the boundary in Passamaquoddy Bay on the boundary between Maine and New Brunswick, (b) the identity of the St. Croix River nearby to the north, (c) the proper stream at the headwaters of the Connecticut River on the New Hampshire-Quebec boundary, (d) the channels between Lake Huron and Lake Superior, (e) the Pigeon River northwest of Lake Superior, (f) the Lake of the Woods, and (g) the San Juan Channel between the State of Washington and the Province of British Columbia. These seven water boundaries have involved long and expensive proceedings between Great Britain and the United States. The settlement of most of the boundary disputes in the area from the Lake of the Woods to the State of Maine required diplomatic proceedings and treaties throughout the long period from 1782 to 1842. The Passamaquoddy Bay dispute, however, was not composed until the United States negotiated a treaty with Great Britain in 1910. That with respect to the boundary in the straits between Washington and British Columbia had to be submitted to arbitration by the Emperor of Germany. As late as the year 1931 a bill was presented to the Congress of the United States providing for the initiation of further proceedings with respect to the river boundary between Minnesota and Ontario.

Besides these seven cases with respect to the northern boundary of the United States there is an eighth and very large group regarding the boundary between Mexico and the United States of America on the Rio Bravo, or Rio Grande.

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In contrast with these eight portions of the boundary of the United States where water boundaries have caused ambiguity, disputes, and expense, there are only one or two cases where straight-line boundaries have caused similar trouble. One of these is where the northern boundary of New York and Vermont crosses Lake Champlain.

One mountain boundary of the United States involved original difficulty

of identification. That was the portion of the boundary of Maine which lies upon the so-called "Highlands." Once it was fixed, in 1842, this mountain boundary has caused no further trouble, nor is there prospect that it ever will.

From all of this it appears that the United States of America has had at least eight times as much trouble with water boundaries as with mountain boundaries. But this is an understatement of the situation, for one of the eight water boundaries, the Rio Bravo del Norte or Rio Grande, has already caused trouble at some 89 localities. It caused this trouble in a period of only 65 years. And it is absolutely certain that it will cause similar trouble and expense at hundreds of other localities in years to come.

Arbitrators burdened with the task of adjudicating in territorial disputes have, when clothed with the requisite jurisdiction, been disposed to look favorably and with a decided preference upon mountains as appropriate as well as natural boundaries between States.<sup>4</sup>

(c)

RIVERS

(i)

§ 137. **Preliminary.** In the Middle Ages, rivers which separated alien peoples or tribes were looked upon as neutral barriers rather than areas susceptible of nice division and capable of ownership.<sup>1</sup> There gradually arose, however, a sense of the necessity for the assertion of control over such waters; but there was confusion of thought as to the nature and extent of that control. Rivers served as natural arteries of commerce as well as natural boundaries. The matter of navigation was of as great moment as that of territorial limits. For that reason, early writers announced the principle of co-dominion, which assigned to the opposite riverain proprietors rights of sovereignty over the entire stream.<sup>2</sup> Men found it difficult to reconcile the claim of exclusive sovereignty asserted by one State over any portion of the stream, with the claim of another to exercise privileges of navigation therein. No doubt the latter claim had a marked effect upon the scope of the former. Nevertheless, the requirements of navigation were not decisive of the problem whether a line of division might be drawn through the waters of a river in recognition of sovereign rights of the States on either side of such a boundary. It came to be understood that such a line could be drawn. In accordance with the views of Grotius and Vattel,

<sup>4</sup> See award in arbitration between Austria and Hungary concerning their frontier near the Lake called "*L'Oeil de la Mère*," *Rev. Droit Int.*, 2 sér., VIII, 162; award of King of Spain, 1906, in boundary dispute between Honduras and Nicaragua, *Nouv. Rec. Gén.*, 2 sér., XXXV, 563; award of the arbitrator, June 25, 1914, in dispute between the Netherlands and Portugal concerning their frontier in the Island of Timor, G. G. Wilson, *Hague Arbitration Cases*, 374, 441.

§ 137. <sup>1</sup> See historical review by E. Nys, in his *Droit International*, 2 ed., I, 423-437, citing, at 424, H. Helmolt in *Historisches Jahrbuch*, 1896, pp. 235 et seq.

<sup>2</sup> *Id.*, I, 425.

nations were agreed that it should pass through the middle of the stream.<sup>1</sup> This method of division proved, however, to be unsatisfactory in the case of navigable rivers; for, in disregarding the course of the principal channel, it was likewise heedless of the equities of the State which happened to be the more remote therefrom. Nor did it adapt itself to gradual changes which such channel might undergo.<sup>4</sup> As a result, at the beginning of the nineteenth century, riparian States began to conclude treaties, which proposed a different method of division, and which has since become the accepted mode of indicating the frontier. There has thus developed a practice manifesting general adherence to a particular doctrine.<sup>5</sup>

(ii)

§ 138. *Thalweg*. It has long been agreed that when a navigable river forms the boundary between two States, the dividing line follows the thalweg of the stream.<sup>1</sup> The thalweg, as the derivation of the word indicates, is the downway

<sup>1</sup> *De Jure Belli et Pacis*, Book II, Chap. 3, Secs. 7 and 8; Chitty's *Vattel* (1859), Chap. 22 Sec. 266, p. 120.

<sup>4</sup> E. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, Paris, 1879, 73. Pierre Orban, *Étude de Droit Fluvial International*, Paris, 1896, 342-346.

<sup>5</sup> Art. VI of Treaty of Luneville, Feb. 9, 1801, *De Clercq, Traité*, I, 426, following the views expressed by the French plenipotentiaries at the Congress of Rastadt in March and April, 1798.

§ 138.<sup>1</sup> Numerous treaties since the beginning of the nineteenth century make express provision that the frontier along navigable rivers shall follow the thalweg. See, for example Art. V of the definitive treaty between France and the Allies of May 30, 1814, *Brit. and For. St. Pap.*, I, Pt. I, 156; also collection of treaties containing similar provisions, in the argument of the United States in the Chamizal Arbitration (Washington, 1911), 10-21. Among more recent conventions to the same effect may be noted that between the Argentine Republic and Brazil of Oct. 6, 1898, *Brit. and For. St. Pap.*, XC, 85; also that between Great Britain and France of June 14, 1898, for the delimitation of possessions west of the Niger, *Brit. and For. St. Pap.*, XCI, 38, 45. *Cf.* also Art. I, Treaty of Constantinople, between Turkey and Bulgaria, of Sept. 16/29, 1913, *Brit. and For. St. Pap.*, CVII, 706, 709.

See also Art. VI, treaty between the Allied Powers and Turkey, of July 24, 1923, *Am. J. XVIII, Official Documents*, 1, 7.

The treaties of the United States concerning river boundaries lack uniformity of expression. Art. II of the definitive treaty of peace with Great Britain of Sept. 3, 1783, provided that the frontier should follow the "middle" of boundary rivers as well as of water communication: between the Lakes. Malloy's *Treaties*, I, 587. Art. I of the Webster-Ashburton Treaty of Aug. 9, 1842, provided that the frontier along the river St. John should follow the "middle of the main channel." (*Id.*, I, 651.) The treaty of April 11, 1908, concerning the Canadian international boundary, provided in Art. II respecting the St. Croix River, that the line should "follow the center of the main channel or thalweg as naturally existing, except where such course would change or disturb or conflict with the national character of islands as already established by mutual recognition and acquiescence." (*Id.*, I, 818.) This is the first boundary convention of the United States in which the term thalweg was employed.

Art. II of the treaty with Spain of Oct. 27, 1795, provided that the boundary along St. Mary's River should follow the "middle thereof"; while Art. IV declared that the "western boundary of the United States which separates them from the Spanish colony of Louisiana is the middle of the channel or bed of the river Mississippi." (*Id.*, II, 1641, 1642.) Art. III of the treaty with Spain of Feb. 22, 1819, provided that the boundary should follow the "course" of the Red River between specified points, all islands therein being assigned to the United States. *Id.*, II, 1652-1653.

Art. II of the treaty with Mexico of Jan. 12, 1828, declared that between specified points the boundary should follow the "course" of the Rio Roxo or Red River. *Id.*, I, 1083. According to Art. V of the Treaty of Guadalupe-Hidalgo of Feb. 2, 1848, the boundary was to proceed up the "middle" of the Rio Grande, "following the deepest channel where it has more than one"; also down the "middle" of a specified branch of the river Gila. *Id.*, I, 1109. Art. of the Gadsden Treaty with Mexico of Dec. 30, 1853, referred to the "middle" of the Rio Grande, and likewise to that of the Colorado. *Id.*, I, 1122. In the preamble of the boundary

or the course followed by vessels of largest tonnage in descending the river.<sup>2</sup> That course frequently, if not commonly, corresponds with the deepest channel. It may, however, for special reasons take a different path. Wheresoever that may be, such a course necessarily indicates the principal artery of commerce, and for that reason is decisive of the *thalweg*.<sup>3</sup>

The Supreme Court of the United States, recognizing the doctrine of *thalweg*, has declared that in the case of navigable boundary rivers the line follows the "middle of the main channel of the stream."<sup>4</sup> In 1934, that tribunal

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convention with Mexico of Nov. 12, 1884, it was declared that according to the provisions of the two last-mentioned treaties the dividing line follows the "middle of the channel of the Rio Grande and Rio Colorado"; and it was, therefore, provided in Art. I that the dividing line should forever "follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium, and not by the abandonment of an existing river bed and the opening of a new one." (*Id.*, I, 1159-1160.)

<sup>2</sup> Declares Westlake: "When a river forms the boundary between two States it is usual to say that the true line of demarcation is the *thalweg*, a German word meaning literally the 'downway'; that is, the course taken by boats going downstream, which again is that of the strongest current, the slack current being left for the convenience of ascending boats. *Thal* in the sense of valley enters into *thalweg* only indirectly. The immediate origin of the word lies in the use of *berg* and *thal* to express the upward and downward directions on a stream, like *amont* and *aval* in French." (I, 144, and note 1.)

Declared the Supreme Court of the United States in the case of *Louisiana v. Mississippi*, 202 U. S. 1, 49: "The term 'thalweg' is commonly used by writers on international law in definition of water boundaries between States, meaning the middle or deepest or most navigable channel. And while often styled 'fairway' or 'midway' or 'main channel,' the word itself has been taken over into various languages. Thus, in the treaty of Luneville, Feb. 9, 1801, we find 'le Thalweg de l'Adige,' 'le Thalweg du Rhin,' and it is similarly used in English treaties and decisions, and in the books of publicists in every tongue."

According to Art. III of the Draft of International Regulations for the Navigation of Rivers, adopted by the Institute of International Law in 1887: "The boundary of the States separated by the river is marked by the *thalweg*; that is, the median line of the channel." (*Annuaire*, IX, 182, J. B. Scott, Resolutions, 78.)

<sup>3</sup> *Minnesota v. Wisconsin*, 252 U. S. 273, 282; Baker's 4th ed. of Halleck, 182, § 23.

<sup>4</sup> *Iowa v. Illinois*, 147 U. S. 1, 7-14; *Handly's Lessee v. Anthony*, 5 Wheat. 374; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535; *Keokuk & Hamilton Bridge Co. v. The People*, 145 Ill. 596; *Same v. Same*, 167 Ill. 15; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626; *Bellefontaine Improvement Co. v. Niedringhaus*, 181 Ill. 426; *Louisiana v. Mississippi*, 202 U. S. 1; *Iowa v. Illinois*, 207 U. S. 59; *Washington v. Oregon*, 211 U. S. 127, 134; 214 U. S. 205, 215; *Arkansas v. Tennessee*, 246 U. S. 158; 247 U. S. 461; *Arkansas v. Mississippi*, 250 U. S. 39, 45. Compare opinion of Mr. Crittenden, Attorney-General, 5 Ops. Attys.-Gen., 412.

The Supreme Court of the United States, in the case of *Iowa v. Illinois*, 147 U. S. 1, 7-14, declared that, according to international law and the usage of European States, the terms "middle of the stream" and the "mid-channel," as applied to a navigable river, are synonymous and interchangeably used; and that the former was employed in the latter sense in the treaty of peace concluded by Great Britain, France and Spain at Paris in 1763. There is room for doubt whether the quotations made from Wheaton, Creassy, Twiss, Halleck, Woolsey and Phillimore sustain such a conclusion. It is believed that prior to the Treaty of Luneville of 1801, States commonly employed the term "middle of the stream" or "midstream" in boundary conventions for the reason that a line other than one drawn midway between the banks of a river was rarely contemplated. After that treaty, States having become familiar with the principle of *thalweg*, seem to have employed either that term, or some other clearly synonymous with it, whenever the new mode of demarcation was intended. The principal boundary treaties concluded since the beginning of the nineteenth century afford abundant evidence of the fact that States have generally taken great care to express their acceptance of the principle of *thalweg*, and have avoided the use of words the literal meaning of which might encourage the inference that the contracting parties sought to retain the old method of establishing a frontier.

Art. 30 of the Treaty of Peace with Germany of June 28, 1919, provided that "in the case of boundaries which are defined by a waterway, the terms 'course' and 'channel' used in the present treaty signify: in the case of non-navigable rivers, the median line of the waterway

declared through Mr. Justice Cardozo: "International law today divides the river boundaries between States by the middle of the main channel, when there is one, and not by the geographical centre, half way between the banks." He added that "it applies the same doctrine, now known as the doctrine of the *Thalweg*, to estuaries and bays in which the dominant sailing channel can be followed to the sea."<sup>5</sup> In the instant case the doctrine was applied to indicate the boundary between the States of Delaware and New Jersey in the lower Delaware River and Bay, upon the achievement of American independence. Passages in the opinion of the learned Justice may leave the attentive reader doubtful whether the tribunal, in the solution of a domestic boundary dispute, was merely utilizing a rule or principle that sooner or later became incorporated in the law of nations, or was formally proclaiming what the law of nations itself decreed when independence was judicially deemed to have been effected.<sup>6</sup>

The boundary line is subject to the gradual and imperceptible changes of the thalweg due to accretion or erosion, and produced by natural causes.<sup>7</sup> If

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or of its principal arm, and in the case of navigable rivers, the median line of the principal channel of navigation." (U. S. Treaty Vol. III, 3349.)

<sup>5</sup> *New Jersey v. Delaware*, 291 U. S. 361, 379.

<sup>6</sup> It was announced that "when independence was achieved, the precepts to be obeyed in the division of the waters were those of international law." (291 U. S. 378.) Then, after a discussion of the growth of respect for the doctrine of thalweg, in the latter part of the eighteenth century, it was said that "the truth plainly is that a rule was in the making which was to give fixity and precision to what had been indefinite and fluid. There was still a margin of uncertainty within which conflicting methods of division were contending for the mastery. . . . In 1783, when the Revolutionary War was over, Delaware and New Jersey began with a clean slate. There was no treaty or convention fixing the boundary between them. . . . In these circumstances, the capacity of the law to develop and apply a formula consonant with justice and with the political and social needs of the international legal system is not lessened by the fact that at the creation of the boundary the formula of the *Thalweg* had only a germinal existence. The gap is not so great that adjudication may not fill it. Lauterpacht, *The Function of Law in the International Community*, pp. 52, 60, 70, 85, 100, 110, 111, 255, 404, 432. Treaties almost contemporaneous, which were to be followed by a host of others, were declaratory of a principle that was making its way into the legal order. Hall, *International Law*, 8th ed., p. 7. International law, or the law that governs between States, has at times, like the common law within States, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality. Lauterpacht, *supra*, pp. 110, 255; Hall, *supra*, pp. 7, 12, 15, 16; Jenks, *The New Jurisprudence*, pp. 11, 12. 'The gradual consolidation of opinions and habits' (Vinogradoff, *Custom and Right*, p. 21) has been doing its quiet work." (*Id.*, 382-384.) See also *Wisconsin v. Michigan*, 295 U. S. 455, 461.

See award of the tribunal in *The Grisbadarna Case between Norway and Sweden* (Scott, *Hague Court Reports*, 1916, 122, 129), concerning the question of the delimitation of a certain part of their maritime boundary, Oct. 23, 1909, where there was unwillingness to apply the rule of the thalweg because — to quote from Mr. Hackworth's *Digest* (I, 574) — "the documents invoked for the purpose did not demonstrate that this rule was followed in the seventeenth century, the period considered material in determining the boundary."

<sup>7</sup> See opinion of Mr. Cushing, Attorney-General, 8 Ops. Attys.-Gen., 175; *Nebraska v. Iowa*, 143 U. S. 359; *McBaine v. Johnson*, 155 Missouri, 191; *Bellefontaine Improvement Co. v. Niedringhaus*, 181 Illinois, 426; *Argument of the United States in the Chamizal Arbitration*, p. 26. Also Art. I of the boundary convention between the United States and Mexico of Nov. 12, 1884, which is believed to express with exactness the correct rule of law in the requirement, that in order to subject the boundary to variations of the thalweg, the changes in the latter must be "effected by natural causes." Malloy's *Treaties*, I, 1159-1160.

In the case of *Washington v. Oregon*, 211 U. S. 127, 136, the Supreme Court of the United States declared: "When, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the States bordering on that river, the boundary, as thus prescribed, remains the

from any cause the change is perceptible and sudden by a process known as avulsion, the boundary continues to follow the line indicated by the previous channel.<sup>8</sup> This is true whether the river leaving its former bed thereby makes for itself a new course, or simply alters by enlargement or otherwise the path of the principal channel.<sup>9</sup> As has been recently observed, "when sudden and violent changes in the channel of the stream occur, whether from natural or artificial causes, and the stream suddenly leaves its old bed and forms a new one, the process is known as avulsion, and the resulting change in the channel does not bring about a change in the boundary."<sup>10</sup> In 1940, the Supreme Court of the United States declared that the rule of the *thalweg*, resting upon equitable considerations, and intended to safeguard to each State equality of access and right of navigation in a stream, "yields to the doctrine that a boundary is unaltered by an avulsion and in such case, in the absence of prescription, the boundary no longer follows the *thalweg* but remains at the original line al-

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boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter in the course of years becomes the most important and properly called the main channel of the river."

<sup>8</sup>*Cf.* opinion of Mr. Cushing, Attorney-General, 8 Ops. Attys.-Gen., 175; *Cooley v. Golden*, 52 Mo. App. 229; *Nebraska v. Iowa*, 143 U. S. 359; *Missouri v. Nebraska*, 196 U. S. 23; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 546; *Arkansas v. Tennessee*, 246 U. S. 158, 173; *Arkansas v. Mississippi*, 250 U. S. 39, 44.

In *Arkansas v. Tennessee*, 246 U. S. 158, at 175, Mr. Justice Pitney, in the course of the opinion of the Court, adverting to the results of avulsion in causing the boundary to remain in the middle of the former channel, said: "An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion. The emergence of the land, however, may or may not follow, and it ought not in reason to have any controlling effect upon the location of the boundary line in the old channel." See, also, *Whiteside v. Norton*, 205 Fed. 5.

<sup>9</sup>In the case of *Nebraska v. Iowa*, 143 U. S. 359, the Supreme Court of the United States held that while there might be an instantaneous and obvious erosion on one side of the Missouri River, if the accretion to the other side was gradual and imperceptible by alluvial deposits, the boundary would follow the changes in the channel thus effected notwithstanding their rapidity.

In the case of the Chamizal Arbitration before the Special International Boundary Commission, under the convention between the United States and Mexico of June 24, 1910, a grave problem arose concerning the interpretation of the boundary convention between those countries of Nov. 12, 1884, relating to the Rio Grande and Rio Colorado. Art. I of that convention provided that the dividing line should follow the center of the normal channel of those rivers irrespective of any alterations in their banks or courses, provided that such alterations were "effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one." The presiding commissioner, Prof. La Fleur, and the Mexican commissioner, Mr. Puga, who constituted a majority of the tribunal, were of opinion that the language quoted signified that the boundary should not vary with alterations in the course of the Rio Grande in case of a rapid and obvious erosion even though there might be no abandonment of the river bed. The American commissioner, Gen. Mills, was, however, of opinion that it was impossible to impute to the contracting parties an intention to prevent the boundary from following changes in the course of the river in the case of rapid and perceptible erosion unless there was also an abandonment of the existing river bed. For the text of the award of the court and the dissenting opinion of the American commissioner, see *Am. J.*, V, 782.

<sup>10</sup>Statement in Hackworth, Dig., I, 409. See also documents, *id.*, 411, in relation to the controversy between the United States and Mexico productive of and growing out of the Chamizal Arbitration.

See the special situation referred to in *Shapleigh v. Mier*, 299 U. S. 468, 470.



though now on dry land because the old channel has filled up.”<sup>11</sup> The Court found occasion in the instant case to conclude that “the doctrine as to the effect of an avulsion may become inapplicable when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area.”<sup>12</sup>

If a State which is the territorial sovereign over lands on both sides of a river makes a grant of territory on one side of the stream, “it retains the river within its own domain, and the newly erected State extends to the river only.”<sup>13</sup> Treaties have oftentimes recognized the fact that a river, instead of forming the boundary between two States, may be itself a part of the national domain of one riparian proprietor, the limit of whose territory is the further edge of the stream.<sup>14</sup>

When a river forms the boundary between two States, neither of them possesses the right to change, by means of artificial works or otherwise, the natural course of the thalweg, and so alter the line of demarcation or affect the navigability of the stream. It would be unjust, as was early perceived by Vattel,<sup>15</sup> for one riparian proprietor so to promote its own advantage at its neighbor’s expense. Numerous treaties give recognition to this principle. While they announce that lawful modification of a boundary by artificial means requires the consent of both the States concerned, they sometimes contemplate uses, obstructions or diversions to be made in accordance with the approval of a joint commission.<sup>16</sup> It must be clear that no agreement of the States whose territories are divided by a river can render lawful acts on the part of either

<sup>11</sup> *Arkansas v. Tennessee*, 310 U. S. 563, 571.

<sup>12</sup> *Id.*, where it was added: “Here that fact has been established and the original rule of the *thalweg* no longer applies.”

<sup>13</sup> *Handly’s Lessee v. Anthony*, 5 Wheat. 374.

Writes Hall: “Upon whatever grounds property in the entirety of a stream or lake is established, it would seem in all cases to carry with it a right to the opposite bank as accessory to the use of the stream, and perhaps it even gives a right to a sufficient margin for defensive or revenue purposes, when the title is derived from occupation, or from a treaty of which the object is to mark out a political frontier.” (5 ed., 123, quoted in Moore, Dig., I, 617, note.)

<sup>14</sup> See, for example, Art. III of the treaty between the United States and Spain of Feb. 22, 1819, relative to the boundary along the river Sabine, Malloy’s *Treaties*, II, 1652; and in this connection, *Oklahoma v. Texas*, 260 U. S. 606, 631. See also texts of boundary conventions in the *Argument of the United States in the Chamizal Arbitration*, 21–24.

In the *Argument of the United States in the Chamizal Arbitration* there is noted (p. 24) a small group of European boundary treaties, which provide that the thalweg shall be designated at fixed points, which shall thereafter be regarded as forming a fixed line of demarcation, notwithstanding subsequent changes of the channel. The text of the boundary convention between Russia and Westphalia of May 14, 1811, is quoted.

The Guatemala-Honduras Special Boundary Tribunal, in its Opinion and Award of Jan. 23, 1933, fixed the boundary between the parties on the right bank of the Tinto River from a specified point downstream to its point of discharge into the Motagua River, thence along the right bank, taken at mean high water mark of the Motagua River downstream to its mouth on the Gulf of Honduras, which served to continue the sovereignty of Guatemala over the entire streams within the areas where they constituted the frontier. The Tribunal declared that “in the event of changes in these streams in the course of time, whether due to accretion, erosion or avulsion, the boundary shall follow the mean high water mark upon the actual right banks of both rivers.” (Opinion and Award, 99.)

<sup>15</sup> Chitty’s ed., § 271, p. 122. See, also, Bluntschli, *Das Moderne Völkerrecht der Civilisirten Staaten*, § 299; Calvo, 5 ed., I, § 342, p. 466.

<sup>16</sup> See, for example, Arts. II, III, and IV of treaty between the United States and Great Britain respecting the boundary waters between the United States and Canada, Jan. 11, 1909, Charles’ *Treaties*, 40–41, *Am. J.*, IV, Supp., 239; Art. VII of treaty between the

sovereign productive of changes in the thalweg where the stream forms the boundary between other States, or serves to impair the value of their rights of navigation. Obviously the lawfulness of such conduct depends upon the consent of all concerned.<sup>17</sup>

If a non-navigable river constitutes an international boundary, it appears to be accepted doctrine that the dividing line follows the middle of the stream.<sup>18</sup>

(iii)

§ 139. Islands. Islands existing or arising within a boundary river belong to the domain of the State on whose side of the thalweg or middle line (in case the stream is not navigable) they may be located.<sup>1</sup> If an island arises in the middle of a non-navigable stream the frontier, in the absence of special agreement, doubtless follows an imaginary line drawn through the middle of the newly formed land. If, however, the river is navigable, as the boundary is indicated by the principal channel, the island necessarily comes into existence on one side or the other thereof, and hence should belong exclusively to one riparian proprietor.<sup>2</sup> Division of the island might, however, be fairly claimed if its formation was sudden and perceptible.

If by slow and imperceptible change of the thalweg the boundary is altered in such a way as to separate an island from the State to which it may have belonged, the right of ownership of the latter is not lost. This fact has been frequently recognized in European treaties.<sup>3</sup> The right of sovereignty is, however, believed to change with the alterations of the thalweg. Thus the former sovereign, although retaining its title, would appear to lose the right of supreme control.<sup>4</sup>

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United States and Mexico, Feb. 2, 1848, Malloy's Treaties, I, 1111; Art. III of boundary convention between the United States and Mexico, Nov. 12, 1884, *id.*, 1160; Art. V of boundary convention between the United States and Mexico, March 1, 1889, *id.*, 1168; Art. III of convention of limits between France and Prussia, Oct. 23, 1829, Brit. and For. State Pap., XVI, 907; convention between Sweden and Norway concerning common lakes and watercourses, Oct. 26, 1905, *Nouv. Rec. Gén.*, 2 sér., XXXIV, 710.

*Cf.*, also, MS. Memorandum by William C. Dennis on "The effect of a gradual change in the thalweg of the Rio Grande caused by an artificial construction authorized by the Governments of the United States and Mexico, upon the international boundary line under the treaties between the two countries."

Also, Convention between Norway and Finland relative to the Frontier between the Province of Finmark and the District of Petsamo, April 28, 1924, Brit. and For. State Pap., CXX, 341.

<sup>17</sup> This is recognized in the rules respecting the International Regulation of the Use of International Streams adopted by the Institute of International Law at Madrid in 1911. *Annuaire*, XXIV, 365, J. B. Scott, Resolutions, 168, 169.

<sup>18</sup> Hall, Higgins' 8 ed., § 38.

§ 139. <sup>1</sup> Such is the common provision of boundary conventions which refer to the matter. See, for example, Art. IV of treaty between the Argentine Republic and Brazil, Oct. 6, 1898, Brit. and For. State Pap., XC, 85; agreement between Great Britain and Portugal, Nov. 6-30, 1911, respecting the boundary on the Ruvo and Shiré Rivers, *id.*, CIV, 194.

*Cf.*, also, Rivier, *Int. Law*, I, 168.

<sup>2</sup> Blatchford, J., in *St. Louis v. Rutz*, 138 U. S. 226, 249.

<sup>3</sup> See, for example, definitive treaty of peace between the Allies and France of May 30, 1814, Brit. and For. State Pap., I, Part I, 156; also statement of E. Nys concerning the treaties, 1801-1840, affecting islands in the Rhine, in his *Droit International*, 2 ed., I, 430-435; also *St. Louis v. Rutz*, 138 U. S. 226, 250.

<sup>4</sup> This principle is well expressed by Fiore (French translation by Antoine), II, § 781 and note. *Compare* Rivier, I, 168.

## (iv)

§ 140. **Bridges.** According to European treaties of the nineteenth century, the frontier on a bridge crossing a river forming an international boundary was fixed at the middle point of the structure.<sup>1</sup> This may have been a natural consequence of the early doctrine which referred to the middle rather than the principal channel of a navigable river as indicative of the boundary. The requirements which led to the adoption of the *thalweg* as the mode of establishing a frontier bore no relation to bridges. The latter continued to be built and maintained at the equal expense of the riverain States whose territories were thus connected. The middle point of such structures continued also to mark the true division of rights of sovereignty as well as of ownership. As these related to what was affected but slightly by alterations of the courses of the rivers spanned, riverain States appeared to agree that the frontier respecting bridges should not vary with changes of the *thalweg*. The boundary conventions which expressly or by implication refer to the matter seem to recognize this principle.<sup>2</sup>

If the frontier with respect to a bridge over a boundary river is to be fixed from the time of construction, it would be most reasonable to make the division of rights of sovereignty coincide with the line of demarcation then recognized in the river itself. Thus, when the latter is the *thalweg*, it is believed that the point where the line of the principal channel intersects the bridge should designate the frontier, and the division thus indicated be given permanent recognition.<sup>3</sup>

§ 140. <sup>1</sup> Treaty of Luneville of Feb. 9, 1801, between France and the Empire, De Clercq, *Traité*s, I, 425; treaty between Baden and Argovie of Sept. 17, 1808, *Nouv. Rec.*, I, 140; Art. III of Treaty of Paris, Nov. 20, 1815, Brit. and For. State Pap., III, 280, 285; decree promulgating treaty of limits between France and Spain of Dec. 2, 1856, Brit. and For. State Pap., XLVII, 765; final act of delimitation of boundary respecting Sardinia, Austria and France of Nov. 10, 1859, Brit. and For. State Pap., LIII, 943; declaration of Jan. 26, 1861, respecting the limit of sovereignty over bridges of the Rhine, between France and Baden, De Clercq, *Traité*s, VIII, 160; final act of delimitation of boundary between Austria and Italy, Dec. 22, 1867, Brit. and For. State Pap., LXIII, 840; final act of the Powers fixing the Turco-Greek frontier, Nov. 27, 1881, Brit. and For. State Pap., LXXII, 738; E. Nys, *Le Droit International*, 2 ed., I, 437; Rivier, I, 168; G. Ullmann, *Volkerrecht*, 2 ed., § 30.

<sup>2</sup> Thus in the declaration of Jan. 21, 1861, respecting the limits of sovereignty over bridges of the Rhine between France and Baden, it was declared:

"1. The middle of the fixed bridge over the Rhine between Strasbourg and Kehl shall be regarded as the limit of sovereignty between France and the Grand Duchy of Baden.

"2. The same principle shall be adopted hereafter respecting the bridge of boats between Strasbourg and Kehl, as well as for all the bridges which shall be constructed in the future between France and the Grand Duchy of Baden.

"3. These provisions are independent of the limit of the waters, and shall be without prejudice as to that limit, such as is established annually, according to the *thalweg* of the Rhine." De Clercq, *Traité*s, VIII, 160.

<sup>3</sup> Such was the policy of the United States and Mexico, expressed in the boundary convention of Nov. 12, 1884, respecting the Rio Grande and the Rio Colorado, Art. IV of which provided that "If any international bridge have been or shall be built across either of the rivers named, the point on such bridge exactly over the middle of the main channel as herein determined shall be marked by a suitable monument, which shall denote the dividing line for all the purposes of such bridge, notwithstanding any change in the channel which may thereafter supervene. But any rights other than in the bridge itself and in the ground on which it is built shall in event of any such subsequent change be determined in accordance with the general provisions of this convention." (Malloy's Treaties, I, 1159, 1160.)

See Exchange of Notes between Colombia and Venezuela respecting the Construction of

## (d)

## THE MARGINAL SEA

## (i)

## § 141. Relation to Territorial Sovereign of Adjacent Land. Breadth.

At the time when the United States came into being, maritime States were fast relinquishing exorbitant pretensions to rights of control over wide areas of the sea contiguous to land constituting the national domain.<sup>1</sup> Such claims

an International Bridge over the River Tachira, July 20, 1925, Brit. and For. St. Pap., CXXV, 299; also, provisions respecting bridges in Chapter III of Treaty between Germany and Lithuania regarding Frontier Questions, with Final Protocol, Jan. 29, 1928, Brit. and For. St. Pap., CXXIX, 617, 618-620.

§ 141.<sup>1</sup> See, generally, The Extent of the Marginal Sea, a collection of official documents and views of representative publicists, prepared by Henry G. Crocker, Dept. of State, 1919; Hugo D. Barbagelata, *Frontières*, Paris, 1911; T. W. Fulton, Sovereignty of the Sea, Edinburgh, 1911, Section II; Paul Godey, *La Mer Côtière*, Paris, 1896; Joseph Imbart de Latour, *La Mer Territoriale*, Paris, 1889; Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, New York, 1927; Gilbert Gidel, *Le Droit International Public de La Mer*, Paris, 1932; A. de Lapradelle, "Le droit de l'État sur la mer territoriale," *Rev. Gén.*, V, 264 and 309; Reinhard Leistikow, *Die Rechtslage in den Küstengewässern*, Griefswald, 1913; Antoine Nuger, *Des Droits de l'État sur la Mer Territoriale*, Paris, 1887; Ferdinand Perels, *Das Internationale öffentliche Seerecht der Gegenwart*, Berlin, 1903; Arnold Ræstad, *La Mer Territoriale*, Paris, 1913; Walther Schücking, *Das Küstenmeer im internationalen Rechte*, Göttingen, 1897; Romée de Villeneuve, *De la Détermination de la Ligne Séparative des Eaux Nationales et de la Mer Territoriale* (with bibliography), Paris, 1914; Lodewijk Ernst Visser, *De Territoriale Zee*, Amersfoort, 1894. Also Moore, Dig., I, 698-735, and documents there cited; Naval War College, Int. Law Topics, 1913, 11-35; Fauchille, 8 ed., §§ 490-494, with bibliography; Calvo, 5 ed., 477-480; Rivier, I, 145-150; Pradier-Fodéré, II, 147-148; Hall, Higgins' 8 ed., §§ 40-41; Lauterpacht's 5 ed. of Oppenheim, I, §§ 185-187, with bibliography; Westlake, 2 ed., I, 187-191; Dana's Wheaton, §§ 178-179; Dana's Note, *id.*, No. 105; Woolsey, 6 ed., 76-77; "La Limite de la Mer Territoriale" (Source—R. de Ryckère), Clunet, XLIV, 921; Sir J. W. Salmond, "Territorial Waters," *Law Quar. Rev.*, XXXIX, 235; Temple Grey, "Territorial Waters," *id.*, XLII, 350.

See, also, Report of Sir Thomas Barclay to the Institute of International Law, Aug. 6, 1892, *Annuaire*, XII, 104; Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law, 1894, *id.*, XIII, 328, J. B. Scott, Resolutions, 113; *Projet de Règlement relatif à la Mer Territoriale en Temps de Paix*, adopted by the same body, at Stockholm, 1928, *Annuaire*, XXXIV, 755; Laws of Maritime Jurisdiction in Time of Peace, Draft Convention (as amended by the Conference), International Law Association, Report, 34th Conference, Vienna, 1926, 101; Philip Marshall Brown, "Protective Jurisdiction over Marginal Waters," *Proceedings, Am. Soc. Int. Law*, Seventeenth Annual Meeting, 1923, 15; Fred K. Nielsen, "Is the Jurisdiction of the United States Exclusive within the Three-Mile Limit? Does it Extend Beyond this Limit for any Purpose?" *id.*, 32.

See especially documents in Hackworth, Dig., I, §§ 92 and 93.

Also, Philip Marshall Brown, "The Marginal Sea," *Am. J.*, XVII, 89; same, "The Law of Territorial Waters," *id.*, XXI, 101; P. T. Fenn, Jr., "Origins of the Theory of Territorial Waters," *id.*, XX, 465; Manley O. Hudson, "The First Conference for the Codification of International Law," *id.*, XXIV, 447, 455-458; Hunter Miller, "The Hague Codification Conference," *id.*, XXIV, 674; Jesse S. Reeves, "The Codification of the Law of Territorial Waters," *id.*, XXIV, 486; S. Whittemore Boggs, "Delimitation of the Territorial Sea," *id.*, XXIV, 541; J. Paulus, "La Mer Territoriale," *Rev. Droit Int.*, 3 sér., V, 397; Jean Hostie, "Le Domaine Maritime," *id.*, 3 sér., VIII, 215; F. Temple Grey, "Des Eaux Territoriales," *id.*, 123; H. S. Fraser, "La Codification Internationale du Droit des Eaux Territoriales," *Rev. Droit Int.* (Paris), I, 133; same, "The Extent and Delimitation of Territorial Waters," *Cornell Quar. Rev.*, XI, 455; H. M. Cleminson, "Laws of Maritime Jurisdiction in Time of Peace," *Brit. Y.B.*, 1925, 144; C. J. Colombos, "Territorial Waters," *Grotius Society*, IX, 89; Th. Niemeyer, "Allgemeines Völkerrecht des Küstenmeers," *Zeit. Int.*, XXXVI, I; Gustav Kraemer, "Das Recht der Küstenzonen in bezug auf die Fischerei," *Zeit. Völk.*, VII, 123; C. B. V. Meyer, The Extent of Jurisdiction in Coastal Waters, Leiden, 1937.

See Instructions of American plenipotentiaries for negotiating a treaty of Commerce with Great Britain, Aug. 14, 1779, Secret Journals of Congress, II, 229, Snow, Topics on American

although based upon a variety of considerations, had commonly been partially attributable to the theory that the waters over which rights of sovereignty were asserted, by reason of what took place within them, bore such a relation to the nearest land as to be regarded as appurtenant to it.<sup>2</sup> To defend it from attack, to protect commerce entering and leaving its ports, to safeguard the fisheries along its borders, and to insure respect for the flag of its territorial sovereign had been decisive influences. With the advent of the nineteenth century it came to be understood that a State was capable of substantially occupying a narrow rim of the sea adjacent to its ocean coasts, and of dealing with it, for most purposes, as though it were a part of the national domain.<sup>3</sup> It was, therefore, generally recognized as advantageous to the international society, that each of its maritime members should exercise a right of control over such marginal sea within certain definite limits, and treat it for most purposes as a part of its territory. The international interest, although conserved by such action on the part of the individual State, was, however, also solicitous that the extent of the water area be narrowly limited and sharply defined. Thus it was not the extent or width of the marginal sea which an adjacent State was capable of occupying, but rather the amount which it could occupy without obvious

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Diplomacy, 55; Report of Committee of Congress, Aug. 16, 1782, Secret Journals of Congress, III, 161, Snow, *id.*, 57, 59, in the course of which it was said: "Thus it appears, upon strict principles of natural law, that the sea is unsusceptible of appropriation; that a species of conventional law has annexed a reasonable district of it to the coast which borders on it; and that in many of the treaties to which Great Britain has acceded, no distance has been assumed for this purpose beyond fourteen miles."

Also, League of Nations, Committee of Experts for the Progressive Codification of International Law, 1926, Report of Sub-Committee, Messrs. Schücking, Magalhães and Wickersham, League of Nations Document — C.196.M.70.1927.V, p. 29, *Am. J.*, XX, *Special Supplement* (July and October, 1926), 62; Harvard Research in International Law, Draft Convention on The Law of Territorial Waters, and Comment, with appendices, George G. Wilson, Reporter, *Am. J.*, *Special Supplement*, XXIII (April, 1929), 243; League of Nations, Conference for the Codification of International Law, Bases of Discussion drawn up for the Conference by the Preparatory Committee, 1929, Vol. II, Territorial Waters, League of Nations Document — C.74.M.39.1929.V; League of Nations, Conference for the Codification of International Law (The Hague, March-April, 1930), Report of the Second Commission (Territorial Sea), M. François (Netherlands), *Rapporteur*, League of Nations Document — C.230.M.117.1930.V, *Am. J.*, XXIV, *Official Documents*, 234; Final Act of the same Conference, April 12, 1930, *id.*, 169, League of Nations Document — C.228.M.115.1930.V.

<sup>2</sup> Thus in the course of the award of the arbitral tribunal at The Hague, under convention of March 14, 1908, between Sweden and Norway, to settle certain differences relating to the maritime boundary between those States, it was declared that by the fundamental principles of the law of nations, both ancient and modern, "Maritime territory is a necessary appurtenance of the land territory." Wilson, *Hague Arbitration Cases*, 103, 121.

<sup>3</sup> Declares Hall: "The true key to the development of the law is to be sought in the principle that maritime occupation must be effective in order to be valid. This principle may be taken as the formal expression of the results of the last two hundred and fifty years, and when coupled with the rule that the proprietor of territorial waters may not deny their navigation to foreigners, it reconciles the interests of a particular State with those of the body of States." Higgins' 8 ed., § 40.

"The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian States, which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether fish, or pearls, or amber, or other products of the sea. See *Manchester v. Massachusetts*, 139 U. S. 240; *McCready v. Virginia*, 94 U. S. 391." (Fuller, C. J., in *Louisiana v. Mississippi*, 202 U. S. 1, 52.)

"The territorial waters of a State consist of its marginal sea and its inland waters." Art. I, Harvard Draft Convention on Territorial Waters, 1929, *Am. J.*, XXIII, *Special Supplement* (April, 1929), 243.

detriment to the society of nations as a whole, which was, and yet remains, an object of concern.

Bynkershoek had, in 1703, declared that the extent of the area should be measured by the power of a State to control it from the land, and that the test of that power was the range of a cannon.<sup>4</sup> That range came to be regarded in the course of the eighteenth century as three marine miles, or one marine league.<sup>5</sup> Hence, that distance, as Westlake has declared, "measured from low-water mark, became a commonplace among authors for the width of the littoral sea."<sup>6</sup> Moreover, statesmen accepted the limit thus laid down, and continued to do so long after the theory on which it had been based became inapplicable;<sup>7</sup> for the constantly increasing range of heavy guns could afford no stable test, nor serve automatically to extend a limit which needed to be definite and constant.

The Hague Conference for the Codification of International Law, of 1930, through its Second Commission made close study of the Bases of Discussion prepared by the Preparatory Committee with respect to the marginal sea and the extent thereof.<sup>8</sup> While it was "recognised that international law attributes to each coastal State sovereignty over a belt of sea around its coasts," and "that the belt of territorial sea forms part of the territory of the State," opinion was "much divided" with regard to "the breadth of the belt over which the sovereignty of the State should be recognised."<sup>9</sup> No agreement was reached that would fix the breadth of the marginal sea for the future, and no attempt was made to produce a convention reflecting what the existing law was understood to prescribe.<sup>10</sup>

<sup>4</sup> "Bynkershoek's argument is in the dissertation *De Dominio Maris*, but the maxim, in the terse form quoted in the text [*Imperium terræ finiri ubi finitur armorum potestas*], occurs in the *Quæstiones Juris Publici*, L. I., c. 8." Westlake, 2 ed., I, 188, note. It may be observed that the *Dissertatio de Dominio Maris* was published in 1703, and the *Quæstiones Juris Publici* in 1737. See O. W. S. Numan, *Cornelis Van Bynkershoek, Zijn Leven En Zijne Geschriften*, Leiden, 1869, 470.

<sup>5</sup> Thomas Wemyss Fulton, in his *Sovereignty of the Sea*, London, 1910, declares that Galiani, an Italian diplomat in the service of the King of the Two Sicilies, "appears to have been the first to fix upon three miles as equivalent to the range of guns" (563), and credits the United States with being the first State to assert that equivalent when it did so in 1793. (*Id.*, 573.) See also, P. C. Jessup, *Territorial Waters*, 6.

<sup>6</sup> *Int. Law*, 2 ed., 188-189.

<sup>7</sup> Preamble of Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law, 1894, *Annuaire*, XIII, 328, J. B. Scott, *Resolutions*, 113.

<sup>8</sup> See League of Nations, Conference for the Codification of International Law, Bases of Discussion, *Territorial Waters*, Vol. II — C.74.M.39.1929.V, especially Basis No. 3 and observations thereon, p. 33.

<sup>9</sup> See illuminating Report of Second Committee, M. François (Netherlands), *Rapporteur*, League of Nations, Conference for the Codification of International Law, 1930 — C.230. M.177.1930.V, p. 3, *Am. J.*, XXIV, *Official Documents*, 234.

<sup>10</sup> *Id.* See also in this connection, Jesse S. Reeves: "The Codification of the Law of Territorial Waters," *Am. J.*, XXIV, 486, 488, where that writer declares: "Following the instructions to the Conference, the Commission did not undertake to agree upon statements of existing international law, and so to limit itself, but it proceeded into the field of international law-making." Also, Hunter Miller, "The Hague Codification Conference," *id.*, XXIV, 674; Manley O. Hudson, "The First Conference for the Codification of International Law," *id.*, XXIV, 447, 455-458.

"The territory of a State includes a belt of sea described in this Convention as the territorial sea. Sovereignty over this belt is exercised subject to the conditions prescribed by the present Convention and the other rules of international law." (Art. I, Convention on

The Conference revealed also the difficulty of obtaining complete agreement concerning the manner of drawing the boundary line between the high sea and the territorial sea. The line of low-water mark following all the sinuosities of the coast was taken as the basis for calculating the breadth of the latter, excluding the special cases of bays, islands near the coast, and groups of islands, by the Second Sub-Committee of the Second Commission, and was applied in a formal suggestion for a base line.<sup>11</sup> It may be observed, however, that an American amendment was presented to the effect that the seaward limit of territorial waters was "the envelope of all arcs of circles having a radius of three nautical miles drawn from all points on the coast (at whatever line of sea level is adopted in the charts of the coastal State), or from the seaward limit of those interior waters which are contiguous with the territorial waters."<sup>12</sup>

A measurement from low water mark refers to a terminus on land. It may be doubted whether such a terminus is always applicable or available in portions of the polar regions where the acquisition of rights of sovereignty over particular areas is, or is to be, acknowledged. The South Polar Region is known to be an ice-covered area of land. From a portion of it that faces New Zealand, there extends for many miles into the sea what is known as the Ross Barrier, an ice-shelf hundreds of feet thick, over-lapping and connected with the land at as yet undistinguishable points beneath it, and abruptly checking all navigation at its outer edge. Were Great Britain acknowledged to be the sovereign of the adjacent land, and possibly of the Barrier itself, the seaward limit of British territory might be deemed to be remote from land and not measurable from a so-called low water mark. In a word, the acknowledgment that a State may acquire sovereignty to permanent ice formations appurtenant to its coasts

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The Legal Status of the Territorial Sea, Annex I to Report of Second Committee.) *Am. J., XXIV, Official Documents*, 239.

<sup>11</sup> Annex II, Report of Second Commission (Territorial Sea), League of Nations Document — C.230.M.117.1930.V, p. II, *Am. J., XXIV, Official Documents*, 247. See, in this connection, Jesse R. Reeves, "The Codification of the Law of Territorial Waters," *Am. J., XXIV*, 486, 497.

<sup>12</sup> S. Whittemore Boggs, Geographer of the Department of State, "Delimitation of the Territorial Sea" (The method of delimitation proposed by the delegation of the United States at The Hague Conference for the Codification of International Law), *Am. J., XXIV*, 541, 544. Declares that writer (p. 543): "There appear to be no agreements or understandings which affect the manner or method of drawing the boundary line between the high sea and the territorial sea. If the territorial sea is to be delimited in a manner to occasion the least possible interference with navigation, it will be necessary to assume the viewpoint of one who is on the sea and who wishes to know where territorial waters begin."

*Cf.* Response of the United States, March 16, 1929, to the Questionnaire of the Preparatory Committee of The Hague Conference, Bases of Discussion, II, Territorial Waters, League of Nations Document — C.74.M.39.1929.V, p. 143.

"The marine or nautical mile now commonly used (also called the 'small nautical mile') is equivalent to 1853 meters and is the same as the geographic mile of 60 to a degree or one minute. (As adopted by the British Hydrographic office it is known as the 'admiralty mile' and equals 1853.2 meters; the official U. S. Coast Survey figure is 1853.248, and the French figure is 1853.9.) This equals about 1.15 English statute miles. It is this mile which is usually referred to in modern treaties and statutes relative to maritime jurisdiction. The so-called 'three-mile limit' thus equals about three and one-half statute miles." (P. C. Jessup, *Law of Territorial Waters*, xxxviii.)

Concerning the matter of Measurement, see documents in Hackworth, *Dig.*, I, § 53, especially Mr. Castle to the German Chargé d'Affaires at Washington, Oct. 6, 1927, *id.*, I, 643.

seems to render inapplicable, in such situations, the measurement of a marginal sea from a point on land.<sup>13</sup>

There is no dispute that the marginal sea belonging to a State, or what has been fairly designated as the territorial sea, embraces a belt of three nautical miles. At present there appears to be no general acquiescence with respect to any greater width,<sup>14</sup> and also no complete accord as to the method of delimiting the boundary between that belt and the high sea. Numerous States have shown a readiness to accept a wider belt, and some seek formal recognition of a zone on the high sea contiguous to the marginal sea, within which the sovereign of the latter may normally exercise a measure of control for specified purposes.<sup>15</sup> The international society thus finds itself in a position where many of its members are dissatisfied with the operation of a rule long imbedded in its law of nations, and yet which is not susceptible to uniform application in every geographical situation as long as no one method of linear measurement is agreed upon. Considerations that may play their part in the ultimate solution of the general problem are discussed elsewhere.<sup>16</sup>

(ii)

§ 142. **Position of the United States.** Mr. Jefferson, as Secretary of State, announced in 1793, that the President, reserving for future deliberation the "ultimate extent" which might be claimed as territorial waters of the United States, saw fit to adhere to instructions already given to officers under his authority to consider "for the present" the distance as limited to "one sea league or three geographical miles from the seashore."<sup>1</sup>

<sup>13</sup> See, Gustav Smedal, *Acquisition of Sovereignty over Polar Areas*, Oslo, 1931, 30-31; also, J. Gordon Hayes, *Antarctica*, London, 1928.

<sup>14</sup> According to Art. 2 of the Harvard Draft Convention on Territorial Waters, of 1929: "The marginal sea of a State is that part of the sea within three miles (60 to the degree of longitude at the equator) of its shore measured outward from the mean low water mark or from the seaward limit of a bay or river-mouth." (*Am. J.*, XXIII, *Special Supplement*, 243.) In commenting thereon the Reporter, Prof. G. G. Wilson, declares: "The practice of States reveals no general acquiescence in the inclusion of a belt of more than three miles in width," *id.*, 250. See also P. C. Jessup, *Law of Territorial Waters*, Chap. I, especially p. 64.

See also Art. II, of Draft Convention drawn up by M. Schücking, *Rapporteur* of the Committee of Experts for the Progressive Codification of International Law, Annex to Bases of Discussion, II, Territorial Waters, League of Nations Document — C.74.M.39.1929.V, p. 193.

<sup>15</sup> See, Extract from the Provisional Minutes of the Thirteenth Meeting of the Second Committee (Territorial Waters) of The Hague Conference for the Codification of International Law of 1930, *Am. J.*, XXIV, *Official Documents*, 253, League of Nations Document — C.230.M.117.1930.V, p. 15; also Jesse S. Reeves, "The Codification of the Law of Territorial Waters," *Am. J.*, XXIV, 486, 492-493.

<sup>16</sup> See, *Zones of Control Adjacent to the Marginal Sea*, *infra*, § 144A; also, Proposed Extension of Existing Limit, *infra*, § 145.

§ 142.<sup>1</sup> He also declared that "The greatest distance to which any respectable assent among nations has been at any time given has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league." (Mr. Jefferson, Secy. of State, to Mr. Hammond, British Minister, Nov. 8, 1793, *British Counter Case and Papers*, Geneva Arbitration, American reprint, 553, Moore, Dig., I, 702); also Mr. Pickering, Secy. of State, to the Lieut. Governor of Virginia, Sept. 2, 1796, 9 MS. Dom. Let. 281, Moore, Dig., I, 704. Cf. Informal suggestions of President Jefferson, Nov. 30, 1805, in conversation with Messrs. J. Q. Adams and Gaillard, to the effect that the neutrality of the United States should extend to the Gulf Stream which was a natural boundary,



The United States during the nineteenth century protested against the occasional efforts of certain other States to exercise rights of sovereignty over a broader area. With Great Britain it successfully opposed the attempt of Russia, announced in the Ukase of September 4, 1821, to prohibit foreign vessels from approaching within a hundred Italian miles of Russian possessions in the Pacific Ocean north of the 45th degree of latitude on the coast of Asia, and of the 51st degree on the coast of America.<sup>2</sup>

In 1862, Spain asserted the right to regard as the territorial waters of Cuba, the waters surrounding that island to a distance of six marine miles therefrom, on the ground that such an area was within the range of a cannon from the shore, which was said to be the true test of the seaward limits of the Spanish domain. Secretary Seward made objection. He declared that the extent of the territorial waters of a State was not to be derived from its own decrees or legislative enactments, but from the law of nations, and that according to that law the limit was fixed at three marine miles from the coast.<sup>3</sup> Again, in 1908, Mr. Adee, Acting Secretary of State, informed the Military Governor of Cuba that: "The rule which is reported to have been announced by the Cuban Government in this case — namely, that the territorial waters of Cuba extend four leagues from the coast of the Island and of the cays belonging to it — not only fails to accord with the views now expressed by the British Government, but is out of harmony with the principles held by this Government as declared by Secretaries Seward and Olney, as well as with the generally accepted rules of international law."<sup>4</sup>

The United States appears generally to have taken a position in harmony with these views, at least with respect to the extent of territorial waters on the American continents.<sup>5</sup> In so doing it has invoked the practice of maritime States,

Moore, Dig., I, 703, and the comment thereon of P. C. Jessup, in his *Law of Territorial Waters*, 51, and foot-note, 27.

<sup>2</sup> See documents in Am. State Pap., For. Rel., V, 432-471. Also Award in the Fur Seal Arbitration, Aug. 15, 1893, *Proceedings*, Fur Seal Arbitration, I, 77; Case of Great Britain, *Proceedings*, Alaskan Boundary Tribunal, III, 14; treaty between the United States and Russia, April 17, 1824, Malloy's *Treaties*, II, 1512.

<sup>3</sup> Mr. Seward, Secy. of State, to Mr. Tassara, Spanish Minister, Dec. 16, 1862, MS. Notes to Spain, VII, 331, Moore, Dig., I, 706-707, where it was said: "This limit was early proposed by the publicists of all maritime nations. While it is not insisted that all nations have accepted or acquiesced and bound themselves to abide by this rule when applied to themselves, yet three points involved in the subject are insisted upon by the United States: First, that this limit has been generally recognized by nations; second, that no other general rule has been accepted; and third, that if any State has succeeded in fixing for itself a larger limit, this has been done by the exercise of maritime power, and constitutes an exception to the general understanding which fixes the *range of a cannon shot* (when it is made the test of jurisdiction) at *three miles*. So generally is this rule accepted that writers commonly use the two expressions, of a *range of cannon shot* and *three miles*, as equivalents of each other."

<sup>4</sup> Communication of Aug. 18, 1908, Hackworth, Dig., I, 631.

<sup>5</sup> "This Government has uniformly, under every administration which has had occasion to consider the subject, objected to the pretension of Spain adverted to, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby.

"We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a *marine league* from its coast." Mr. Fish, Secy. of State, to Sir Edward Thornton, British Minister, Jan. 22, 1875, For. Rel. 1875, I, 649, Crocker's *Compilation*, 664.

See, also, Mr. Fish, Secy. of State, to Mr. Boker, Minister to Russia, Dec. 1, 1875, MS.

which, in its judgment, has failed to indicate general acquiescence in the doctrine that the range of cannon should prescribe the test, or any indefinite extension of the traditional limit.<sup>6</sup>

In 1916, when the United States was a neutral in relation to the existing war, the Department of State, although expressing regret that British cruisers should patrol the waters adjacent to its ocean coast in close proximity thereto, and requesting a cessation of such action, took pains to declare that it advanced no claim that such vessels when "cruising off American ports beyond the three-mile limit" were not in so doing "within their strict legal rights under international

Inst. Russia, XV, 536, Moore, Dig., I, 705; Mr. Seward, Secy. of State, to Mr. Tassara, Spanish Minister, Aug. 10, 1863, MS. Notes to Spanish Legation, VII, 407, Moore, Dig., I, 709. Declared Mr. Bayard, Secy. of State, in the course of a communication to Mr. Manning, Secy. of the Treasury, May 28, 1886: "We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place around such islands the same belt." 160 MS. Dom. Let. 348, Moore, Dig., I, 718-720. Cf. Art. II, Stockton's Naval War Code of 1900 (withdrawn in 1904), Naval War College, Int. Law Discussions, 1903, 103.

In the course of the arbitration of the *C. H. White* Case, Mr. Pierce, Agent of the United States, in pursuance of authority from the Secretary of State, made a declaration to the effect that "The Government of the United States claims, neither in Bering Sea, nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to such jurisdiction upon the following principle:

"The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a *marine league*, unless a different rule is fixed by treaty between two States: even then the treaty States are alone affected by the agreement." For. Rel. 1902, Appendix I, 440, 461, Crocker's Compilation, 680.

Art. IV of the Suez Canal Convention of Oct. 29, 1888, prohibited the commission of hostilities within a radius of three marine miles of the ports of access to the Canal. Moore, Dig., III, 264, *Nouv. Rec. Gén.*, 2 ser., XV, 560. Cf., also, Section 5, Art. III, of the Hay-Pauncefote Treaty of Nov. 18, 1901, to facilitate the construction of a trans-Isthmian ship canal, Malloy's Treaties, I, 782.

According to Art. V of the Treaty of Guadalupe-Hidalgo, concluded with Mexico Feb. 2, 1848, Malloy's Treaties, I, 1110, "The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande." The same seaward limit was expressed in Art. I of the Gadsden Treaty of Dec. 30, 1853, *id.*, 1122. In later years, in correspondence with Great Britain, the Department of State appeared to take the stand that this provision was solely applicable to the rights of the contracting parties, and did not necessarily imply more, or amount to an abridgment of the rights of other States under the law of nations. Mr. Buchanan, Secy. of State, to Mr. Crampton, British Minister, Aug. 19, 1848, MS. Notes to Great Britain, VII, 185, Moore, Dig., I, 730; Mr. Fish, Secy. of State, to Sir Edward Thornton, British Minister, Jan. 22, 1875, For. Rel. 1875, I, 649, Moore, Dig., I, 731. See *Bolmer v. Edsall*, 106 At. (N. J. Ch.), 646.

<sup>6</sup> Compare, however, Mr. Buchanan, Secy. of State, to Mr. Jordan, Jan. 23, 1849, 37 MS. Dom. Let. 98, Moore, Dig., I, 705; also dictum of Mr. Martens in his award as Arbitrator in the case of the *Costa Rica Packet* to the effect that "the right of sovereignty of the State over territorial waters is determined by the range of cannon measured from the low-water mark." Moore, Arbitrations, V, 4952. Also Arts. XII and XIX of unconfirmed convention with Great Britain, of Dec. 31, 1806, *Proceedings*, North Atlantic Coast Fisheries Arbitration, IV, Appendix, 42, Senate Doc. No. 870, 61 Cong., 3 Sess.; Crocker's Compilation, 642.

Declared Mr. Lansing, Acting Secy. of State, in a communication to the Italian Ambassador at Washington, Nov. 28, 1914: "An examination into the question involved leads to the conclusion that the territorial jurisdiction of a nation over the waters of the sea which wash its shore is now generally recognized by the principal nations to extend to the distance of one marine league or three nautical miles, that the Government of the United States appears to have uniformly supported this rule, and that the right of a nation to extend, by domestic ordinance, its jurisdiction beyond this limit has not been acquiesced in by the United States." (For. Rel. 1914, Supp., 665.) See also same, Dec. 12, 1914, *id.*, 666.

law.”<sup>7</sup> In the discussion which took place, it was assumed on both sides that three marine miles was the extent of the territorial waters of the United States.<sup>8</sup>

(aa)

§ 142A. **The Same.** In 1923, the Supreme Court of the United States found occasion to declare it to be “settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other enclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coastline outward a marine league or three geographical miles.”<sup>1</sup>

In order to dispel the fears of Lord Curzon lest the United States, in seeking British acquiescence in an arrangement contemplating the seizure beyond the three-mile mark of British vessels endeavoring unlawfully to introduce intoxicating liquors into American territory, was attempting to extend the territorial limits thereof on the marginal sea, Secretary Hughes declared on July 19, 1923: “It was not the purpose of the Secretary of State to propose an extension of the limits of territorial waters, and the draft proposal specifically negated such an intention.”<sup>2</sup> The convention for the Prevention of the Smuggling of Intoxicating Liquors that was concluded with Great Britain on January 23, 1924, reflected the common thought of the contracting States in the declaration that it was “their firm intention to uphold the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters.”<sup>3</sup> The same thought found expression in the response of the United States of March 16, 1929, to the Questionnaire of the Preparatory Committee for The Codification Conference that was to assemble at The Hague.<sup>4</sup> Moreover, at that Conference on April 3, 1930, the chief of the American Delegation, Mr. Hunter Miller, invoked the text quoted from the Anglo-American convention, and duplicated in certain other conventions to

<sup>7</sup> Mr. Lansing, Secy. of State, to Sir Cecil Spring Rice, British Ambassador at Washington, April 26, 1916, For. Rel. 1916, Supp., 762.

<sup>8</sup> See documents, American White Book, European War, III, 139, 140, 131–141. Unanchored Mines, *infra*, § 715.

§ 142A. <sup>1</sup> *Cunard S. S. Co. v. Mellon*, 262 U. S. 100, 122. See, also, *The Ann*, 1 F. 926; *Manchester v. Massachusetts*, 139 U. S. 240, 257. See also, *infra*, § 235A.

<sup>2</sup> Memorandum from the Secy. of State to the British Chargé d’Affaires *ad interim*, July 19, 1923, Dept. of State Press Release, Feb. 20, 1927, p. 6; also, Mr. Hughes, Secy. of State, to the British Ambassador, June 26, 1922, *id.*, p. 1. Cf. Sir A. C. Geddes, British Ambassador, to the Secy. of State, Oct. 13, 1922, *id.*, pp. 4–6.

<sup>3</sup> Art. I, U. S. Treaty Vol. IV, 4225. Directly after the signature of the convention, which the author had the honor to witness, Secretary Hughes went to New York where on the evening of the same day he addressed the Council on Foreign Relations in regard to the existing foreign policy of his country. In the course of so doing he declared: “It is quite apparent that this Government is not in a position to maintain that its territorial waters extend beyond the three-mile limit and, in order to avoid liability to other Governments, it is important that, in the enforcement of the laws of the United States, this limit should be appropriately recognized.” (*Am. J.*, XVIII, 229, 231.)

<sup>4</sup> League of Nations, Conference for the Codification of International Law, Bases of Discussion, II, Territorial Waters, 128–142 (C.74.M.39.1929.V.).

See also documents illustrative of the American position in Comment on Art. 2 of Harvard Draft Convention of 1929 on Territorial Waters, *Am. J.*, *Special Supplement*, XXIII (April, 1929), 252–259; also in Jessup, *Territorial Waters*, 49–60.

which the United States was a party,<sup>5</sup> as decisive of the views of his Government.<sup>6</sup>

As a careful observer has recently declared: "One cannot read the record of American practice without being impressed with its generally consistent adherence to the three-mile limit from quite early in the life of the Republic, not only with respect to foreign waters but also with respect to American waters, both in international cases and in its domestic law."<sup>7</sup>

(bb)

§ 143. **The Same.** Since its earliest treaty with Great Britain, the United States seems to have been generally unwilling to admit that the presence of valuable fisheries bordering the ocean coast of a State and more than three marine miles distant therefrom, serves to extend the limits of its territorial waters.<sup>1</sup> The chief problem, however, in relation to the fisheries on the North Atlantic coast has concerned the extent of bays within which exclusive rights might be exercised by the territorial sovereign as such, rather than the proper

<sup>5</sup> See convention with Cuba, March 4, 1926, U. S. Treaty Vol. IV, 4041; with Germany, May 19, 1924, U. S. Treaty Vol. IV, 4208; with The Netherlands, Aug. 21, 1924, U. S. Treaty Vol. IV, 4509; with Japan, May 31, 1928, U. S. Treaty Vol. IV, 4389.

"The High Contracting Parties respectively retain their rights and claims, without prejudice by reason of this agreement, with respect to the extent of their territorial jurisdiction" is the language employed in conventions for the Prevention of the Smuggling of Intoxicating Liquors concluded by the United States with Belgium, Dec. 9, 1925, U. S. Treaty Vol. IV, 3959; with Denmark, May 29, 1924, U. S. Treaty Vol. IV, 4070; with France, June 30, 1924, U. S. Treaty Vol. IV, 4175; with Italy, June 3, 1924, U. S. Treaty Vol. IV, 4381; with Norway, May 24, 1924, U. S. Treaty Vol. IV, 4525; with Greece, April 25, 1928, U. S. Treaty Vol. IV, 4284; with Chile, May 27, 1930, U. S. Treaty Vol. IV, 4017; with Poland, June 19, 1930, U. S. Treaty Vol. IV, 4570. The words "and claims" are omitted from the convention concluded with Spain, Feb. 10, 1926, U. S. Treaty Vol. IV, 4661.

<sup>6</sup> Annex III, Report of Second Commission (Territorial Sea), League of Nations Doc. No. C.230.M.177.1930.V., p. 15, *Am. J.*, XXIV, *Official Documents*, 253, 254.

<sup>7</sup> He adds: "Of course there have been variations from the simple line, but they have been few and principally quite early." (J. W. Bingham, Report on the International Law of Pacific Coastal Fisheries, Stanford University, California, 1939, 34.)

Declared Mr. Welles, Acting Secy. of State, to the American Minister to Honduras, Oct. 19, 1937: "It is desired that you advise the Honduran Foreign Office in writing that your Government reserves all rights of whatever nature with regard to any effects upon American interests from an enforcement of this Constitutional provision so far as it asserts that the territorial waters of Honduras extend beyond the three-mile limit." (Hackworth, Dig., I, 633, footnote.)

§ 143.<sup>1</sup> "No general disposition has been manifested in recent years to restrict the right of all nations to take fish in the open sea. The three-mile rule, which defines the exclusive right of fishery on the Canadian coasts under the convention between the United States and Great Britain of 1818, may also be found in the convention of 1882 between Belgium, Denmark, France, Germany, and Great Britain for the regulation of the fisheries in the North Sea. The same rule is embodied in conventions between France and Great Britain of 1839 and 1843 for the regulation of the fisheries in the channel. It is also found in a law passed by the French legislature in 1885 for the exclusion of foreigners from fishing in the territorial waters of France and Algiers." (Moore, Dig., I, 716.)

See Mr. Fish, Secy. of State, to Mr. Boker, Minister to Russia, Dec. 1, 1875, MS. Inst. Russia, XV, 536, Moore, Dig., I, 717; Mr. John Davis, Asst. Secy. of State, to Mr. Osborn, Feb. 14, 1884, 150 MS. Dom. Let. 6, Moore, Dig., I, 718; Mr. Bayard, Secy. of State, to Mr. Manning, Secy. of the Treasury, May 28, 1886, 160 MS. Dom. Let. 348, Moore, Dig., I, 718.

See in this connection opinion of the Solicitor for the Dept. of State, of Oct. 2, 1906, growing out of protests alleging that the Government of Mexico was seizing American fishing vessels both within and beyond the three mile limit and that proceedings were being instituted for the confiscation of such vessels, Hackworth, Dig., I, 657.

limits of the marginal sea.<sup>2</sup> Obviously the question whether a State may under any circumstances not unlawfully exercise an exclusive control over fisheries on the bottom of the high sea contiguous to its territory has no necessary connection with the rule decisive of the breadth of the marginal sea. The effort to gain recognition of such control may, however, encourage such a State to endeavor to obtain recognition of a fresh rule that may serve to bring its ocean coastal fisheries within the limits of the national domain.<sup>3</sup>

It goes without saying that within its territorial limits, embracing the marginal sea, a State enjoys the exclusive right to control fisheries. In so doing it may reserve the uses of them to its own nationals.<sup>4</sup>

(iii)

**§ 144. Certain Acts Not Assertive of Territorial Claims.** It is believed to be important to observe that a State may endeavor to prevent, in times of peace or war, the commission of certain acts by foreign ships or the occupants thereof, at a distance of more than three marine miles from its coast, without claiming that the place where they occur is a part of its domain. This is true in the case of so-called hovering laws, designed to prevent smuggling by interference outside of territorial waters with foreign vessels about to enter them for an illegal purpose.<sup>1</sup>

Justification of such defensive measures of prevention when applied to foreign shipping rests generally upon the causal connection between the acts sought to be thwarted and the injury otherwise to be anticipated from them by the aggrieved State within its own territory. As that connection may be found to exist at varying distances from the outer limits of territorial waters, the freedom of such a State is not on principle dependent upon the precise location of the spot where an offender may be apprehended, or upon the possession by the State of a special right of control over that spot.<sup>2</sup>

Other instances of the applicability of the same principle are apparent when a neutral State seeks to check the commission of belligerent acts within dangerous proximity to its shores although outside of the marginal sea,<sup>3</sup> or when a belligerent power undertakes to establish a defensive area within waters outside of and adjacent to that sea.<sup>4</sup> Such steps, although taken with a view to

<sup>2</sup> See Bays, *The North Atlantic Coast Fisheries Arbitration*, *infra*, § 147.

<sup>3</sup> See, *Zones of Control Adjacent to the Marginal Sea*, *infra*, § 144A; *The Special Case of Norway*, *infra*, § 144B; *Aspects of Sedentary Fisheries*, *infra*, § 227C; *The Alaska Salmon Fisheries*, *infra*, § 227D.

<sup>4</sup> See *Louisiana v. Mississippi*, 202 U. S. 1, 52.

See also other documents in Hackworth, Dig., I, § 97.

§ 144.<sup>1</sup> See the British Hovering Act of 1736 (9 Geo. II, 35), Moore, Dig., I, 725; also Act of Congress of March 2, 1799, Secs. 26 and 27, 1 Stat. 647 and 648. Cf. Jurisdiction, *The High Seas, Revenue or Hovering Laws*, *infra*, § 235; also §§ 235A and 235B.

<sup>2</sup> See illustrative documents in Hackworth, Dig., I, § 98.

<sup>3</sup> See, for example, the effort of France in 1864 to prevent the engagement between the *Kearsarge* and the *Alabama* at a distance within such proximity to the French coast, although more than three marine miles therefrom, as would "be offensive to the dignity of France." Dip. Cor. 1864, III, 104-121, Moore, Dig., I, 723-724. Also, in this connection, Mr. Bayard, Secy. of State, to Mr. Manning, Secy. of the Treasury, May 28, 1886, 160 MS. Dom. Let. 348, Moore, Dig., I, 718-721.

<sup>4</sup> Concerning the defensive sea areas established by the United States in 1917 and 1918, see *Access to Ports*, *infra*, § 187.

safeguarding the national domain, even when confined to specified areas, are not necessarily indicative of the breadth of the maritime belt belonging to the State that has recourse to them, or of assertions of sovereignty over the waters where they are applied.

The significant fact is that the law of nations does not in a variety of situations forbid a State to exercise a protective and preventive jurisdiction for special purposes within waters beyond the marginal sea, and that it does not infer from that exercise an attempt to extend the limits of that sea. This consideration needs to be borne in mind in appraising the value of proposals that would assign to maritime States a normal measure of control over a zone adjacent to the marginal sea.

(iv)

§ 144A. **Zones of Control Adjacent to the Marginal Sea.** With the understanding that the marginal sea is a part of the territory of the adjacent State, the contrasting aspect of the high sea, even where contiguous to territorial waters, is accentuated. The latter belongs to no State and is, therefore, subject to the control of none. The former does belong to a State and is, accordingly, subject to a large measure of its control. It is thus the presence or absence of the right of control which in fact distinguishes the relationship of a State with the two classes or types of water areas. Although without a sovereign, the high sea is, nevertheless, oftentimes the scene of activities in which a State asserts the right to check or forbid the commission of a particular act. Yet that assertion, as has been noted elsewhere,<sup>1</sup> does not necessarily or commonly purport to be a manifestation of dominion over waters, or of a control over them, but rather an interference with acts sought to be committed thereon. The distinction is believed to be important. It may be obscured if a zone of waters on the high sea be assigned to a maritime State as an area within which a special control may be normally exercised for specified purposes. Schemes that would thus transform the privilege of interference into a right to control an area of defined limits, or which would base that privilege upon a right to control a particular zone, would at once differentiate the waters of the zone from other portions of the high sea, and cause them to resemble territorial waters. This circumstance justifies the fear lest acquiescence in a system of zones contiguous to the marginal sea might prove to be the means of enlarging the breadth of the latter.<sup>2</sup>

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It may be observed that the outer limit of the defensive sea area established by the executive order of April 5, 1917, with respect to the entrance to Chesapeake Bay, was a "line parallel to that joining Cape Henry Light and Cape Charles Light and four nautical miles to eastward thereof, and the lines from Cape Charles Light and from Cape Henry Light perpendicular to this line."

See Neutral Protective Zones, the Declaration of Panama, *infra*, § 888B.

§ 144. <sup>1</sup> See, Certain Acts Not Assertive of Territorial Claims, *supra*, § 144.

<sup>2</sup> The Delegation of the United States at The Hague Conference for the Codification of International Law of 1930, "favored the three-mile limit, proposed that the coastal State should have certain rights of customs and other control in the waters adjacent to the territorial sea, but did not favor a defined contiguous zone." (Hunter Miller, "The Hague Codification Conference," *Am. J.*, XXIV, 674, 688.) Declares Prof. Jesse S. Reeves: "To recognize an additional zone encroaching upon the high seas in order to give greater security to the littoral State would have had the effect, according to the opponents to such a prin-

It should be observed that the privilege which a State now enjoys of exercising a preventive jurisdiction on the high sea, and of thwarting under special circumstances certain activities thereon, is not measured by exact limits and might be rendered illusory if it were. The geographical features of the coasts of maritime States vary so greatly that needed privileges of self-protection on the high sea are not alike and do not lend themselves to arrangements that lay down uniform geographical or linear tests. Bi-partite conventions that register what the contracting parties are agreed may not unreasonably be done in that regard, even though marking limits of permitted action must, in their responsiveness to the needs of the contracting parties, be expected to differ greatly in character. Moreover, they may serve their purpose well without assigning zones of control to those parties.<sup>3</sup> It is acts on the high sea, rather than areas of control thereon, which are in reality the matter of chief concern to maritime States. Statements of the law indicative of the scope of the propriety of the former gain no strength or lucidity from attempts to unite them with, or base them upon, extrinsic considerations.

The existence of sedentary fisheries appertaining to the bed of the sea contiguous to that subjacent to territorial waters constituting the marginal sea, may serve to encourage the territorial sovereign of the latter to seek recognition of a special right to control the particular area of the high sea superjacent to the land on which the aquatic life finds its habitat.<sup>4</sup> In such a situation the interested State is in reality chiefly concerned with the control of fisheries, rather than with that of waters. Moreover, it is the character of the connection of the former with a particular part of the bed of the sea that creates a special interest in the enjoyment of a particular activity in the waters above them, and in a special control of that activity within those waters.<sup>5</sup> There may be, however, danger of laying undue stress upon the control of an area rather than the control of something within or beneath it. This circumstance may account in part for the reluctance of the international society to acknowledge that the mere existence of sedentary fisheries justifies the recognition of a special zone of control over the waters superjacent to them, and still less of a widening of the marginal sea so as to become co-extensive with such waters.<sup>6</sup> Even in the few cases where

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inciple, of practically extending the territorial sea to a new and wider limit. Under a theory of relative or qualified sovereignty over the territorial sea and under a theory of a contiguous zone, the extent of jurisdiction over which to be determined by the claims of the littoral State to security, there would be little if any practical distinction from the point of view of freedom of navigation between the measure of authority exercisable over the marginal sea, strictly so called, and that exercisable over the contiguous zone." ("The Codification of the Law of Territorial Waters," *id.*, XXIV, 486, 494.)

See also, Report of the Second Commission (Territorial Sea), M. François, *Rapporteur*, League of Nations, Conference for the Codification of International Law, 1930,—C.230.M.177.1930.V., p. 4, *Am. J.*, XXIV, *Official Documents*, 234, 236.

<sup>3</sup> See, for example, convention between the United States and Great Britain for the Prevention of the Smuggling of Intoxicating Liquors, of Jan. 23, 1924, U. S. Treaty Vol. IV, 4225.

<sup>4</sup> See Conference for the Codification of International Law, 1930, Report of Second Commission, M. François, *Rapporteur*, League of Nations Doc. No. C.230.M.117.1930.V., 4.

<sup>5</sup> See Sedentary Fisheries, *infra*, § 227C.

<sup>6</sup> Declared the Preparatory Committee for the Codification Conference at The Hague (that assembled in 1930): "The Government replies do not make it possible to expect that

peculiarly strong equities of a coastal State have been respected by the outside world in relation to claims to other fisheries contiguous to the marginal sea, that circumstance has not been deemed to alter the width of that sea.<sup>7</sup>

(v)

§ 144B. **The Special Case of Norway.** The coast-line of Norway from the Skager Rack to the North Cape, and even beyond it, is a series of rocky and irregular declivities indented by numerous fiords, and flanked by almost countless islands of which the Lofoden Isles are the most prominent single group.<sup>1</sup> The sea bottom along the Norwegian coast, in contrast to that of other countries bordering the North Sea, "generally forms terraces with scarped and rocky slopes," a circumstance which in Norwegian opinion has given the fisheries thereon a "strictly local" character.<sup>2</sup> These topographical features that distinguish the coast-line, have also offered a favorable habitat for a piscatorial life and development long identified with the adjacent sea bottom, and that in turn has offered a substantial means of livelihood for the people living on the coast near it.<sup>3</sup> Accordingly, Norway made early claim to exclusive control of the fisheries within a four-mile limit of its coasts, and seemingly regarded such a belt as a part of its territory.<sup>4</sup> In the Norwegian response of January 3, 1929, to the Questionnaire of the Preparatory Committee for The Hague Conference for the Codification of International Law, it was declared that "the breadth of the Norwegian territorial water Zone is one geographical league from the coast or from the furthest island, islet or rock which is not constantly submerged; the

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agreement could be secured for an extension beyond the limits of territorial waters of exclusive rights of the coastal State in regard to fisheries." (Bases of Discussion, II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 34.)

<sup>7</sup> See The Special Case of Norway, *infra*, § 144B.

§ 144B.<sup>1</sup> "The length of the coast around the outer belt of rocks is 1700 miles, the entire shore line, including the fiords and the large islands, being about 12,000 miles." (*New International Encyclopedia*. XIII, 178.)

<sup>2</sup> Norwegian reply of Jan. 3, 1929, to Questionnaire of the Preparatory Committee for the Codification Conference at The Hague, Bases of Discussion, II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 173.

<sup>3</sup> "The settlement of the population on the Norwegian coast has depended on the development of coastal fishing, which is the basic factor in determining population in that part of the country. The inhabitants have for ages had the exclusive right of fishing on the coastal banks, and this right is deemed indispensable for the subsistence of the coastal population." (*Id.*)

Also T. W. Fulton, *Sovereignty of the Sea*, 676-677.

<sup>4</sup> See The Principal Facts concerning Norwegian Territorial Waters; Memorandum prepared by the Norwegian Territorial Waters Commission, Christiania, 1924; Arnold Ræstad, *La mer territoriale*, Paris, 1913.

See decree of Feb. 22, 1812, Henry G. Crocker, *Extent of the Marginal Sea*, 1919, 609. Also C. B. V. Meyer, *The Extent of Jurisdiction in Coastal Waters*, Leiden, 1937, 478-511.

In an opinion of March 22, 1922, in the *Penal Case Against Jens Hansen Lund*, the Supreme Court of Norway declared: "By 'Royal Resolution' of February 22, 1812, it is provided that the limit for territorial waters shall be calculated as up to one nautical mile from land, corresponding approximately to 1 1/3 leagues. This provision is still valid. It was alleged during the proceedings before the Supreme Court that during the last war Norway limited herself to seeking enforcement of the three mile limit, *inter alia* with respect to the question of neutrality. No accurate information in regard thereto is before the Supreme Court, but in any event there can be no permanent deviation from or abandonment of the said provision as to a nautical mile as a limit for territorial waters." (Hackworth, *Dig.*, I, 634, citing *Norsk retstidende*, 1922, 499.)



breadth of such waters has never been less than this." It was added, however, that in the Norwegian Government's opinion, "a State has the right, within reasonable limits and with due allowance for the particular geographical configuration of the coast and of important national interests, to decide upon the breadth of its maritime territory itself, provided that the legitimately acquired rights of foreign States are not affected thereby." It was declared that "in any case the Norwegian Government can not see any objection to a claim by a foreign State to exercise sovereignty over territorial waters wider than those over which Norway claims sovereignty, if such claim be founded on continuous and age-long usage."<sup>5</sup>

At The Hague Conference, on April 3, 1930, M. Ræstad declared in behalf of Norway that as there was "no binding rule of international law" on the subject, his Government considered that it was necessary to take into consideration the requirements of the different countries; and that his Delegation was "in favour of the limit of four miles," which, he said, "was older than the three-mile rule."<sup>6</sup> At the present time, Norway, in consequence or by reason of its long claim to fisheries over a four-mile belt, appears to lay claim to an equal breadth for the Norwegian marginal sea.<sup>7</sup>

(vi)

§ 145. **Proposed Extension of Existing Limit.** There has long been a disposition on the part of some publicists of distinction to advocate an exten-

<sup>5</sup> Bases of Discussion, II, Territorial Waters, League of Nations Document — C.74.M.39.1929.V. p. 173, with bibliography concerning the Norwegian position, and calling attention to the Norwegian Government's reply of March 3, 1927, to Article 2 of the League of Nations Questionnaire No. 2, respecting "Extent of Rights of the Coastal State." This is contained in League of Nations Doc. No. C.196.M.70.1927.V, 172-173.

See in this connection, Art. I of Italian decree of Aug. 6, 1914, relating to the extent of jurisdictional waters, in regard to neutral rights and duties conventionally assumed, and declaring that "by territorial waters is understood the zone of water included between the coast line and a line 6 nautical miles (11,111 meters) due seaward of the said coast line," Naval War College, Int. Law Documents, 1918, 100. On March 5, 1915, the Swedish Minister at Washington announced to the Department of State that "according to a long tradition, the territorial waters of Sweden extend 4 nautical miles (4 minutes or 7,420 meters) from the coast or from the furthest outlying islets or skerries, which are not continually washed over by the sea." (*Id.*, 153.)

<sup>6</sup> Annex III to Report of the Second Committee, League of Nations Document — C.230.M.177.1930.V. p. 16, *Am. J.*, XXIV, *Official Documents*, 255-256.

<sup>7</sup> "As the undisturbed possession of fishing rights within the four-mile limit, which the population has enjoyed as an age-long tradition, is considered necessary for its subsistence, the Norwegian Government has not been able to accede to any convention limiting the Norwegian territorial sea. Thus it could not accede to the Convention of 1882 between the other coastal States of the North Sea for the purpose of regulating the policing of fishing in that sea outside the zone agreed upon for purposes of surveillance; and again, the negotiations which took place in 1924 and 1925 between the Norwegian and British Governments on the basis of a British proposal whereby Norway was to limit the breadth of her territorial waters to three nautical miles led to no positive result." (Norwegian reply of Jan. 3, 1929, to Questionnaire of the Preparatory Committee for the Conference on the Codification of International Law, Bases of Discussion, II, Territorial Waters, League of Nations Document — C.74.M.39.1929.V. p. 173.)

See Proposals for Agreements between His Majesty's Government in Great Britain and the Norwegian Government regarding Territorial Waters and Fisheries off the Norwegian Coast, Norway No. 1 (1928), Cmd. 3121.

See Aspects of Sedentary Fisheries, *infra*, § 227C; The Alaska Salmon Fisheries, *infra*, § 227D.

sion of the limit of the marginal sea.<sup>1</sup> New elements have entered into the equation. These have complicated the task of balancing fairly the equities of particular States as against the interests of the international society, and have served also to obscure from view the simplest modes of doing so.

The development within recent years of relatively small boats into high-powered sea craft of great speed, has transformed and enhanced the power of the smuggler successfully to ply his trade; and it has likewise rendered abortive and unavailing the efforts of the maritime State to frustrate him by acts confined to its territorial waters. Thus the normal exigencies of its daily life may compel it to patrol the waters outside thereof, and assert a preventive authority on the high sea. The increasing disposition of maritime States to do so,<sup>2</sup> not merely as a necessary response to an extraordinary occurrence, or to special emergencies occasioned by war, but rather as a common incident in the effective maintenance of a customs régime, has borne fruit. It has doubtless served to increase the number of statesmen and publicists alike who would widen the maritime belt, as well as that of those who would establish a zone of control on the high sea adjacent to it. The Conference for the Codification of International Law that assembled at The Hague in 1930, revealed, however, the fact that maritime States were not then agreed or prepared to take either of these steps.<sup>3</sup> Nevertheless, the discussions at The Hague and the work of the Committee preparatory for them did more than emphasize the difficulty involved in changing, even for the sole benefit of the parties to a multi-partite convention, a rule imbedded deep in the law of nations. Moreover, the extent and vigor of the opposition to a widening of the marginal sea was not ineffective. The very clash of opinion was useful as a means of accentuating realities — that is to say, the actual considerations which might be expected to impel foreign offices to take one stand rather than another, and to point, by that means, to a possible basis of a future and better understanding.

§ 145. <sup>1</sup> According to Art. II of the Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law in 1894: "The territorial sea extends six marine miles (60 to a degree of latitude) from the low-water mark along the full extent of the coasts." *Annuaire*, XIII, 329, J. B. Scott, Resolutions, 114, Moore, Dig., I, 734. Also Report of Sir Thomas Barclay, with draft of proposal, to the Institute of International Law, 1912, *Annuaire*, XXV, 375; Report of Prof. Oppenheim, to the Institute, 1913, *id.*, XXVI, 403; Art. II, *Projet de règlement relatif à la Mer Territoriale en Temps de Paix*, Institute of International Law, Stockholm, 1928, *Annuaire*, XXXIV, 755, *Am. J.*, XXIII, *Special Supplement* (Harvard Research in International Law), 368. See, also, conclusions of Naval War College in 1913, Naval War College, Int. Law Topics, 1913, 34.

See Mr. Olney, Secy. of State, to Mr. de Weckherlin, Netherland Minister at Washington, Feb. 15, 1896, MS. Notes to the Netherlands, VIII, 359, Moore, Dig., I, 734.

See also Art. 2 of a French decree of Sept. 23, 1911, announcing the limit of the territorial waters to be fixed by an imaginary line running out three marine miles from the great outer reefs and, where there are no such reefs, three marine miles from the shore mark at low tide. Hackworth, Dig., I, 630, citing *Journal Officiel*, Sept. 29, 1911, p. 7856.

<sup>2</sup> See Observations by Preparatory Committee for The Hague Codification Conference, May, 1929, League of Nations, Bases of Discussion, II, Territorial Waters, — C.74.M.39. 1929.V., p. 34.

<sup>3</sup> See, League of Nations, Conference for the Codification of International Law, 1930, Report of Second Commission (Territorial Sea), M. François, *Rapporteur*, — C.230.M.117. 1930.V., p. 3. *Am. J.*, XXIV, *Official Documents*, 234; also, Jesse S. Reeves, "The Codification of the Law of Territorial Waters," *id.*, XXIV, 486.

See *infra*, §§ 235A and 235B.

Numerous States possessed of extended coast-lines, and among them the United States, appear to be of opinion that the international society has not ceased to benefit from general adherence to the three-mile limit, which, regardless of its origin, and despite the existing lack of full accord concerning the basis of measurement, has kept within narrow and fairly uniform limits the territorial pretensions of maritime powers.<sup>4</sup> To each of them the generally unrestricted freedom of navigation up to the three-mile limit of their coasts has probably been advantageous. Yet the common acknowledgment of the continuance of that advantage must be regarded as dependent upon the fact, and nothing short of it, that that limit does not place too sharp a restraint upon the adjacent State. In a word, the continuance of the three-mile limit of the marginal sea must be expected to commend itself to the international society only as long as it is believed that that limit does not serve to prevent a coastal State from doing whatever it may really need to do on the high sea for the maintenance and defense of its normal life.<sup>5</sup> When it is perceived that the requirements of that maintenance and defense call for no acts on the high sea which the principles of international law forbid, and that they may necessitate a latitude for the commission of acts of prevention at distances from territorial waters which do not lend themselves to exact and uniform measurement for common application, reasons for an extension of the width of the marginal sea lose their strongest prop. With a common appreciation of the scope of the existing right of the coastal State to prevent certain forms of activities on the high sea that mark no assertion of dominion thereon, there is proportionally lessened the sense of need of a wider marginal sea, or of a zone of control adjacent to it.<sup>6</sup> If special arrangement be essential for the better understanding and respect for that right, it is believed that it should assume a form indicative of the nature of repressive acts that may not unreasonably be deemed to be associated with the maintenance and defense of the normal life of the coastal State within its

<sup>4</sup> "His Majesty's Government admit that the speed of modern vessels and aircraft and the immense range and power of modern implements of warfare may render a belt of three miles insufficient to prevent injurious consequences resulting in the national territory from acts which have taken place on the high seas, but this affords no sufficient argument for a change in the three-mile limit. To ensure that no injurious consequence should result within the national territory from an act which has taken place on the high seas, it would be necessary to establish a belt so wide as to constitute a serious encroachment on the high seas. A belt of such width would lead to perpetual disputes. The difficulty of determining with accuracy whether a vessel is within the coastal belt would be increased very largely if the width of that belt were increased, as the greater the distance from the shore the more difficult it is to fix by reference to the shore the exact position of the vessel. Furthermore, the burden imposed on neutral States in time of war would be intolerable." (British response of Dec. 6, 1928, to Questionnaire of the Preparatory Committee for the Codification Conference at The Hague, League of Nations, Bases of Discussion, II, Territorial Waters, — C.74.M.39.1929.V., p. 162.)

<sup>5</sup> "His Majesty's Government accept the view that no State can be expected to tolerate with equanimity circumstances arising under which, owing to peculiar local circumstances, the absence of jurisdiction over foreign vessels on the high seas immediately contiguous to its territorial waters may prejudice gravely the enforcement of the laws or the well being of the community within its territory." (*Id.*)

<sup>6</sup> "Questions of the breadth of the territorial sea and of the rights of the coastal State in adjacent waters are not two separate questions but one. It is impossible to divide them and it was impossible to reconcile the conflicting proposals." (Hunter Miller, "The Hague Codification Conference," *Am. J.*, XXIV, 674, 688.)

territorial limits. It is the character of the appropriate preventive act rather than the relationship between the place where it is committed and the neighboring coastal State that seemingly needs emphasis, and which possibly might be appropriately registered in a multi-partite convention.<sup>7</sup>

Faithful appraisal needs of course to be made of the recurrent efforts of various States seemingly to claim as territorial waters areas that extend well beyond three marine miles from low-water mark.<sup>8</sup> It should be observed, however, that those efforts may be primarily attributable to, or made the expression of, an attempt to assert a protective control, as for customs or other kindred purposes, that might be effective and not internationally illegal when applied within waters which were essentially extraterritorial. It needs constantly to be borne in mind, for sake of clearness of thought and as a means of inspiring general agreement, that the distinction between a right of sovereignty over a particular area and a right to exercise a preventive or protective jurisdiction over or within an area that is outside of the national domain is a real one. Failure to heed it inevitably breeds confusion of thinking.

(vii)

§ 145A. The Subsoil of Areas Appurtenant to a Coast and Beneath the High Sea. The subsoil appurtenant to the coast of a State and extending there-

<sup>7</sup> Due respect for this consideration might pave the way for a solution of the problem that baffled the Second Commission at The Hague Conference of 1930. It would mitigate the seeming harshness of the three-mile rule, without attempting to defy it or to nullify it as by the establishment of a zone of control on the high sea.

See, in this connection, form of Art. 11, of Draft Convention drawn up by Dr. Schücking, *rapporteur* of the Committee of Experts for the Progressive Codification of International Law, Annex to Bases of Discussion, II, Territorial Waters, — C.74.M.39.1929.V., p. 193; also Art. 20, Harvard Code on Territorial Waters, 1929, *Am. J.*, XXIII, *Special Supplement* (April, 1929), 245, where it is declared: "On the high sea adjacent to the marginal sea, however, a State may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection."

<sup>8</sup> See discussion between Great Britain and Russia growing out of the Russian claim to a 12-mile limit of territorial waters, enunciated in a Russian decree of May, 1921, and referred to in a report from the American Consul General at London, to Mr. Hughes, Secy. of State, May 3, 1923, Hackworth, *Dig.*, I, 631-632. Also documents in *For. Rel.* 1912, 1287-1309, concerning the extension by Russia of the three-mile limit of territorial waters to twelve miles for customs purposes and control of fisheries, especially, text of a Russian note addressed to the Japanese Ambassador to Russia, *id.*, 1308.

See Art. 153 of the constitution of Honduras of 1936, declaring that: "To the State appertains the full dominion, inalienable and imprescriptible, over the waters of the territorial seas to a distance of twelve kilometers from the lowest tide mark. . . ." (Hackworth, *Dig.*, I, 633.)

See Mexican decree of Aug. 30, 1935, purporting to extend Mexican territorial waters from three miles to nine miles, Hackworth, *Dig.*, I, 639; also the resulting discussion between the Governments of the United States and Mexico, especially communication from Mr. Moore, Assist. Secy. of State, to Mr. Daniels, Ambassador to Mexico, May 23, 1936, Hackworth, *Dig.*, I, 640.

In Hackworth, *Dig.*, I, 639, and documents there cited, reference is made to the attitude of the United States relative to the Spanish-French maritime patrol of the Moroccan coast, and to a note from Secy. Kellogg to the American Embassy at Madrid, July 31, 1925, in which it was said: "This Government does not recognize the right of either the Spanish or French Governments to interfere with American vessels outside the three mile limit, as recognized by international law, nor does it recognize the right to interfere with such vessels within the three mile limit except in the manner provided for under the Act of Algeciras." (*Id.*, 639.)

from into an area beneath the high sea is doubtless susceptible to acquisition by that State. Accordingly, by appropriate processes indicative of the assertion of control, a right of sovereignty therein may be brought into being.<sup>1</sup> It is not understood, however, that the United States has found occasion to endeavor to exercise such a privilege.

(e)

#### BAYS

(i)

§ 146. **The General Principle. Certain Applications.** The individual State has in practice enjoyed much latitude in determining what bays or arms of the sea penetrating its territory may be regarded as a part of the national domain and dealt with accordingly.<sup>1</sup> This is partly due to the fact that a bay of wide expanse, the entrance to which is far more than six marine miles in extent, may still be subjected to control and practically occupied by the territorial sovereign of the surrounding land, and that without interference with any channel of communication between States generally, or with any other definite interest of the society of nations.<sup>2</sup>

When nature has herself lodged a bay in the very bosom of a maritime State, she has by such action encouraged the latter to claim the water area as its own, and other States to respect the claim, despite the extent of the distance between

§ 145A.<sup>1</sup> In his 5th edition of Oppenheim, Dr. Lauterpacht declares that the "subsoil can be acquired through occupation." (I, § 287c.) He declares that "this occupation takes place *ipso facto* by a tunnel or a mine being driven from the shore through the subsoil of the maritime belt into the subsoil of the open sea." (*Id.*) See also his footnote, *id.*, I, § 287d, concerning "The Proposed Channel Tunnel."

§ 146.<sup>1</sup> See, generally, documents in Moore, Dig., I, 735-743; Naval War College, Int. Law Situations, 1904, 138-140; *id.*, Int. Law Topics, 1913, 35-42, 46-47; *Proceedings of Alaskan Boundary Tribunal*, Counter Case of Great Britain, Vol. IV, Part 3, 24-30; Territorial Waters Brief of Great Britain, *Documents and Proceedings of Halifax Commission*, II, 1887-1906, Moore, Arbitrations, I, 744, Moore, Dig., I, 806. Compare, Brief of the United States, *Proceedings, Halifax Commission*, I, 119-167, Moore, Arbitrations, I, 743, Moore, Dig., I, 806; Report of Mr. Edmunds from Senate Committee on Foreign Relations, Jan. 19, 1887, Sen. Rep. No. 1683, Reports of Senate Committee on Foreign Relations, V, 615, 619. Documents in Hackworth, Dig., I, § 100.

See A. H. Charteris, "Territorial Jurisdiction in Wide Bays," *Yale Law Journal*, XVI, 471; Int. Law Association, 23d Report, Berlin Conference (1906), 103; Charles Noble Gregory, "The Recent Controversy as to the British Jurisdiction over Foreign Fishermen More Than Three Miles from Shore," *Am. Pol. Sc. Rev.*, I, 410; "Territorial Jurisdiction in Wide Bays," *Harv. Law Rev.*, XXI, 65; *id.*, XVI, 150. See also T. W. Fulton, Sovereignty of the Sea, Edinburgh, 1911, Chap. III; W. Schücking, *Das Küstenmeer im internationalen Rechte*, Göttingen, 1887, § 4; Romée de Villeneuve, *De la détermination de la ligne séparative des eaux nationales et de la mer territoriale spécialement dans les baies*, Paris, 1914; Fauchille, 7 ed., § 516; Hall, Higgins' 8 ed., § 41; Lauterpacht's 5 ed. Oppenheim, I, §§ 191-193; Rivier, I, 153-157; P. C. Jessup, Law of Territorial Waters and Maritime Jurisdiction, New York, 1927, Chap. VIII; Westlake, 2 ed., I, 191-192; also bibliography at beginning of The Marginal Sea, *supra*, § 141.

<sup>2</sup> "In practice, States deal with their own bays in their own way, and in so doing suffer, as Schücking (*Das Küstenmeer*, p. 21) points out, the less interference from their neighbours, since bays are not usually channels of communication on the highway of the ocean which every maritime nation is concerned to keep open, but are merely means of access to ports lying within them." A. H. Charteris, "Territorial Jurisdiction in Wide Bays," *Int. Law Association, Proceedings*, 23d Conference, 103, 107.

the seaward headlands. Numerous instances where general acquiescence has long rewarded the assertion of dominion over certain broad expanses have begotten the term "historic bays" by way of explanation.<sup>3</sup> The phrase signifies that in each case where it is applied the interested coastal State at some earlier time began to endeavor to possess itself as it were of the waters of the particular bay, regardless of its magnitude, and to assert a right to control them as a part of its territory; and it suggests also that the geographical relationship of those waters to that State were generally deemed to be such as to justify the assertion and discourage foreign opposition to it. Thus, the situation, that made a bay geographically a part of the encircling country and, for that reason, peculiarly available for acquisition as a part of its territory, was the decisive factor. It is believed, therefore, that the term "historic bays" is illustrative of the full effect of a habit of maritime States, rather than a token of an exception to an accepted rule.<sup>4</sup> It refers to a practice that furnishes a mass of evidence in support of the fresh and initial claims of a State to dominion over bays of wide area. It reveals the fact that maritime States have not acted on the theory that international law as such yielded water indentations of defined limits or calculated width to the sovereign of the adjacent land, and withheld others of

<sup>3</sup> See, Award, North Atlantic Coast Fisheries Arbitration, *Proceedings* (Senate Doc. No. 870, 63 Cong., 3 Sess.), I, 93, 96; dissenting opinion of Dr. Drago, *id.*, 112.

"By general acquiescence, certain historic bays have been recognized as forming part of the national territory, even though their width exceeds that indicated in the earlier part of the answer on this point." (British response of Dec. 8, 1928, to Questionnaire of the Preparatory Committee for The Hague Codification Conference of 1930, League of Nations, Bases of Discussion, II, Territorial Waters—C.74.M.39.1929.V. p. 163.)

<sup>4</sup> The frequent suggestion that a "historic bay" marks the acquisition or perfecting of a right of dominion by way of prescription is not believed to be in complete harmony with the theory on which maritime States have acted. A prescriptive right is one which grows out of conduct which in its initial stages might have been deemed wrongful by the State or entity in the face of which it was undertaken. No prescriptive claim or assertion begins to run that may not be lawfully opposed by the possessor of a definite legal right of which the assertion is defiant. That the claim or assertion ripens into something worthy of respect is due to the failure of the possessor of that right to make objection for a prolonged period. As the privilege of objection sinks into desuetude, the unopposed claim acquires strength and gains an acknowledged standing, despite its unlawful beginning.

A bay regarded as "historic" doubtless betokens a common acquiescence in the assertion of dominion by the coastal State; but it does not necessarily signify that the original assertion of that dominion constituted a violation of any legal obligation towards any State or to the society of States. When nature made a bay geographically a part of the domain of the littoral State, that State when first asserting dominion did not in fact assume that in occupying the water area as a part of its territory it failed in any international obligation because of the width of the entrance. In a word, the absence in every quarter of a sense that the assertion of dominion amounted to wrongful conduct, distinguished the acquisition of the right from one that might be said to have a prescriptive character. No rule of law was acknowledged to proscribe what was done. Yet there might have been cases where the configuration of a water indentation challenged the conclusion that it was geographically a part of the adjacent territory and that its outer area was not a portion of the high sea. There might have been room in such cases for the contention that acquiescence in the claim of dominion was responsible for the growth of something akin to a prescriptive right, because it was at the start contemptuous of legal principle and defiant of the rights of the several members of the international society. Generally, however, the configuration of a bay in relation to the territory of the claimant State constituted a rough test of the legal quality of the initial claim. In practice, the significant fact has been that the bays commonly regarded as the most conspicuous examples of those assigned to the class described as "historic" may, in a geographical sense, be said to belong to, as being within, the land areas under the dominion of the States which have severally laid claim to them.

greater extent from its grasp. The term "historic bays," unsatisfactory as it is, and confusing as it has sometimes proved to be,<sup>5</sup> points at least in the opposite direction, and serves to render incapable of proof the contention that as yet international law has prescribed a linear test of the width of the entrances of bays which a State may see fit to control as a part of its own territory.

It may be observed that the reluctance of a State for reasons of policy to make claim to the waters of a particular bay, and the pronouncements of its courts that are declaratory and respectful of such a policy,<sup>6</sup> are not to be taken as indicative of what it may conceive to be its rights under the law of nations. Nor is the readiness of a State to accept under appropriate conditions a restrictive rule, if generally acquiesced in by maritime States, evidence of what it may deem that law to permit before such acquiescence is forthcoming.

It is not unprofitable to note a few conspicuous instances of the assertion of dominion by the United States and certain other States over the waters of particular bays of special prominence.

Delaware Bay, some ten marine miles wide at its entrance, and forty miles in length from its entrance to the Delaware River (as measured in a straight line to Liston Point), was in 1793, regarded by Attorney General Randolph as an American bay.<sup>7</sup> In his opinion, the seizure within its waters of the British ship *Grange* by a French vessel of war was an illegal act within neutral territory.<sup>8</sup> Some years later, Chesapeake Bay, nine and a half nautical miles wide at its entrance (as measured between Cape Henry and The Isaacs), and one hundred and seventy miles in length to the mouth of the Susquehanna River (following mid-channel), was regarded by the Court of Commissioners of Alabama Claims in the case of the *Alleganean*, as within the territorial waters of the United States. In the course of its opinion the Court said:

Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent States encompass it; that from the earliest history of the country it has been claimed to be territorial waters,

<sup>5</sup> See, Hunter Miller, "The Hague Codification Conference," *Am. J.*, XXIV, 674, 690-691, in special relation to critical suggestions of the Delegation of the United States at The Hague Conference for the Codification of International Law of 1930, concerning "historic bays."

<sup>6</sup> See, *The Fagernes*, L.R. Probate [1927], 311, where the Court of Appeal was respectful of the fact that the British Crown had not possessed itself of, or effectively asserted any territorial rights over, that part of the Bristol Channel twenty miles wide, where a particular collision occurred.

*Cf.* *Reg. v. Cunningham*, Bell's C.C. 72, 86, where, although unnecessary for the decision of the case, it was stated by the Court with respect to the Bristol Channel: "that the whole of this inland sea, between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded." Moore, Dig., I, 739-740.

<sup>7</sup> The measurements of bays as stated in the text, under this section, have been furnished the author by the Hydrographic Office.

<sup>8</sup> Opinion of Mr. Randolph, Atty. Gen., May 14, 1793, in the course of which he said: "The corner stone of our claim is, that the United States are proprietors of the lands on both sides of the Delaware, from its head to its entrance into the sea." *Am. State Pap.*, For. Rel., I, 148; 1 Ops. Attys. Gen., 32, Moore, Dig., I, 735, 736.

and that the claim has never been questioned; that it cannot become the pathway from one nation to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig *Grange* and the position taken by the Government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the Government of the United States and no part of the 'high Seas' within the meaning of the term as used in Section 5, of the act of June 5, 1872.<sup>9</sup>

In 1877, the Judicial Committee of the Privy Council was of opinion that Conception Bay in Newfoundland, having a width of ten and a quarter nautical miles at its entrance (at Broad Cove Head), and a length of thirty-two and a quarter miles, as measured from the center of the entrance (on a line from Spit Point to Cape St. Francis) to the mouth of Holy Rood Bay, was a British bay. Reliance was placed upon the long exercise of British dominion over and exclusive occupation of the waters in question, and upon the acquiescence of other States.<sup>10</sup>

<sup>9</sup> Second Court of Commissioners of Alabama Claims, *Stetson v. United States*, No. 3993, class 1; Moore, *Arbitrations*, IV, 4332-4341; Moore, *Dig.*, I, 741-742. In *Commonwealth v. Manchester*, 152 Mass. 230, it was held that Buzzards Bay, the distance between the headlands of which is less than two marine miles, was in the territorial limits of Massachusetts. Also, *Dunham v. Lamphere*, 3 Gray, 268, 270.

<sup>10</sup> *Direct United States Cable Co. v. Anglo-American Telegraph Co.* (1877), L. R. 2 App. Cas. 394. Declared the Court: "It seems generally agreed that where the configuration and dimensions of the bay are such as to shew that the nation occupying the adjoining coasts also occupies the bays, it is part of the territory, and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation." (*Id.*, 419.)

In the opinion of Mr. Bates, Umpire in the case of *The Washington* under convention between the United States and Great Britain of February 8, 1853, the Bay of Fundy was not a British bay by reason of the fact that one of its headlands was in the United States. Moore, *Arbitrations*, IV, 4342, 4344.

THE UNITED STATES AND BERING SEA. By the terms of the convention concluded with Great Britain Feb. 29, 1892, providing for the so-called Fur Seal Arbitration before an international tribunal at Paris, it was agreed that there should be submitted to the arbitrators five points with a view to securing a distinct decision on each of them. Malloy's *Treaties*, I, 748-749. The first of these raised the question as to what exclusive jurisdiction in Bering Sea and what exclusive rights in the seal fisheries therein had been asserted and exercised by Russia prior and up to the time of the cession of Alaska to the United States. A majority of the Arbitrators (embracing all of them except Senator John T. Morgan) declared in response, that while Russia had claimed in 1821 jurisdiction to Bering Sea to the extent of one hundred Italian miles from the coasts and islands belonging to her, she had subsequently admitted in the course of concluding treaties with the United States, in 1824, and with Great Britain, in 1825, that her jurisdiction should be restricted to the reach of cannon shot from shore and that it appeared that, "from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Bering's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limit of territorial waters." Malloy's *Treaties*, I, 753. The second question related to the extent to which any Russian claims of jurisdiction as to the seal fisheries had been recognized and conceded by Great Britain. The same majority of the arbitrators declared in response, that Great Britain had not recognized or conceded any claim upon the part of Russia, to exclusive jurisdiction as to those fisheries within that sea, outside of ordinary territorial waters. The third question was in part whether the body of water known as Bering Sea had been included in the phrase "Pacific Ocean" as used in the treaty of 1825, between Great Britain and Russia. The arbitrators were of unanimous opinion that Bering Sea had been included in the phrase "Pacific Ocean" as used in that treaty. In response to the fourth question, whether all of the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea east of the water boundary, in the treaty between the United States and Russia of 1867, passed unim-



In the case of *Mortensen v. Peters*, the Danish master of a trawler, registered in Norway, was convicted in Scotland of having violated the Sea Fisheries and Herring Fisheries (Scotland) Act, by reason of his having used a method of otter-trawling in the Moray Firth, at a point more than three marine miles from the Scottish coast, but, nevertheless, within a line drawn from Duncansby Head in Caithness-shire to Rattray Point in Aberdeenshire, where the employment of such a method of trawling was prohibited under a by-law of the Scottish Fishery Board. In sustaining the conviction, the High Court of Justiciary, according to the opinion of the Lord Justice General, believed that its single duty was to give effect to an Act of the British Parliament, and not to consider whether that Act violated the law of nations.<sup>11</sup>

The exercise, however, by Great Britain of rights of sovereignty over the waters of the Moray Firth within the limits stated was not without significance, inasmuch as the distance between Duncansby Head to Rattray Point is seventy-four and a half nautical miles.<sup>12</sup> Possibly the British claim would have aroused less interest than it did, had the water area thus enclosed resembled in form that embraced in Chesapeake Bay, rather than an equilateral triangle with a seaward base as long as the sides indenting the land.<sup>13</sup> Great Britain did not,

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paired to the United States under that treaty, the arbitrators were of unanimous opinion that all of those rights did so pass. In response to the fifth question, whether the United States had any right, and if so what right, of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea, when such seals were found outside of the ordinary three-mile limit, all of the arbitrators, except Senator Morgan and Mr. Justice Harlan, were of opinion that the United States had no right of protection or property in those seals when they were found outside of that limit.

It seems important to observe that the United States in asserting a right of protection or property in the fur seals frequenting its islands in Bering Sea, when outside of the ordinary three-mile limit, did not purport to rest its case altogether upon any jurisdictional claim (or territorial claim, if it could be called such) over Bering Sea. See *Case of the United States, Fur Seal Arbitration, Proceedings*, II, 85. This point was emphasized in the Counter Case of the United States, where it was stated: "The distinction between the right of exclusive territorial jurisdiction over Bering Sea, on the one hand, and the right of a nation, on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or sea, is so broad as to require no further exposition. It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves." *Proceedings, Fur Seal Arbitration*, VII, 19.

With respect to the claims of the United States concerning the fisheries in Bering Sea and in relation to the Fur Seal Arbitration, see Moore, *Arbitrations*, I, Chap. VII, and documents there cited.

<sup>11</sup> *Mortensen v. Peters*, 8 Fraser, 93; [1906] 14 Sc. L. T. 227; *Am. J.*, I, 526, at 533. The learned Lord Justice General took occasion to observe that: "International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland."

<sup>12</sup> "To international lawyers the interest of this case lies less in the decision than in the legislation on which it turned. And here one cannot help feeling that the British Parliament, without perhaps being fully aware of what it was doing, has made, in reference to the Moray Firth, a claim to jurisdiction to which there is almost no parallel." A. H. Charteris, Report, 23d Conference Int. Law Assn., Berlin, 1906, 130. See, also, *Harv. Law Rev.*, XXI, 65; Charles Noble Gregory, "The Recent Controversy as to the British Jurisdiction over Foreign Fishermen more than Three Miles from Shore." *Pol. Sc. Rev.*, I, 410.

<sup>13</sup> Declared Sir Robert Finlay in the course of his oral argument before the Alaskan Boundary Tribunal: "What I am going to submit as a general proposition of international law is this, that there is no necessary limit as regards the width of the estuary or inlet which is to be regarded as territorial waters; but where you have got a very deep inlet which is deep out of all proportion of its breadth, that must be regarded as being territorial waters." *Proceedings, Alaskan Boundary Tribunal*, VI, 219. See Beale's Cases on Conflict of Laws,

however, persist in maintaining exclusive fishery rights within these broad limits.<sup>14</sup>

The coast of Alaska is indented by certain bays of broad dimensions which by reason of their relation to the land, appear to belong in a geographical sense to the sovereign thereof. Kotzebue Sound (facing the Arctic Ocean) or the inner portions of it, Golofnin Bay inside of a line from Cape Nome to St. Michaels Island, Kuskokwim Bay, Bristol Bay (inside of a line drawn from Igagik to Protection Point), Cook Inlet from a line drawn between Cape Elizabeth and Kaguyak, and Yakutat Bay inside of Ocean Cape, are instances. They are water areas which, regardless of the distance between headlands, it is believed that the United States may formally claim to be its own without violating any requirement of international law. Again, on the coast of the State of Maine, the outer reaches of Penobscot Bay inside of a line connecting Monhegan Island, Matinicus Rock, Seal Island, Isle Au Haut, and Long Island are understood to be deemed by the United States to be a part of its territorial waters.<sup>15</sup> The

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III, Summary, § 19; For. Rel. 1908, 677-680 with respect to the claims of the United States that the waters of Manzanillo Bay should be regarded as territory of the Canal Zone, and, therefore, subject to the jurisdiction of the United States.

<sup>14</sup> "The debate arose upon the arrest of certain Norwegian fishermen in the waters of Moray Firth. . . . Norway protested against the arrest of her citizens in that water, which Norway claimed to be the free sea. . . .

"Upon this debate the Foreign Office of Great Britain allowed the protest of Norway and released the Norwegian citizens who had been arrested for violating this statute upon that water; and accepted the situation that this statute, which in terms covered this water, was to be construed as the Courts of England have always construed statutes, that by their terms extend beyond the limits of British jurisdiction, as applying only to British subjects, and not applying to Norwegian subjects." Oral Argument of Mr. Root in behalf of the United States, North Atlantic Coast Fisheries Arbitration, *Proceedings*, XI, 2168-2169.

See, also, statement by Lord Fitzmaurice in behalf of the British Government, in the House of Lords, Feb. 21, 1907, *quoted* by Mr. Root in his argument, *id.*, 2166. In this connection, see Thomas Wemyss Fulton, *The Sovereignty of the Sea*, Edinburgh, 1911, 720-738, with reference to the Moray Firth case, and later Parliamentary discussions. *Cf.* The Trawling in Prohibited Areas Prevention Act, 1909 (9 Edw. VII, c. 8); also Lauterpacht's 5 ed. of *Oppenheim*, I, § 192.

"It seems clear that the policy of the British Government was largely dictated by the realization that any extensive pretensions in their own waters would meet with reciprocal claims off foreign shores. The resulting injury to British fishing interests in general would have been greater than that occasioned by foreign trawling in the Moray Firth. In conclusion it must be stated that Great Britain does not claim the Moray Firth as part of British territorial waters." (P. C. Jessup, *Law of Territorial Waters*, 436.)

"Art. II. In bays, inlets, and gulfs the territorial waters, for the purposes stated in the preceding article, are those included within the external (seaward) straight-line tangent to the two circumferences of 6-mile radius struck with the extreme outer points of the bay, inlet, or gulf as centers, provided that the distance between the said points does not exceed 20 nautical miles (37,040 meters).

"If the distance between the extreme outer points of the opening exceeds 20 nautical miles, the territorial waters are those included within the straight line drawn between the two most seaward points of the bay, inlet, or gulf distant from each other at least 20 nautical miles." Italian decree relating to jurisdictional waters, Aug. 6, 1914, Naval War College, *Int. Law Documents* 1918, 100.

See V. Kenneth Johnston, "Canada's Title to Hudson Bay and Hudson Strait," *Brit. Y.B.*, 1934, XV, 1. Declared Mr. Adee, Second Assist. Secy. of State, to Mr. Ludwig Wurzburg, Oct. 8, 1906: "In any event, with respect to Hudson Bay, which is a body of water 900 miles long by 600 miles wide, and connected with the Atlantic Ocean by a strait about 400 miles in length and varying from 60 to 100 miles in width, the United States will take the position that citizens of the United States have the right to whale and fish within its waters outside the three mile limit." (Hackworth, *Dig.*, I, 701.)

<sup>15</sup> These outer waters of Penobscot Bay belong geographically to the Atlantic Ocean

State of California has by its constitution declared Monterey Bay, of which the opening headlands are about nineteen miles apart, to be within its limits, and has asserted control over the fisheries therein.<sup>16</sup> In 1927, the Supreme Court of California, declaring that there could not be said to be "any rule of international law upon the subject," expressed the view that the whole matter rested "in the undisputed assertion of jurisdiction by the power of possessing the enclosing shore line of the bay or inlet in question."<sup>17</sup>

In 1927, the Department of State found occasion to make the following significant statement that is self-explanatory:

In the absence of any accepted standard as to their size and conformation, it is difficult to determine in any given case whether a bay, gulf or recess in a coast line can be regarded as territorial waters. Under the applicable general principles of international law, however, as evidenced by writers on the subject, it may be stated that gulfs and bays surrounded by land of one and the same littoral State whose entrance is of such a width that it cannot be commanded by coast batteries are regarded as non-territorial. The Gulf of California has apparently not been discussed by such authorities, but the width of the Gulf leaves little doubt that it should be regarded as a part of the open sea, with the exception, of course, of the inside, marginal belts of territorial water.<sup>18</sup>

The potentialities of coast batteries must ever vary and be expected constantly to increase. At the present time they suffice to render dangerous access by surface craft to waters of great width between headlands on which such batteries are mounted. If here is to be found the test of the extent of bays which may be fairly regarded as territorial, there is necessary acknowledgment of the lati-

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rather than to the territory constituting or pertaining to the State of Maine. Nevertheless, the small islands mentioned in the text, although separated by wide distances, constitute, for geographical reasons, convenient bases of measurement on the ocean front. The assertion of American dominion over the full expanse of water inside of a line connecting them is not likely to be challenged by the outside world.

See "line between the high seas and territorial waters," as drawn by the United States Tariff Commission for the sole purpose of facilitating the conduct of an investigation under Senate Resolution 314, 71 Cong., 2 Sess., on chart 1106 of U. S. Coast and Geodetic Survey (Bay of Fundy to Cape Cod). This line was "not to be regarded as having official sanction or significance for any other purpose."

<sup>16</sup>*Ocean Industries, Inc. v. Greene*, 15 F. (2d) 862. Compare, however, "line between the high seas and territorial waters" as drawn by the United States Tariff Commission for the sole purpose of facilitating the conduct of an investigation under Senate Resolution 314, 71 Cong., 2 Sess., on chart 5402 of U. S. Coast and Geodetic Survey, embracing Monterey Bay. See, also, *United States v. Carrillo*, 13 F. Supp. 121, in relation to San Pedro Bay, California.

P. C. Jessup in his excellent treatise on the Law of Territorial Waters, mentioning in Chapter VIII various instances of territorial bays, adverts to the Swedish claim to Laholm Bay (413-424, quoting at length an opinion by Mr. E. Löfgren, sometime Legal Adviser to the Swedish Foreign Office, of Feb. 11, 1925); also to the claim of the Netherlands to the Zuyder Zee (438) which has long been acquiesced in.

<sup>17</sup>*Ocean Industries, Inc. v. the Superior Court of Santa Cruz County*, 200 Cal. 235, 246, where it added: "This being so, we arrive at the conclusion that the bay of Monterey between its headlands and the ocean adjacent to a line drawn between these headlands for a distance of three nautical miles is within the boundaries of the State of California and of the counties respectively of Santa Cruz and Monterey."

<sup>18</sup>Mr. Grew, Under Secy. of State, to Mr. O'Malley, March 16, 1927, Hackworth, Dig., I, 708.

tude enjoyed by the State possessed of batteries of the most advanced type when mounted on favorable elevations.

## (ii)

§ 146A. **Bays Bordered by Land Belonging to Two or More States.** When the geographical relationship of a bay to the adjacent or enveloping land is such that the sovereign of the latter, if a single State, might not unlawfully claim the waters as a part of its territory, it is not apparent why a like privilege should be denied to two or more States to which such land belongs, at least if they are so agreed, and accept as between themselves a division of the waters concerned.<sup>1</sup> No requirement of international law as such deprives them of that privilege, notwithstanding the disposition of some who would leave little room for its application.<sup>2</sup>

In an opinion and decision of March 9, 1917, the Central American Court of Justice concluded that the Gulf of Fonseca was "an historic bay possessed of the characteristics of a closed sea";<sup>3</sup> and also that a right of co-ownership existed between the Republics of El Salvador and Nicaragua in the non-littoral waters of the Gulf and certain others thereof, without prejudice to the rights that belonged to Honduras in those non-littoral waters.<sup>4</sup> In a circular note of November 24, 1917, sent by the Government of Nicaragua to the other Central American Governments there was announcement of reasons for the rejection of the decision, embracing a denial of a co-dominion over the waters of the Gulf by the three interested republics.<sup>5</sup>

§ 146A.<sup>1</sup> It has been well said that "The power of two or more States should not be smaller than the power of one State in this respect if the States can reach an agreement." (Commentary on Art. 6 of Harvard Draft Convention of 1929 concerning the Law of Territorial Waters, George G. Wilson, Reporter, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 274.) According to that Article: "When the waters of a bay or river-mouth which lie within the seaward limit thereof are bordered by the territory of two or more States, the bordering States may agree upon a division of such waters as inland waters; in the absence of such agreement, the marginal sea of each State shall not be measured from the seaward limit but shall follow the sinuosities of the shore in the bay or river-mouth." (*Id.*)

See also, Art. 6, Project No. 10, concerning National Domain, from American Institute of International Law, *Am. J.*, XX, *Special Supplement*, July and October, 1926, 318.

*Cf.* Final paragraph of Draft Convention on the Law of Territorial Waters in P. C. Jessup's *Law of Territorial Waters*, 481.

See Thalweg, *supra*, § 138.

<sup>2</sup> See, for example Art. 4 of Draft Convention drawn up by Dr. Schücking, *Rapporteur* of the Committee of Experts for the Progressive Codification of International Law, League of Nations Document — C.196.M.70.1927.V. p. 72, published also in League of Nations Document — C.74.M.39.1929.V. p. 193; Art. 3 of Project of the Institute of International Law for the Régime of the Territorial Sea in Time of Peace, 1928, *Annuaire*, XXXIV, 755; Basis of Discussion No. 9 from the Preparatory Committee for The Hague Codification Conference, Bases of Discussion, II, Territorial Waters, League of Nations Document — C.74.M.39.1929.V. p. 45.

<sup>3</sup> *The Republic of El Salvador v. The Republic of Nicaragua*, *Am. J.*, XI, 674, 693.

<sup>4</sup> *Id.*, 694. The other waters were those "that are intermingled because of the existence of the respective zones of inspection in which those Republics exercise police power and the rights of national security and defense." It should be observed that Judge Gutiérrez Navas did not agree with his colleagues as to the right of co-ownership.

A majority of the court also concluded that there should be excepted from the community of interest or co-ownership "the league of maritime littoral that belongs to each of the States that surround the Gulf of Fonseca adjacent to the coasts of their mainlands and islands respectively, and in which they have exercised their exclusive sovereignty" (*Id.*)

<sup>5</sup> Hackworth, Dig., I, 705. See also P. C. Jessup, *Law of Territorial Waters*, 398-410

The suggestion may be offered that the Bay of Fundy, by reason of its geographical relationship to the land into which it is projected might be fairly dealt with by the United States and Canada, should they so agree, as a closed bay.<sup>8</sup>

(iii)

**§ 147. The North Atlantic Coast Fisheries Arbitration.** In its award in the case of the North Atlantic Coast Fisheries Arbitration, pursuant to a convention between the United States and Great Britain of July 27, 1909,<sup>1</sup> the Tribunal assembled at the Hague declared that,

admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but . . . no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty.<sup>2</sup>

The Tribunal was called upon to interpret Article I, of the convention between the opposing States, concluded October 20, 1818, and was confronted with the precise question from where should be measured the "three marine miles of any of the coasts, bays, creeks, or harbours," on or within which (according to that Article) the United States had renounced forever, any "liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure, fish." The Tribunal, having utmost regard for what, in view of all the evidence, was deemed to have been in the minds of the negotiators, in 1818, concluded that the description of the coast was expressed throughout the treaty in geographical terms, and not by reference to political control, and decided that the measurement in the case of bays should be from a straight line across the body of water at the place where it ceased to have the configuration and characteristics of a bay, and that at all other places the three marine miles should be measured following the sinuosities of the coast.<sup>3</sup>

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See in this connection Convention Respecting a Nicaraguan Canal Route concluded by the United States and Nicaragua, Aug. 5, 1914, U. S. Treaty Vol. III, 2740, and particularly, the terms on which the advice and consent of the Senate of the United States were given, *id.*, 2742.

<sup>8</sup> *Cf.* Views of Mr. Bates, Umpire, in the case of *The Washington*, under convention between the United States and Great Britain, of Feb. 8, 1853, Moore, Arbitrations, IV, 4342, 4344.

§ 147. <sup>1</sup> Malloy's Treaties, I, 835. It should be observed that this special agreement assumed the form of a convention concluded Jan. 27, 1909, which was submitted to the Senate for approval. The Senate having advised and consented to ratification (subject to certain interpretative reservations acceptable to Great Britain) on Feb. 18, 1909 (*id.*, 843), the agreement was confirmed by an exchange of notes March 4, 1909, *id.*

<sup>2</sup> *Proceedings*, North Atlantic Coast Fisheries Arbitration, I, 94, Senate Doc. No. 870, 61 Cong., 3 Sess.

<sup>3</sup> The Tribunal was composed of Dr. H. Lammasch (Austria), President, Jonkheer A. F. de Savornin Lohman (Netherlands), Judge George Gray (United States), Sir Charles Fitzpatrick (Canada), and Dr. Luis M. Drago (Argentina). Dr. Drago dissented from the

Declaring, however, that this decision, although correct in principle, was not entirely satisfactory as to its practical applicability, and that it left room for doubts and differences in practice, the Tribunal recommended, in virtue of responsibilities imposed upon it by the terms of the special agreement, certain rules and methods of procedure for the determination of the limits of bays previously enumerated. It was thus declared that in every bay not thereafter specifically provided for, the limits of exclusion should be drawn three miles seaward from a straight line across the bay in the part nearest the entrance "at the first point where the width does not exceed ten miles."<sup>4</sup> It was further declared that in a number of specified bays, where the configuration of the coast and the local climatic conditions were such that foreign fishermen when within the geographic headlands might reasonably and *bona fide* believe themselves on the high seas, the limits of exclusion should be drawn in each case between the headlands thereafter specified as being those at and within which such fishermen might be reasonably expected to recognize the bay under average conditions.

It should be borne in mind that the award had a twofold aspect: first, as an arbitral decision interpretative of an old convention; and secondly, as an arbitral recommendation based upon the special circumstances of the case, in the light of the practices and equities of the opposing States with respect to the fisheries within the areas concerned. The failure of the United States to convince the Tribunal that it was the design of the negotiators of the treaty of 1818 that the distance of "three marine miles of any of the coasts, bays, creeks, or harbours," should be measured from low-water mark following the indentations of the coast,<sup>5</sup> seems to have been due in part to the following circumstances.

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opinion of his colleagues with respect to the solution of the (fifth) question of measurement as stated in the text.

See, in this connection, Chandler P. Anderson, "The Final Outcome of the Fisheries Arbitration," *Am. J.*, VII, 1; Robert Lansing, "The North Atlantic Fisheries Arbitration," *Am. J.*, V, 1, 19-25; Thomas Willing Balch, "*La décision de la cour permanente d'arbitrage*," *Rev. Droit Int.*, 2 ser., XIII, 5; J. de Louter, "*L'arbitrage dans le conflit Anglo-Américain*," *id.*, 131; J. Basdevant, "*L'affaire des pêcheries des côtes septentrionales de l'Atlantique*," *Rev. Gén.*, XIX, 421; and especially, P. C. Jessup, *Law of Territorial Waters*, 363-382.

See also documents pertaining to the case in Hackworth, *Dig.*, I, 691.

<sup>4</sup> In making this recommendation the Tribunal adverted to British treaties with France, with the North German Confederation and with the German Empire, and to the North Sea Convention, in which there had been adopted for similar cases the rule that only bays of ten miles in width should be considered as those wherein the fishing was reserved to nationals. It considered also the fact that in the course of negotiations between the United States and Great Britain, a similar rule had on various occasions been proposed and adopted by Great Britain in instructions to naval officers stationed on the coasts concerned. It was declared that "though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule, with such exceptions, has already formed the basis of an agreement between the two Powers" *Proceedings*, I, 97.

See Art. II of agreement concluded by the United States and Great Britain July 20, 1912, adopting, with certain modifications, the rules and methods of procedure recommended in the award in the North Atlantic Coast Fisheries Arbitration, U. S. Treaty Vol. III, 2632. Concerning the Fortune Bay case, involving an attack upon American fishermen while fishing within its waters, Sunday, Jan. 6, 1878, and the payment by Great Britain of claims arising therefrom, see *For. Rel.* 1881, 496-510, 544-545; also Moore, *Dig.*, I, 807-808.

See also *United States v. Carrillo*, 13 F. Supp. 121, 122.

<sup>5</sup> Such was the contention of the United States. Case of the United States, 248, *Proceedings*, II. In his dissenting opinion, Dr. Drago acquiesced in the American contention. *Proceedings*, I, 102, 104-106.

The Tribunal did not believe that the so-called three-mile rule determining the limits of territorial waters on the high seas established the method or principle as accepted in 1818, of determining the limits also of such waters within bays. That the United States had long regarded certain wide bays, such as Delaware Bay, as within its domain was a circumstance which, however sought to be explained, doubtless weakened the influence of the American contention, and weighed upon the minds of the arbitrators.<sup>7</sup> As a principle of interpretation the Tribunal declined to take cognizance of later practices of the nineteenth century concerning the territorial sovereignty over bays, as shedding light upon the sense in which particular terms were employed by the plenipotentiaries in 1818.<sup>8</sup>

## (iv)

§ 147A. **Difficulties in the Way of General Agreement.** The Hague Codification Conference of 1930, revealed three major difficulties in the way of general agreement concerning the matter of bays. First, there is involved faithful reckoning with the actual claims made by States to particular bay regardless of their magnitude and configuration. Secondly, there must be common acquiescence in the width at their entrances of territorial bays which are not within the specially reserved class; and finally, there must be agreement as to the system or method of measurement. The Delegation of the United States proposed a solution of the first of these problems by suggesting that "Waters whether called bays, sounds, straits or by some other name, which have been under the jurisdiction of the coastal State as part of its interior waters, are deemed to continue a part thereof. Charts indicating the line drawn in such cases shall be communicated to the other parties thereto."<sup>1</sup> This might well be described as the doctrine of *uti possidetis* at the time of agreement.<sup>2</sup> The Conference as well as the work of the Preparatory Committee showed a tendency

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See Oral Argument of Mr. Elihu Root, Counsel for the United States, *Proceedings*, X 2139-2193; North Atlantic Coast Fisheries Arbitration at the Hague, Argument on Behalf of the United States by Elihu Root, edited by Robert Bacon and James Brown Scott, Cambridge 1917.

<sup>6</sup> In the course of the award it was declared: "It has not been shown by the documents and correspondence in evidence that the application of the three-mile rule to bays was present to the minds of the negotiators in 1818, and they could not reasonably have been expected either to presume it or to provide against its presumption." *Proceedings*, I, 94-9. Compare dissenting opinion of Dr. Drago, *id.*, 104-106, 112.

<sup>7</sup> See the award, *Proceedings*, I, 95; also Robert Lansing, in *Am. J.*, V, 1, 22-23, where was said: "In this connection they [British Counsel] relied upon the cases of Delaware Bay and Chesapeake Bay, over which, it was pointed out, the United States had claimed an successfully maintained jurisdiction, although each exceeded six miles in width at its entrance."

"The answer of the United States to this latter argument, which was undoubtedly difficult to meet, was that at the time the claim was made a condition of belligerency existed which gave to the United States extraordinary rights over those waters; and, that in any event other nations having acquiesced in the claim, the rights of the United States rested upon principle entirely different from the general rule and formed an exception to it."

<sup>8</sup> See award, *Proceedings*, I, 94; also Agreements between States, Sources of Interpretation: The North Atlantic Coast Fisheries Arbitration, *infra*, § 533.

§ 147A. <sup>1</sup> See, Hunter Miller, Chief of the Delegation of the United States, in *Am. J.*, XXII 674, 690. Also, Report of Second Commission, Territorial Sea, M. François, *Rapport au League of Nations Document* — C.230.M.117.1930.V., p. 5.

<sup>2</sup> Cf. The Theory of *Uti Possidetis* in Central and South American Boundary Dispute *infra*, § 151A.

favorable to a ten-mile entrance width of territorial bays not within the reserved class.<sup>3</sup> The highly technical problem of determining with exactness whether a particular body of water was to be deemed to be a bay,<sup>4</sup> and the basis of its measurement was sought to be solved by necessarily elaborate proposals emanating from both the United States and France. That of the former was in the following form:

In the case of a bay or estuary the coasts of which belong to a single State, or to two or more States which have agreed upon a division of the waters thereof, the determination of the status of the waters of the bay or estuary shall be made in the following manner:

(1) On a chart or map a straight line not to exceed ten nautical miles in

<sup>3</sup> See Report of Sub-Committee No. II, Annex II to Report of the Second Commission, Territorial Sea, League of Nations Document — C.230.M.177.1930.V. pp. 11–12.

Also Jesse S. Reeves, in *Am. J.*, XXIV, 486, 497; and Manley O. Hudson, in *id.*, 447, 457.

In support generally of the ten-mile entrance limit with varying reservations to cover the cases of "historic bays," see Art. 4 of Draft Convention drawn up by Dr. Schücking, *Rapporteur* of the Committee of Experts for the Progressive Codification of International Law, League of Nations Document — C.196.M.70.1927.V. p. 72, also contained in League of Nations Document — C.74.M.39.1929.V. p. 193; Art. 2 of proposed Draft Convention in P. C. Jessup's *Law of Territorial Waters*, 481; Art. 3 of the Project of the Institute of International Law Relative to the Territorial Sea in Time of Peace, 1928, *Annuaire*, XXXIV, 755; Articles 5 and 12 of Harvard Draft Convention on the Law of Territorial Waters of 1929, *Am. J.*, XXIII, *Special Supplement* (April, 1929), 243–244; Observations of Preparatory Committee for The Hague Codification Conference of 1930, League of Nations, Bases of Discussion, II, Territorial Waters — C.74.M.39.V.1929. pp. 44–45.

According to Art. III of the Rules for the Definition and Régime of the Territorial Sea adopted by the Institute of International Law, in 1894: "For bays, the territorial sea follows the sinuities of the coast, except that it is measured from a straight line drawn across the bay at the place nearest the opening toward the sea where the distance between the two sides of the bay is twelve marine miles in width, unless a continued usage of long standing has sanctioned a greater breadth." *Annuaire*, XIII, 329, J. B. Scott, Resolutions, 114. See, also, 25th Report, Int. Law Association, Budapest Conference (1908), 547.

Art. I of the Fishery Convention between Great Britain and France, of 1867, reserves an exclusive right of fishing within bays not exceeding ten miles in width, measured from headland to headland. *Nouv. Rec. Gén.*, XX, 466. The North Sea Convention of May 6, 1882, to which Great Britain, Germany, Belgium, Denmark, France and Holland were signatories, reserving exclusive fishing rights within three miles from the low-water mark, provides in Art. II, "as to bays, the distance of three miles shall be measured in a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles." (*Nouv. Rec. Gén.*, 2 Sér., IX, 556, 557.) Section I, Art. II, of the treaty between Spain and Portugal of Oct. 2, 1885, reserves exclusive fishery rights in bays the openings of which do not exceed twelve geographical miles. *Nouv. Rec. Gén.*, 2 Sér., XIV, 77, 78. See, also, A. H. Charteris, 23d Report, Int. Law Association, Berlin Conference, 1906, 115–119.

According to Art. I of the protocol annexed to the Russo-Japanese Fisheries Convention of July 15 (28), 1907, granting to Japanese subjects fishing rights along the coast of the Russian possessions in the seas of Japan, Okhotsk and Bering, such privileges were expressly excluded in specified bays and inlets. It was provided, for example, that between certain points in the Sea of Okhotsk, with the exception of Penjinsky Gulf, the reservations should apply to "Bays which cut into the continent a distance three times as great as the width of their entrance." It was also agreed that for strategical reasons, all foreigners should be prohibited from fishing within the "territorial waters" of De Castries Bay, St. Olga Bay, Peter the Great Bay "from Cape Povorotony to Cape Gamov, including the islands within this bay." *Am. J.*, II, Supplement, 274, 279–280. The distance in an air line between those Capes "as measured on Hydrographic Office Chart No. 1780, is 81.45 nautical miles." (Mr. Tittmann, Supt. Coast and Geodetic Survey, to the author, June 18, 1909.)

<sup>4</sup> "There is as yet, however, no established rule by which to determine what bodies of water 'have the configuration and characteristics of a bay.' It is admitted that when an indentation of the coast is regarded as a *bona fide* bay, it ceases to have the configuration of a bay at its outer headlands." (S. Whittemore Boggs, Geographer, Department of State, "Delimitation of the Territorial Sea," *Am. J.*, XXIV, 541, 549.)



length shall be drawn across the bay or estuary as follows: The line shall be drawn between two headlands or pronounced convexities on the coast which embrace the pronounced indentation or concavity comprising the bay or estuary if the distance between the two headlands does not exceed ten nautical miles; otherwise the line shall be drawn through the point nearest to the entrance at which the width does not exceed ten nautical miles;

(2) The envelope of all arcs of circles having a radius equal to one-fourth the length of the straight line across the bay or estuary shall then be drawn from all points on the coast of the mainland (at whatever line of sealevel is adopted on the charts of the coastal State) but such arcs of circles shall not be drawn around islands in connection with the process which is next described;

(3) If the area enclosed within the straight line and the envelope of the arcs of circles exceeds the area of a semi-circle whose diameter is equal to one-half the length of the straight line across the bay or estuary, the waters of the bay or estuary inside of the straight line shall be regarded, for the purposes of this convention, as interior waters; otherwise they shall not be so regarded.

When the determination of the status of the waters of a bay or estuary has been made in the manner described above, the delimitation of the territorial waters shall be made as follows:

(1) If the waters of the bay or estuary are found to be interior waters, the straight line across the entrance or across the bay or estuary shall be regarded as the boundary between interior waters and territorial waters, and the three-mile belt of territorial waters shall be measured outward from that line in the same manner as if it were a portion of the coast;

(2) Otherwise the belt of territorial waters shall be measured outward from all points on the coast line;

(3) In either case arcs of circles of three mile radius shall be drawn around the coasts of islands (if there be any) in accordance with provisions for delimiting territorial waters around islands.<sup>5</sup>

The American proposal avoided the definition of such words as "bay" and "estuary" in a geographical sense. It simply undertook, according to its author, "to determine when an indentation of the coast is sufficiently great to regard the waters within the indentation as national waters, which are to be separated from territorial waters by a straight line drawn across the entrance."<sup>6</sup> Despite

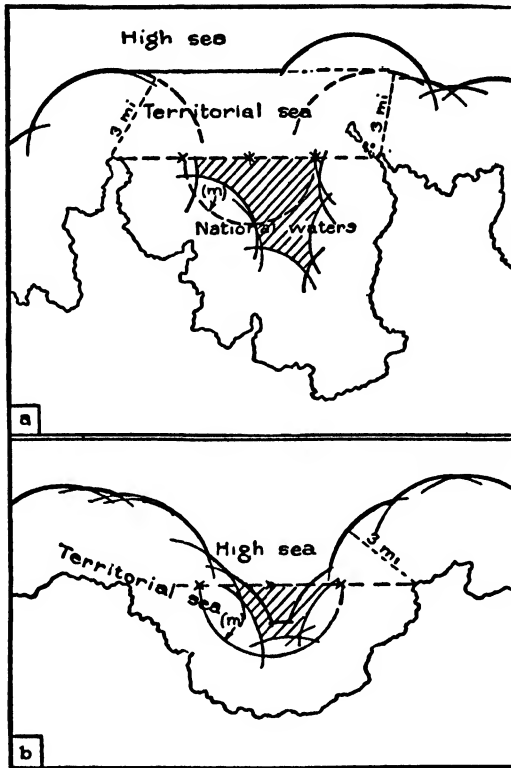
<sup>5</sup> Report of Second Commission, Territorial Sea, Appendix A to Annex II, League of Nations Document — C.230.M.117.1930.V, p. 12.

The Compromise-Proposal of the French Delegation, constituting Appendix B to Annex II of the foregoing document was in the following form:

"In the case of indentations where there is only one Coastal State, the breadth of the territorial sea may be measured from a straight line drawn across the opening of the indentation provided that the length of this line does not exceed ten miles and that the indentation may properly be termed a bay.

"In order that an indentation may be properly termed a bay, the area comprised between the curve of the coast and its chord must be equal to or greater than the area of the segment of the circle the centre of which is situated on the perpendicular to the chord in its middle, at a distance from the chord equal to one half of the length of this chord and of which the radius is equal to the distance which separates this point from one end of the curve." (*Id.*)

<sup>6</sup> S. Whittemore Boggs, Geographer of the Department of State, "Delimitation of the Territorial Sea," *Am. J.*, XXIV, 541, 550. At page 547, the same writer offers the diagrams and explanations hereinbelow set forth as illustrative of the American proposal.



The American proposal regarding bays and estuaries.

(a) Since the area between the envelopes of the arcs of circles and the straight headland-to-headland line (shaded in the diagram) exceeds the area of the semi-circle (marked "m"), the waters of the bay are interior or national waters, and the straight line becomes the landward boundary of the territorial sea.

(b) Since the area between the envelopes of the arcs of circles and the straight headland-to-headland line (shaded) is less than the area of the semi-circle (marked "m"), the waters of the bay are not interior waters, and the territorial sea is delimited by means of the envelope of the arcs of circles of three-mile radius drawn from all points on the coast.

the absence of formal agreement, the proposal constituted a scientific scheme of delimitation worthy of the faithful and unbiased consideration of all maritime States.

(v)

§ 148. **Some Conclusions.** States have been prone to claim as a part of their respective territories water areas indenting their coasts, and roughly described as bays, whenever a sense of need or of great national interest has been apparent. In the course of so doing they have frequently not been deterred by the extent of the distance between the headlands marking the entrance to such waters. The tendency to be impervious to such a consideration has been conspicuous in the case of some bays of wide area when surrounded or largely enveloped by the land belonging to the claimant State. In such cases other mari-

time States have lodged few objections. The geographical relationship between the littoral State and the particular bay has frequently lulled opposition to the claim. Practice has generally spelled approval rather than disapproval.<sup>1</sup> As has been observed above,<sup>2</sup> numerous bays of large area, such as Chesapeake Bay, have of recent years been referred to or described as "historic bays," by way of excuse for the common acknowledgment that their waters are territorial. Yet the yielding of acquiescence, regardless of the description applied to the results of it, strengthens the conclusion that a State does not necessarily violate an injunction of international law when, even at the present time, it begins to cause a bay of broad dimensions to become what may be duly called a "historic bay," provided nature has made it part and parcel of the country into which it has been thrust. No rule of that law is as yet regarded as laying down exact linear tests of the freedom of the littoral State, or a geometrical scheme of determining when a particular indentation is to be deemed a bay.

The present state of the law appears to be at variance with what a majority of maritime powers would welcome as the basis of a multi-partite arrangement. Possibly this circumstance is prophetic of the ultimate conclusion of a general agreement that shall serve to amend the customary law. Such an achievement must, however, depend upon and await the growth of an opinion that the latitude now asserted and enjoyed by the individual maritime State is sufficiently detrimental to the welfare of the international society to demand the imposition of a fresh restraint. What, however, still weighs the scale in favor of the freedom of the individual State is the circumstance that its assertions of dominion do not necessarily extend over areas that in a geographical sense constitute a part of the high sea, and are chiefly confined to acts which in their application are primarily local and involve little interference with navigation between foreign States generally.

(f)

§ 149. **Interior Waters. Lakes and Enclosed Seas.** The term inland waters may be fairly used to refer to those waters within the territory of a State which do not in themselves constitute a frontier on the ocean coast such as the marginal sea, and which do not border upon or mark an international boundary.<sup>1</sup> They are territorial, in the sense that they belong to the State of whose domain they are geographically a part.<sup>2</sup> They assume various forms, such as waters inside

§ 148.<sup>1</sup> What may in fact encourage and produce foreign objection is the form of the water indentation and its relationship to the adjacent land. If, in a geographical sense, the former appears to belong to the high sea as much as to the land, there may be reason in a particular case to charge that the littoral State in claiming the waters as its own is extending the limits of its marginal sea in the face of the three-mile rule.

Also, Christopher B. V. Meyer, *Extent of Jurisdiction in Coastal Waters*, Leiden, 1937, 518-519.

<sup>2</sup> See Bays, *The General Principle*, *supra*, § 146.

§ 149.<sup>1</sup> "The inland waters of a State are the waters inside of its marginal sea, as well as the waters within its land territory." (Harvard Draft Convention on Territorial Waters of 1929, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 243, also comment of Reporter, Prof. G. G. Wilson, *id.*, 262-265.) Also G. Gidel, *Le Droit International Public de la Mer*, II, 9-37.

<sup>2</sup> It should be observed in this connection that the phrase "inland waters" may be employed in the domestic legislation of a State in a broader or different sense than that attached to it

of, and possibly connected with the marginal sea, or the interior waters of bays.<sup>3</sup> They obviously embrace lakes or landlocked seas lying wholly within the territory of a State. These also are acknowledged to be a part of the national domain.<sup>4</sup> This is true whether the water area is what has been described as an interior sea, such as the Dead Sea or Lake Winnipeg, or whether like Lake Michigan, it forms an inner link in a chain of navigable waterways communicating with the sea.<sup>5</sup> The circumstance that the water area is completely within the territory of a single State suffices to justify the assertion that it is to be deemed a part thereof.

When a lake or interior sea is surrounded by the territories of two or more States, such as Lake Constance, although not constituting a part of the inland waters of any one of them, it may, nevertheless, be regarded as belonging to them in proportional parts, if those States are so agreed, and provided no well-defined and grave international interest supervenes.<sup>6</sup> The Great Lakes of Ontario, Erie, Huron and Superior, and their water communications constituting the boundary between the United States and Canada, are wholly territorial. The line of demarcation passes through the middle of the area. Declared Mr. Uhl, Acting Secretary of State, in 1894:

By the treaty of peace of 1783 the lakes were divided between the contracting parties and the boundary fixed as running through the middle of the lakes and of the waterways connecting them. The United States and Great Britain thus shared thenceforth, to the exclusion of any claim whatsoever of a third nation, the territorial sovereignty over the lake waters which had theretofore been wholly British, and it was competent for the two countries to treat with each other in respect to their relative rights in those lakes without encroaching on any possible right of another country.<sup>7</sup>

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in the text; also that the statutory law may, in relation to the matter of navigation, make special provisions for various and differing sets or classes of inland waters. Compare, for example, the Act of June 7, 1897 (30 Stat. 96), embracing regulations for preventing collisions "by all vessels navigating all harbors, rivers, and inland waters of the United States, except the Great Lakes and their connecting and tributary waters as far east as Montreal and the Red River of the North and rivers emptying into the Gulf of Mexico and their tributaries," with the Act of Feb. 8, 1895 (28 Stat. 645), embracing rules for preventing collisions to be "followed in the navigation of all public and private vessels of the United States upon the Great Lakes and their connecting and tributary waters as far east as Montreal."

See also, the definition of "inland waters" in § 4 of the Act of Feb. 19, 1895, Chap. 102, 28 Stat. 672, and in this connection, *United States v. Newark Meadows Improvement Co.*, 173 Fed. 426.

See Convention on the Measurement of Vessels Employed in Inland Navigation, of Nov. 27, 1925, League of Nations document — C.L.136.1926.VIII.Annex; Hudson, *Int. Legislation*, No. 151, with editorial note; also convention of Feb. 4, 1898, *Brit. and For. St. Pap.* XC, 303.

<sup>3</sup> See, Sir Cecil Hurst, *The Territoriality of Bays*, *Brit. Y.B.*, 1922–23, 42.

<sup>4</sup> Rivier, I, 143–145, translated in Moore, *Dig.*, I, 669, and writers there cited; Lauterpacht's 5 ed., of Oppenheim, I, §§ 179–181; Fauchille, 8 ed., §§ 495–505. Also *Alsos v. Kendall*, 111 Oregon 359, 369.

<sup>5</sup> It is not believed that the existence or nature of a communication with the ocean has any bearing upon the territorial character of such bodies of water.

<sup>6</sup> Rivier, I, 143; Lauterpacht's 5 ed. of Oppenheim, I, § 179.

<sup>7</sup> Communication to Messrs. Laughlin, Ewell and Houpt, May 23, 1894, 197 Dom. Let. 118, Moore, *Dig.*, I, 672, 673.

See Art. II, treaty between the United States and Great Britain, Sept. 3, 1783, Malloy's

It must be clear that the Supreme Court of the United States in concluding in 1893, that the term "high seas," as used in a section of the Revised Statutes to denote places within which the commission of specified acts on a vessel was rendered criminal, embraced the unenclosed waters of the Great Lakes between which the Detroit River was a connecting stream, did not intimate that those waters were not territorial.<sup>8</sup>

A special situation arises where a large inland sea, such as the Black Sea, having, nevertheless, a connection with the ocean, is surrounded by the territories of two or more States, and finds an outlet to the ocean through the territorial waters of one of them. In this particular case the magnitude of the water area involved, its connection with the ocean, its importance as a means of access to certain countries adjacent to it, and the resulting general interest of maritime powers that it be dealt with as the high seas, have combined to justify the insistent demand that the Black Sea be not partitioned among the surrounding States and regarded as territorial. Deemed, therefore, non-territorial, the right of Turkey to control the sole access thereto through the Bosphorus and the Dardanelles was, even before World War I, looked upon as proportionally limited.<sup>9</sup>

(g)

§ 149A. **Waters Around Islands.** The Department of State has expressed the view that "any naturally formed part of the earth's surface, projecting above the level of the sea at low tide and surrounded by water at low tide, should be considered an island;"<sup>1</sup> and that "a submerged shoal could not be considered

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Treaties, I, 587. Concerning the demarcation of the water boundary in the Great Lakes under Arts. VI and VII of the Treaty of Ghent, see Moore, Arbitrations, I, Chaps. V and VI. See, also, treaty between the United States and Great Britain for the more complete definition and demarcation of the international boundary between the United States and the Dominion of Canada, April 11, 1908, Malloy's Treaties, I, 815.

According to the "Preliminary Article" of the Convention Concerning the Boundary Waters between the United States and Canada, of Jan. 11, 1909, U. S. Treaty Vol. III, 2607, 2608: "Boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."

<sup>8</sup> *United States v. Rodgers*, 150 U. S. 249; also dissenting opinions of Mr. Justice Gray, *id.*, 266, and of Mr. Justice Brown, *id.*, 279. Cf. also *Illinois Central Railroad Co. v. Illinois*, 146 U. S. 387, 436-437. Also in this connection, see H. E. Hunt, "How the Great Lakes Became 'High Seas,' and Their Status Viewed from the Standpoint of International Law," *Am. J.*, IV, 285, 300-301.

See decision of the German Criminal Court of Appeals (Division 1), Sept. 25, 1923, Hackworth, Dig., I, 615, denying the applicability of the doctrine of condominium to a portion of Lake Constance, and upholding the contention that the median line of the lake should form the boundary.

<sup>9</sup> Woolsey, 6 ed., 78-79; Dana's Wheaton, § 182; Lauterpacht's 5 ed. of Oppenheim, I, §§ 181 and 252; Fauchille, 8 ed., §§ 499-503; Arts. I, II and III of Treaty of London, of March 13, 1871, *Nouv. Rec. Gén.*, XVIII, 303, 305, annexing thereto Arts. XI, XIII, and XIV of the Treaty of Paris, of March 30, 1856, *Nouv. Rec. Gén.*, XV, 770, 775-776.

See Convention on the Régime of the Straits, of July 24, 1923, *Am. J.* XVIII, *Official Documents*, 53, Hudson Int. Legislation, 1028, 28 League of Nations Treaty Series, 115.

See also The Montreux Convention Regarding the Régime of the Straits, *infra*, § 198B.

§ 149A. <sup>1</sup> Letter of March 16, 1929, to the Preparatory Committee for The Hague Codification Conference, Bases of Discussion, Territorial Waters, II, League of Nations Document — C.74.M.39.1929.V., p. 145.

an island.”<sup>2</sup> The erection of a lighthouse on a submerged rock in the high sea does not confer upon the State that erects and maintains it the privilege of making valid claim to the surrounding waters as territorial.<sup>3</sup> Such was the conclusion of the United States Naval War College in 1932.<sup>4</sup>

An Island in the high sea, such as Porto Rico or Crete, has its own territorial waters or marginal sea, measured three marine miles outward therefrom in the same manner as from the mainland.<sup>5</sup> Where, however, a group of islands forms a fringe or cluster along the ocean front of a maritime State it may be doubted whether there is evidence of any rule of international law that obliges such State invariably to limit or measure its claim to the waters around them by the exact distances which separate the several units. Moreover, if, in a particular case, the geographical relationship of the entire series to the neighboring mainland coast causes the islands to be a natural frontier or barrier between itself and the ocean, it is believed that that circumstance may not unreasonably be made the basis of a broad territorial claim to waters that connect them with each other.<sup>6</sup>

If The Hague Conference for the Codification of International Law of 1930, revealed the lack of accord among interested powers, it served to bring home to them a fresh understanding of the fact that if geographical considerations have long been decisive of the nature and development of State practices, rules designed to mirror what they ordain and to merit general approval must rest upon the same foundation.<sup>7</sup> It should be observed that at that Conference an

<sup>2</sup> *Id.*, citing *Soult v. L'Africaine*, 22 Fed. Cases, 13179. The Department added that a shallow submerged reef off the coast of Florida on which a beacon was built could not be considered territory of the United States, citing, *United States v. Henning*, 7 Fed. (2d) 488.

See also, *The Anna*, 5 C. Rob. 373, in which Sir William Scott expressed the opinion that alluvial islands off the mouths of the Mississippi, of insufficient consistency to support life, uninhabited and resorted to only for shooting and taking birds' nests, were a part of the territory of the United States. "Whether they are composed of earth or solid rock, will not," he declared, "vary the right of dominion, for the right of dominion does not depend upon the texture of the soil." (385d)

*Cf.* Observations and Basis of Discussion No. 14, from the Preparatory Committee for The Hague Conference for the Codification of International Law, Bases of Discussion, II, Territorial Waters, League of Nations Document—C.74.M.39.1929.V., p. 54. According to the latter: "In order that an island may have its own territorial waters, it is necessary that it should be permanently above the level of high tide. In order that an island lying within the territorial waters of another island or of the mainland may be taken into account in determining the belt of such territorial waters, it is sufficient for the island to be above water at low tide."

<sup>3</sup> See, argument of Sir Charles Russell (subsequently Lord Chief Justice of England), British Counsel in the Fur Seal Arbitration, Moore, Arbitrations, I, 900-901.

<sup>4</sup> Naval War College, Int. Law Situations, 1932, 53, 54.

<sup>5</sup> "The marginal sea around an island, or around land exposed only at some stage of the tide, is measured outward three miles therefrom in the same manner as from the mainland." (Art. 7, Harvard Draft Convention on Territorial Waters, *Am. J.*, XIII, *Special Supplement*, April, 1929, 243. See also Comment, *id.*, 275-280, and documents there quoted.)

See also *ex parte* Marincovich, 192 Pac. Rep. 156, 158.

<sup>6</sup> See, in this connection, Mr. Seward, Secy. of State, to Mr. Tassara, Spanish Minister, Aug. 10, 1863, MS. Notes to Spanish Legation, VII, 407, Moore, Dig., I, 711; Mr. Fish, Secy. of State, to Mr. Borie, Secy. of Navy, May 18, 1869, 81 MS. Dom. Let. 124, Moore, Dig., I, 713; Mr. Bayard, Secy. of State, to Mr. Manning, Secy. of the Treasury, May 28, 1886, Moore, Dig., I, 720. The texts of these communications were quoted in the letter of the Department of State to the Preparatory Committee for The Hague Conference for the Codification of International Law, of March 16, 1929, League of Nations, Bases of Discussion, II, Territorial Waters, League of Nations Document—C.74.M.39.1929.V., p. 143.

<sup>7</sup> "While it was admitted that 'every island has its own territorial sea' no agreement was reached as to a method of determining the nature of the waters in and around a group of

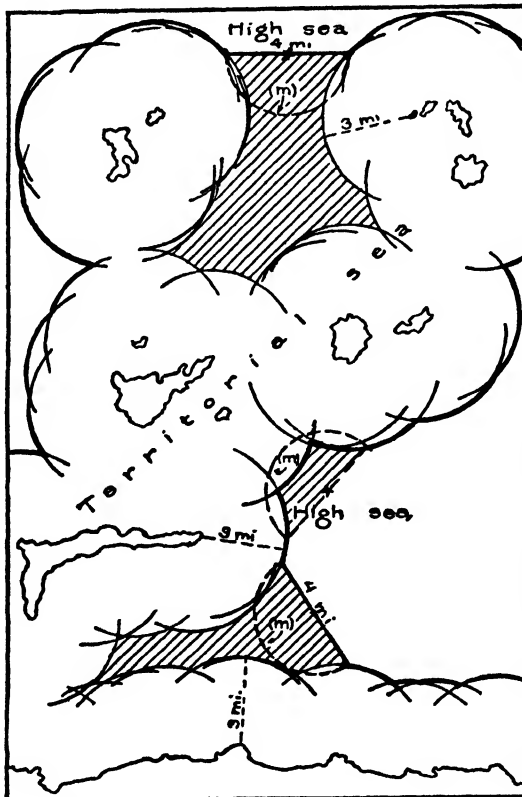
American proposal was offered for the elimination of objectionable pockets of the high seas "occasioned by the presence of one or more islands near the mainland, or by any number of islands at any distance from the mainland."<sup>8</sup> According to its author:

The real reason for making a special case of islands is that the three-mile envelope leaves undesirable pockets. It is the American viewpoint that the only practicable way to eliminate these pockets is to consider the pockets as pockets rather than to consider the islands as islands. It is believed that the general proposal for the assimilation of anomalous pockets of high sea by a geometrical means avoids a definition of 'a group of islands,' just as the geometrical solution of the proposal relating to bays avoids the definition of 'bays,' and that in both cases the desired results are obtained in an entirely satisfactory manner.<sup>9</sup>

islands or archipelago." (Jesse S. Reeves, *The Codification of the Law of Territorial Waters*, *Am. J.*, XXIV, 486, 497-498.)

<sup>8</sup> S. Whittemore Boggs, Geographer, Department of State, "Delimitation of the Territorial Sea," *Am. J.*, XXIV, 541, 552.

<sup>9</sup> *Id.*, 554. The subjoined diagram and explanatory statement, *id.*, 547, illustrate the proposal.



The American proposal for the elimination of objectionable pockets of the high sea. The envelope of the arcs of circles of three-mile radius is first drawn from all coasts, both

It is believed that general acceptance of this proposal may be expected to be conditioned upon an understanding that it should not be so applied as to deprive particular maritime States of island-surrounding waters which they have long regarded as territorial, and which have been generally acknowledged to belong to the powers that claim them as their own.<sup>10</sup>

(h)

§ 150. **Straits.** There are straits and straits. Water areas so generally described because they connect high seas or parts thereof, greatly differ both in their geographical relationship to the lands which they separate, and in their economic importance to the international society. Schemes that are unobservant of, or unresponsive to, such considerations, fail also to take cognizance of what have proved to be decisive factors in the practice of nations.

Where a strait is a channel separating an elongated island from the mainland to which it is appurtenant, and links together portions of the same sea, and especially where the separated lands belong to the same State, the waterway may not be deemed to be a necessary channel for international commerce or intercourse. When under such conditions the sovereign of those lands has made claim to the strait as belonging to itself, it has paid scant respect for the precise breadth of the water area at any point. Nor have foreign States betrayed a sufficient interest to raise objection. The conduct of the claimant State has not been deemed to be illegal. The claim of the United States, and of Great Britain before it, to the waters of Long Island Sound is illustrative.<sup>1</sup> There are other instances where the same underlying considerations have served to yield to the territorial sovereign great latitude.<sup>2</sup> If there have been "historic bays" there have been also "historic straits,"<sup>3</sup> and the fact of their existence must challenge the soundness of the contention that international law has, at least in

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mainland and islands. Where there is a pronounced pocket of high sea which may be wholly enclosed by drawing a single straight line not more than four miles long, such a line is drawn where the entrance first narrows to four miles. If the area between the straight line and the "envelope" (the three shaded areas in the diagram) exceeds the area of a semi-circle drawn on the four-mile line (as in the upper and lower shaded areas), the pocket of high sea *may* be assimilated to the territorial sea. If the area is less than that of the semi-circle (as in the middle shaded area) the pocket remains a portion of the high sea.

<sup>10</sup> A major difficulty in the codification of the law of territorial waters is the circumstance that practice and rules produced by it have been influenced by geographical and economic, rather than geometrical factors, and that any attempt to apply fresh and different tests of national pretensions must encounter a real obstacle whenever under any circumstance the application of them serves to deprive a State of a water area which by virtue of a different theory it has claimed as its own and over which it has without opposition exercised control.

§ 150.<sup>1</sup> With reference to Long Island Sound, see *Mahler v. Transportation Company*, 35 N. Y. 352; also *Shively v. Bowlby*, 152 U. S. 1; *The J. Duffy*, 14 Fed. (2d) 426.

It will be recalled that the westerly end of Long Island Sound narrows into a thin waterway and finally terminates south of Manhattan Island when it communicates with New York Harbor. The geographical description of the Sound as given in the case of *Mahler v. Transportation Company*, 35 N. Y. 352, leaves something to be desired.

<sup>2</sup> See, for example, Shelikof Strait that separates Kadiak and Afogniak Islands from the Alaskan Peninsula.

<sup>3</sup> See, in this connection, responses of Great Britain and also of Japan, to the Questionnaire



such situations, prescribed a limit of the width of the waters that may be regarded as territorial.

Nor is the foregoing situation necessarily changed when the lands separated by a strait belong to different States, provided the waterway retains substantially the same lack of importance to international intercourse. The United States and Canada exercise dominion over, and regard as territorial, the waters of the Straits of Juan de Fuca, the breadth of which at the narrowest part is about ten marine miles. In the course of a communication of May 22, 1891, to the Secretary of the Treasury, Dr. Wharton, Acting Secretary of State, adverted to the circumstance that these Straits were "not a great natural thoroughfare or channel of navigation in an international sense"; and stated that "in view of their situation, it is not apprehended that any other nation can make reasonable objection to the jurisdiction of the Government of the United States and of Great Britain over their entire area."<sup>4</sup>

When, however, a strait is an essential channel of international intercourse, as, for example, when it connects two open seas, the international society necessarily exhibits deep interest in the free use of that channel.<sup>5</sup> Consequently that society may be said to regard as detrimental to its interests, efforts of the State or States to which belong the bordering lands, to assert dominion over waters of broad and varying width. More is sought by the former than a mere privilege of innocent passage over territorial waters. In the clash of opposing equities those of the bordering States have been, and are, seemingly held in lesser esteem when the area of a strait of the class here discussed exceeds a width of six nautical miles. The proposals offered in codes suggested for general acceptance greatly differ.<sup>6</sup> As a matter of fact, however, straits possessing the greatest international sig-

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of the Preparatory Committee for The Hague Codification Conference, Bases of Discussion, II, Territorial Waters, League of Nations Document—C.74.M.39.1929.V., pp. 57-58.

<sup>4</sup> 182 MS. Dom. Let. 79, *citing* Hall, 3 ed., 140, Moore, Dig., I, 658, quoted by the United States in its response of March 16, 1929, to the Questionnaire of the Preparatory Committee for The Hague Codification Conference, League of Nations Document—C.74.M.39.1929.V., p. 145.

See also Art. IV of treaty relative to the boundary between the United States and Canada, of Feb. 24, 1925, U. S. Treaty Vol. IV, 3988.

<sup>5</sup> "In an instruction dated January 18th, 1879, which Mr. Evarts, Secretary of State sent to the American Legation at Santiago, Chile, with respect to the Straits of Magellan, Mr. Evarts stated: 'The Government of the United States will not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan, and will hold responsible any Government that undertakes, no matter on what pretext, to lay any impost or check on United States commerce through those Straits.' Moore, Dig., I, 664," quoted by the United States in its response of March 16, 1929, to the Questionnaire of the Preparatory Committee for The Hague Codification Conference, Bases of Discussion, II, Territorial Waters, League of Nations Document—C.74.M.39.1929.V., p. 56.

See *The Bangor* (1916) Probate, 181, in which the learned judge (Sir Samuel Evans) adverted with seeming approval to the views of Secretary Evarts quoted above.

See U. S. Naval War College, Int. Law Topics, 1916, 21, where there is given the text of a decree of the Government of Chile, of Dec. 15, 1914, in which it is declared "that the Strait of Magellan as well as the canals of the southern region lie within the international limits of Chile, and consequently form part of the territory of the Republic."

Also J. G. Guerra, "*Les Eaux Territoriales dans les Détroits*," *Rev. Gén.*, XXXI, 232.

See Jules Escudero Guzman, *La Situation Juridique Internationale des Eaux du Détroit de Magellan*, 2 ed., Santiago, Chile, 1930.

<sup>6</sup> See Arts. 8 and 9 of Harvard Draft Convention on the Law of Territorial Waters of 1929, *Am. J.*, XXIII, *Special Supplement* (April, 1929), 243, also Comment (Prof. G. G. Wilson, Reporter), 281-288, and documents there cited.

nificance, such as those of Dover or of Gibraltar, are usually of such great width and so completely dedicated to the common life of the international society that the adjacent or littoral States do not assert that the waters are territorial. The instances are so few where such States press what are regarded as unreasonable claims of sovereignty over straits of real international significance that the need of a restrictive pronouncement is hardly apparent in respect to those which are to be deemed within that category. Moreover, any rule fairly applicable to them is likely to prove to be a harsh restraint when applied to straits that are outside of it, as in situations where the bordering States have in fact hitherto enjoyed great latitude. Respect for the distinction that practice has itself recorded, and for the basis on which it rests, might, it is believed, strengthen the force of any appeal for the general approval of maritime States.

Where a strait or narrow passage connecting two open seas constitutes the boundary between two States, the line of demarcation is said to be "governed by substantially the same principles as that of the limits of territorial jurisdiction in and over rivers."<sup>7</sup> It is believed that the principle of *thalweg* is applicable in such case and that the boundary line should follow the middle of the main channel if there be one.<sup>8</sup>

## (3)

## DETERMINATION OF BOUNDARY DISPUTES

## (a)

§ 151. **In General.** A dispute between States respecting a boundary may be adjusted by any of the means, amicable or otherwise, by which international differences are settled.<sup>1</sup> If diplomacy fails, and recourse be had to arbitration or to the offices of a joint tribunal, the special agreement or *compromis* providing for the employment of such an agency usually defines with exactness the problems involved, and the nature of the duties of the tribunal. Its task is thus

*Cf.* Art. 6 of Draft Convention drawn up by M. Schücking, *Rapporteur*, of the Committee of Experts for the Progressive Codification of International Law, Bases of Discussion, II, Territorial Waters, League of Nations Document — C.74.M.39.1929.V., p. 193.

Also Report of Sub-Committee No. II, Annex II to Report of Second Commission, M. François, *Rapporteur*, Conference for the Codification of International Law, 1930, League of Nations Document — C.230.M.117.1930.V., p. 13; *Am. J.*, XXIV, *Official Documents*, 252.

<sup>7</sup> Statement in Moore, *Dig.*, I, 658.

<sup>8</sup> See *Louisiana v. Mississippi*, 202 U. S. 1, 50; Art X of Rules adopted by the Institute of International Law, March 31, 1894, *Annuaire*, XIII, 330-331, Moore, *Dig.*, I, 659, J. B. Scott, *Resolutions*, 115.

According to Art. 9 of the Harvard Draft Convention on Territorial Waters of 1929: "In the absence of special agreement to the contrary, where two or more States border upon a strait, the territorial waters of each State extend to the middle of the strait in those parts where the width does not exceed six miles." (*Am. J.* XXIII, *Special Supplement*, April, 1929, 243.) *Cf.* Art. 14 of Draft Convention on Law of Maritime Jurisdiction in Time of Peace, from International Law Association, 1926, *Proceedings*, 34th Conference, 103; also Art. 9 of Project No. 10 on "National Domain" from American Institute of International Law, *Am. J.*, XX, *Special Supplement*, July and October, 1926, 318, 319.

§151.<sup>1</sup> See Recourse to Arbitration by the United States, Territorial Differences, *infra*, § 563. See Paul de Lapradelle, *La Frontière*, Paris, 1928. See also documents in Hackworth, *Dig.*, I, § 103.

constantly and necessarily interpretative of the document that registers the design of the States at variance. The tribunal is obliged rigidly to adhere thereto. If those States confer an authority that yields latitude or discretion to the deciding body, it must obviously be exercised in harmony with the evidence that it is probative of their common thought.<sup>2</sup> Whether the States at variance have conferred upon a particular entity authority to insure a definite and binding solution of their controversy may itself be a subject of dispute.<sup>3</sup>

The agreement providing for an adjudication may announce certain principles of international law, or certain tests which the tribunal is called upon to respect and utilize.<sup>4</sup> Thus the treaty between Guatemala and Honduras of July 16, 1930, for the arbitration of the long-pending boundary dispute between those States declared that "the only juridical line" which could be established between their respective territories was that of the "*Uti Possidetis* of 1821," and provided that the arbitral tribunal "shall determine this line."<sup>5</sup> "In view of the inadequacy of the topographical data with respect to certain portions of the territory in dispute," that tribunal on June 29, 1932, in harmony with Article XIII of the Treaty, "and in order to accomplish its purposes," directed that arrangements be made for the submission by the litigating States of photographs and map of an aerial survey embracing specified areas, under the direction and supervision of the secretary of the tribunal. The order was duly complied with.<sup>6</sup>

As in other classes of arbitral cases, and subject to like conditions, an agreement to adjust a controversy relating to a boundary by reference to an international tribunal, serves to impose upon the contracting parties an obligation to abide by the award.

Even when there is no disagreement as to the principles governing the course of a boundary, or after a judicial tribunal has indicated how it should be drawn, the actual demarcation or delimitation of the line may give rise to special technical problems. For their solution it is not uncommon to arrange by convention for the appointment of experts to mark the boundary according to given directions, and to agree that the line thus established shall be deemed to be the true

<sup>2</sup> See letter of President Wilson, to the President of the Supreme Council of the Allied Powers, Nov. 22, 1920, explanatory of what he took into account in arbitrating the question of the boundaries between Turkey and Armenia pursuant to Part III, Section 6, Article 89, of the Treaty of Sévres, For. Rel. 1920, Vol. III, 790; also decision of the President as arbitrator, of like date, *id.*, 795.

<sup>3</sup> The Permanent Court of International Justice, in an Advisory Opinion of Nov. 21, 1925, in the case concerning the Boundary between Turkey and Iraq, announced the view "that the 'decision to be taken' by the Council of the League of Nations in virtue of Article 3, paragraph 2, of the Treaty of Lausanne, will be binding on the Parties and will constitute a definitive determination of the frontier between Turkey and Iraq." (Publications, Permanent Court of International Justice, Series B, No. 12, 33.)

<sup>4</sup> See, for example, convention of Jan. 24, 1903, between the United States and Great Britain for the settlement of the Alaskan Boundary Dispute, For. Rel. 1903, 488, Malloy's Treaties, I, 787; also Art. IV of Convention of Feb. 2, 1897, between Great Britain and Venezuela for the settlement of the British Guiana-Venezuelan Boundary Dispute, Brit. and For. St. Pap., LXXXIX, 57; Moore, Dig., I, 297.

<sup>5</sup> Art. V.

<sup>6</sup> Cf. provisions of the arbitration treaties between Colombia and Venezuela, of Sept. 14, 1881, Brit. and For. St. Pap., LXXIII, 1107; Bolivia and Peru, of Dec. 30, 1902, *Am. J.*, III, *Supplement*, 383; and Honduras and Nicaragua, of Oct. 7, 1894, *Nouv. Rec. Gén.*, 2 Sér., XXXV, 563.

<sup>6</sup> See Opinion and Award, 70.

boundary.<sup>7</sup> Provision is sometimes made that in case such experts disagree, separate reports shall be made to the contracting States, which shall thereupon take further steps to reach an agreement.<sup>8</sup>

The decisions of domestic tribunals as to the extent of the national domain cannot affect the adverse claims of a foreign State; and they may also serve seriously to embarrass the proper department of their own Government in the assertion of rights of sovereignty. Matters of such a character are, therefore, regarded as raising questions essentially political rather than judicial. Hence the decisions of the political department of a State are, in the case of the United States, deemed to be binding upon the courts.<sup>9</sup> Of the extent of the territorial limits announced by the former, the latter take judicial notice.<sup>10</sup> This is true whether a boundary is the subject of international controversy, or a question arises as to what State or authority therein is to be regarded as possessing rights of sovereignty over any particular geographical area.<sup>11</sup> The decisions of

<sup>7</sup> See, for example, convention between the United States and Mexico, of July 29, 1882, providing for an international commission to re-locate the international boundary in certain places, Malloy's Treaties, I, 1141; also convention between the United States and Great Britain, of April 11, 1908, concerning the Canadian international boundary, *id.*, 815.

See especially, treaty between the United States and Great Britain (in respect of Canada) of Feb. 24, 1925, to define more precisely at certain points and to complete the international boundary between the United States and Canada, U. S. Treaty Series, No. 720. *Cf.* treaty with Great Britain of May 21, 1910, concerning the boundary line in Passamaquoddy Bay, U. S. Treaty Vol. III, 2616.

See Art. 35 of treaty of peace with Germany of June 28, 1919, relative to the settlement of the new frontier line between Belgium and Germany, U. S. Treaty Vol. III, 3350.

See *Informe Detallado de la Comisión Técnica de Demarcación de la Frontera entre Guatemala y Honduras, rendido a los gobiernos de Guatemala y Honduras y al presidente del tribunal de arbitraje, de conformidad con el artículo IX de la convención adicional al tratado de arbitraje respectivo, celebrada en Washington, D. C., E. U. de A., el 16 de Julio de 1930*, Washington, D. C., 1937; also *Mapas que Acompañan al Informe Detallado de la Comisión Técnica de Demarcación de la Frontera entre Guatemala y Honduras*, 1936.

<sup>8</sup> See, for example, Art. IX of convention between the United States and Great Britain, of April 11, 1908, for the more complete definition and demarcation of the boundary between the United States and the Dominion of Canada, Malloy's Treaties, I, 826.

<sup>9</sup> In *Jones v. United States*, 137 U. S. 202, 212-213, it was declared by Mr. Justice Gray in the course of the opinion of the Court: "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. *Gelston v. Hoyt*, 3 Wheat. 246, 324; *United States v. Palmer*, 3 Wheat. 610; *The Divina Pastora*, 4 Wheat. 52; *Foster v. Neilson*, 2 Pet. 253, 307, 309; *Keane v. McDonough*, 8 Pet. 308; *Garcia v. Lee*, 12 Pet. 511, 520; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415; *United States v. Yorba*, 1 Wall. 412, 423; *United States v. Lynde*, 11 Wall. 632, 638. It is equally well settled in England. *The Pelican*, *Edw. Adm. appx. D*; *Taylor v. Barclay*, 2 Sim. 213; *Emperor of Austria v. Day*, 3 DeG., F. & J. 217, 221, 233; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489, 497; *Republic of Peru v. Dreyfus*, 38 Ch. D. 248, 356, 359." *Cf.*, also, *Pearcy v. Stranahan*, 205 U. S. 257; *Oetjen v. Central Leather Co.*, 246 U. S. 297.

<sup>10</sup> *Jones v. United States*, 137 U. S. 202, 214, where it was said: "All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings."

<sup>11</sup> *Foster v. Neilson*, 2 Pet. 253, 307; *Garcia v. Lee*, 12 Pet. 511; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420; *United States v. Reynes*, 9 How. 127; *United States v. Texas*, 143 U. S. 621; *Jones v. United States*, 137 U. S. 202, 212-213; *In re Cooper*, 143 U. S. 472, 502-505; *Reg. v. Keyn*, 2 Ex. D. 63; *Pearcy v. Stranahan*, 205 U. S. 257, 265. *Compare* concurring opinion of Mr. Justice White, *id.*, 273.

In the course of the opinion of the Court in *In re Cooper*, *supra*, at 503, it was declared that: "We are not to be understood, however, as under-rating the weight of the argument

the political department in such matters are likewise binding upon the nationals of the same State.<sup>12</sup>

States whose territories are contiguous for a great distance may find it advantageous to agree to make use of permanent joint commissions for the purpose of maintaining the common boundary, whether land or water, and of facilitating the solution of questions necessarily arising in connection therewith. Such has been the experience of the United States growing out of matters relating to both its northern and southern frontiers.<sup>13</sup>

(b)

GEOGRAPHICAL EVIDENCE

(i)

§ 151A. **Maps.**<sup>1</sup> A map is a portrayal of geographical facts, and usually also of political facts associated with them; for the cartographer commonly endeavors to reveal not only what nature has wrought, but also what States have decreed with respect to her works. Thus he commonly depicts not only mountains and rivers and cities and bays, but also the political entity with which they are associated, and the names which they bear. The competence of the cartographer to paint a true picture depends upon his knowledge of the topography of the area with which he deals. If that is meagre, and his suppositions erroneous, he offers doubtful guidance.

that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, 'since we have no more right to decline the jurisdiction which is given than to usurp that which is not given.'

*Cf.*, also, *Cordova v. Grant*, 248 U. S. 413, where the plaintiff's title to land depended on whether the international boundary along the Rio Grande had shifted with the river. The defendant asserted that the United States, although exercising *de facto* jurisdiction over the *locus*, had conceded the boundary to be unsettled, having by treaty agreed to adjust it by an international commission with exclusive jurisdiction to settle it. It was held that this circumstance did not oust the United States District Court of jurisdiction in the particular case, because the United States had rejected the action of the commission under the treaty, and had also waived objections based on comity to the litigation.

<sup>12</sup> *Poole v. Fleeger*, 11 Pet. 185; *Robinson v. Minor*, 10 How. 627; Mr. Buchanan, Secy. of State, to Mr. Calderon de la Barca, July 27, 1847, MS. Notes to Spain, VI, 155, Moore, Dig., I, 746.

From the absence of a delimitation of the boundary between the territories of two States it is not to be concluded that the domain of either fails to extend to what should be deemed to be the appropriate and lawful frontier, or that there should be regarded as existing an intervening area with respect to any part of which neither State may rightfully assume to be and act as the territorial sovereign. See, in this connection, *Deutsche Continental Gas-Gesellschaft v. Etat polonais*, German-Polish Mixed Arbitral Tribunal, 1929, IX T.A.M., 336, 346, translated in part in Hackworth, Dig., I, 726.

<sup>13</sup> See illustrative documents in Hackworth, Dig. I, § 106, concerning boundary questions between the United States and Canada; also documents *id.*, § 107, concerning boundary questions between the United States and Mexico. See in this connection, *Willis v. First Real Estate & Inv. Co.*, 68 F. (2d) 671, 674.

See *Diversion of Waters, Certain Contractual Arrangements of the United States*, *infra*, § 184.

§ 151A. <sup>1</sup> This section reproduces and slightly supplements a contribution by the author on "Maps as Evidence in International Boundary Disputes," published in *Am. J.*, XXVII, 311.

See excellent discussion in Durward V. Sandifer's *Evidence Before International Tribunals*, Chicago, 1939, §§ 49 and 87.

Until the beginning of the nineteenth century cartographers lacked reliable geographical data concerning many features of the western hemisphere. As those features sometimes formed the bases on which States proceeded to act in establishing boundaries, the early map-makers not infrequently proved to be bad blunderers when they undertook to depict the territorial limits of particular countries. Ignorance of essential topographical facts occasionally led the geographers to locate mountains or rivers in fantastic positions that nature herself had avoided, or to assign to them names by which they were not commonly or locally known. Moreover, such portrayals, however erroneous, not infrequently misled equally ill-informed negotiators of treaties of limits, who were inclined to accept the testimony of the cartographer recorded in his map as the basis of the description of a frontier worthy of incorporation in a formal international agreement.<sup>2</sup>

In Central and South America the character of the country and the absence of surveys greatly retarded the acquisition of knowledge of geographical facts requisite for the preparation of accurate or sufficient maps until after the close of the colonial régime in the nineteenth century.<sup>3</sup> Prior to that time the cartog-

<sup>2</sup> The negotiators of the Treaty of Peace between the United States and Great Britain, signed Nov. 30, 1782, and which laid down boundaries, had before them and used a map made in England by one John Mitchell in 1755. The eastern boundary of the United States was declared by the treaty to begin "by a line to be drawn along the middle of the River St. Croix from its mouth in the Bay of Fundy to its source." Miller's Treaties, II, 96, 97. "On Mitchell's map . . . the River St. Croix appears as a stream of considerable volume, having its source in a lake called Kousaki and its mouth at the eastern head of what is now known as Passamaquoddy Bay, though on the map the greater part of the bay has no separate designation and appears merely as a part of the Bay of Fundy. To the westward on the same map is another stream called the "Passamacadie" (Passamaquoddy) emptying into a small bay or estuary of the same name. But, while Mitchell's map was correct in representing two streams of some magnitude as falling into the body of water commonly known as Passamaquoddy Bay, it did not give their true courses or positions, nor was there in the region any river then commonly known as the St. Croix. This name originated with the early French explorers, from whose charts it was transferred to later maps, on which it was given first to one stream and then to another; and in all these maps, including that of Mitchell, the topography of the region was inaccurate." (Moore, Adjudications, I, 6.) Under Article V of the Jay Treaty of Nov. 19, 1794, there was referred to an arbitral commission the question "What river was truly intended under the name of the River St. Croix mentioned in the Treaty of Peace." Miller's Treaties, II, 245, 249. The decision of the Commissioners was given at Providence, Rhode Island, Oct. 25, 1798. A complete account of the arbitration is contained in Moore, Adjudications, Vols. I and II. For the text of the decision see *id.*, II, 373. A copy of Mitchell's Map is contained in a pocket inside the back cover of Miller's Treaties, III.

See also Dr. Karl Sapper, "A Modern Boundary Question," *Geopolitik*, Berlin, November, 1928 (translated and published by the Boundary Commission of Guatemala, 1929), 7-8, in relation to the effect of the reliance of Guatemalan Commissioners upon a map by a German geographer, Herman Au (1876), in negotiating in 1881, a boundary treaty with Mexico.

Article III of the treaty between the United States and Spain of 1819, set forth the boundary line between the two countries west of the Mississippi, describing it in part as "then following the course of the Rio Roxo, westward, to the degree of longitude 100 west from London and 23 from Washington; . . . the whole being as laid down in Melish's Map of the United States, published at Philadelphia, improved to the first of January, 1818." As a matter of fact Melish's map located the 100th meridian far east of the place where the true meridian is, when properly delineated. In an exhaustive opinion interpretative of the treaty, the Supreme Court of the United States, in 1896, concluded that the reference to the 100th meridian was to that meridian astronomically located, and not necessarily to the 100th meridian as located on Melish's map. See *United States v. Texas*, 162 U. S. 1, 37-42.

<sup>3</sup> "When the process of emancipation was complete, not a single boundary line had been actually agreed upon and defined, much less marked. Even where attempts were made to indicate them, the indications were insufficient or defective, owing to want of precise geographical data. The earlier laws, decrees and orders of the former Spanish government, home

raphers could not have been expected to know, still less to portray, the exact frontiers between adjacent provinces that frequently followed natural boundaries. When, therefore, independence dawned in Central America in 1821, no geographer had in fact made reliable portrayal of the precise boundaries of the old Spanish provinces which were to constitute the dividing lines between the territories of the new Republics.

Arbitrators, advocates, and publicists have long perceived and uttered salutar warnings respecting the danger of reliance upon maps of which the authors were themselves ignorant of essential topographical facts, as a means of deriving correct conclusions concerning the exact location of boundaries that might be in dispute.<sup>4</sup> In so doing they have been inclined to accentuate the insufficiency of

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and colonial, were for the same reason necessarily insufficient." (John Bassett Moore, *Memorandum on Uti Possidetis, Costa Rica-Panama Arbitration*, 1913, p. 21.)

"Mexico was comparatively much better known than Central America, and if the early maps of the former country were wrong, those of the latter can only be characterized as geographically absurd. Even in later times, although the coasts have been defined with greater accuracy, the interior geography has remained as obscure as it was a hundred years ago. The latest maps, some of which are sufficiently pretentious, are for the most part conjectural and the geographical features which they indicate are wholly inapplicable to the country which they profess to represent.

"Map-makers, destitute of requisite accurate data, have been obliged to copy the works of their predecessors, and thus contribute to the perpetuation of their errors. That they have done this, with little or no care to test the accuracy of what they have copied, can also be excused on the ground that hitherto these countries have not had sufficient interest to make accuracy a matter of any practical importance." (E. G. Squier, *States of Central America* New York, 1858, preface, xii-xv, quoted by Col. Lawrence Martin, in "The Cartographic Evidence Presented by the Republic of Honduras," Special Annex, *Counter Case of Guatemala* pp. 557-558, Guatemala-Honduras Boundary Arbitration under treaty of July 16, 1930.)

<sup>4</sup> "For Maps are from the Nature of them a very slight Evidence, Geographers often lay them down upon incorrect Surveys, copying the Mistakes of one another; and if the Survey be correct, the Maps taken from them, tho' they may show the true position of a Country the Situation of Islands and Towns, and the Course of Rivers, yet can never determine the Limits of a Territory, which depend entirely upon authentic Proof; and the Proofs in this Case, upon which the Maps should be founded to give them any Weight, would be themselves a better Evidence, and therefore ought to be produced in a Dispute of this Nature, which the Rights of Kingdoms are concern'd." (Memorial of the British Commissioners, Jan. 11, 1751, Dispute Concerning the Limits of Nova Scotia or Acadia, 1750-1751, quoted Document No. 1430, Joint Appendix, Canada-Newfoundland Boundary Dispute in the Labrador Peninsula, Vol. VIII, p. 3755; quoted also by Mr. Ward Chipman in his Supplement Argument in behalf of Great Britain, in the St. Croix River Arbitration, June 30, 1798, *Moore Adjudications*, II, 27.)

See discussions of nature and validity of maps as evidence by Counsel for both Great Britain and the United States in the St. Croix River Arbitration, Moore, *Adjudications*, 282, 289, II, 27, 91, 165, 173, 240-241; Sir Travers Twiss, *The Oregon Question Examined* London, 1846, 288, 305-306; S. Mallet-Prevost, Report on the Cartographical Testimony of Geographers, British Guiana-Venezuelan Arbitration, *Counter-Case of Venezuela* (New York 1898), II, 267-311, Appendix No. 6.

See Alaskan Boundary Tribunal, Proceedings, Senate Doc. No. 162, 58 Cong., 2 Ses. Washington, 1904, especially, Opinion of Lord Alverstone on Second Question, I, 34; Opinion of United States Members on Fifth Question, I, 61; Case of Great Britain, III, 100-10. Oral Argument of Sir Robert Finlay, VI, 293; Oral Argument of Mr. Dickinson (for United States), VII, 764, 771, 781; Oral Argument of Mr. Taylor (for United States), VII, 539.

See Memorandum of Authorities and Opinions on Evidential Value of Maps, Joint Appendix, in the Matter of the Boundary Between the Dominion of Canada and the Colony Newfoundland in the Labrador Peninsula, in the Privy Council, Vol. VIII, Section II 3755-3766.

Also the *King v. Price* (1926) S. C. R. (Can.) 28, quoted in document last cited, 3763; *1 Boundary between Canada and Newfoundland in the Labrador Peninsula*, 1927, 137 L. T. J. 187.

Declared Huber, Sole Arbitrator, in his award of April 4, 1928, in the *Palmas Island Arbitration* between the United States and the Netherlands: "Any maps which do not precise

the older maps made at a time when erroneous suppositions of cartographers touching particular areas were notorious. On the other hand, the negotiators of quite modern conventions for the adjustment of boundary disputes have at times authorized, if not obliged, arbitral tribunals to heed maps, and even venerable ones as sources of light, a circumstance not inexplicable where a treaty has registered a common design to test the pretensions of opposing litigants by reference to events from a remote past,<sup>5</sup> rather than by reference to a situation of fact existing at a particular time.<sup>6</sup>

When a cartographer possessed of requisite geographical data, proceeds to make a map setting out political as well as physical situations, his trustworthiness as a witness must depend upon the impartiality with which he paints his picture. This is bound to be enhanced when, in portraying an area under dispute between two States, he is himself alien to the controversy, and as a neutral, escapes the temptation to accentuate the pretensions of his own country.

A map-maker may be employed to reveal what a particular State such as his own asserts to be the full measure of its territorial domain, regardless of the propriety of the assertion, and without intimation that the portrayal depicts the scope of a claim rather than the position of an accepted boundary. Thus the aggressive territorial aspirations of a State may, in the course of a span of years, be reflected in a progressive series of maps that grimly depict the actual and gradual advance; and the later portrayals may thus differ sharply from the earlier ones, even though no treaty has in fact extended limits or modified a frontier. Such an achievement of the cartographer may, however, in the course of a protracted boundary dispute, prove to be embarrassing, because the chief service of the later maps may be to accentuate the extent of the variation from a line previously accepted as reasonable or sufficient.<sup>7</sup>

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indicate the political subdivisions of territories, and in particular the Island of Palmas (or Miangas) clearly marked as such, must be rejected forthwith, unless they contribute—supposing that they are accurate—to the location of geographical names. Moreover, indications of such a nature are only of value when there is reason to think that the cartographer has not merely referred to already existing maps . . . but that he has based his decision on information carefully collected for the purpose. Above all, then, official or semi-official maps seem capable of fulfilling these conditions, and they would be of special interest in cases where they do not assert the sovereignty of the country of which the Govt. has caused them to be issued.

“If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.

“The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also modern, even official or semi-official maps seem wanting in accuracy.” (Publication, International Bureau of the Permanent Court of Arbitration, 1928, 36–37.) See Counter-Memorandum of Netherland Government, in same Case, 11, and 61, Annex II. Cf. Rejoinder of United States in same Case, 28.

<sup>5</sup> See Art. III, treaty between Bolivia and Peru, of Dec. 30, 1902, *Am. J.*, III, *Supplement*, 383; Art. II, treaty between Honduras and Nicaragua, of Oct. 7, 1894, *Martens, Nouv. Rec. Gén.* 2 *Sér.*, XXXV, 563, and award of King of Spain, Dec. 23, 1906, *Gaceta de Madrid*, No. 359. Also Art. VI of treaty between Guatemala and Honduras, of March 1, 1895, reproduced in treaty between the same Republics in 1914, *Brit. and For. St. Pap.*, CVII, 908.

<sup>6</sup> See, for example, Art. V of treaty between Guatemala and Honduras, of July 16, 1930.

<sup>7</sup> The last two paragraphs of the text constitute a repetition of the substance of pages 342 and 343 (prepared by this author), of the *Counter Case* of Guatemala, in the Guatemala-Honduras Boundary Arbitration, under the treaty of July 16, 1930.



The cartographer officially employed to portray the political limits of a particular State is usually cognizant of their scope. His map may, therefore, be taken as the embodiment of the full extent of its territorial pretensions. Thus a map published by a State, or under its auspices, or purporting to reflect its position, and which it has been disposed to utilize as a means of publicly revealing its position, may be fairly accepted as establishing that when issued it represented what that State deemed the limits of its domain. Moreover, when a series of maps of such a kind, appearing within a few decades, tell the same story and depict substantially the same limits, the conclusion is justified that they mark a frontier beyond which the interested State cannot go without some fresh and definite and respectable process of acquisition, such as one embodied in a treaty of accession. Thus in the course of a boundary arbitration the most obvious function of an official map issued under the auspices of a particular litigant may be that of holding that litigant in leash. Arbitral tribunals have perceived the point, and dwelt upon it. The Judicial Committee of the Privy Council did so, in substance, in the course of its opinion, in 1927, in the Canada-Newfoundland Boundary Dispute in the Labrador Peninsula. After discussing a number of maps it said:

The maps here referred to, even when issued or accepted by departments of the Canadian Government, cannot be treated as admissions binding on that Government; for even if such an admission could be effectively made, the departments concerned are not shown to have had any authority to make it. But the fact that throughout a long series of years, and until the present dispute arose, all the maps issued in Canada either supported or were consistent with the claim now put forward by Newfoundland, is of some value as showing the construction put upon the Orders in Council and statutes by persons of authority and by the general public in the Dominion.<sup>8</sup>

Maps of the present day, prepared by scientific persons possessed of accurate and sufficient topographical data may, and commonly do, serve to portray geographical facts in illuminating fashion. Moreover, their authors, when not asso-

<sup>8</sup> 137 L.T.R. 187, 199.

See also *The King v. Price* (1926) S.C.R. (Can.) 28.

"In all of these maps (issued by Russia, Great Britain, and the United States) the boundary line is drawn around the heads of the inlets. It is not contended that this boundary line was an accurate location of the true boundary. In the absence of knowledge as to the mountains, it appears to have been drawn on the 10 marine-league line, meaning from the heads of the bays and inlets. It precludes no one from saying that the occurrence of a mountain crest within 10 marine leagues of the coast would call for a change of the position of the line. But it is manifest that in every case the line was drawn in accordance with the American theory of what constituted the coast, and not in accordance with the theory now maintained by the Counsel for Great Britain as to what constituted the coast: . . . It is not contended that the action of any one of the officials making these maps worked on an estoppel against this Government, but the uniform and continuous adoption and promulgation for sixty years, by all these officers, of the view that the line went around the head of the Lynn Canal, without a single map, or paper, or word, or act indicating the existence of any different view on the part of their Governments, certainly does lead to a strong inference that their Governments understood the Treaty consistently with the maps, and not inconsistently with them." (Opinion of United States Members, Messrs. Root, Lodge and Turner, on Fifth Question, Alaskan Boundary Tribunal, *Proceedings*, Senate Doc., No. 162, 52 Cong., 2 Sess., I, 61.)

See award of Undén, Arbitrator, Nov. 4, 1931, in Arbitration between Greece and Bulgaria, under Art. 181 of the Treaty of Neuilly, *Am. J.*, XXVIII, 760, 774, 791.

ciated officially or otherwise with adjacent States whose common frontier is in dispute, may be singularly qualified to indicate how impartial observers, neutral to the controversy, suppose that the correct line of demarcation should run. A series of maps of such authorship, in substantial harmony with each other in that regard, serves to reveal the widespread character of the supposition. It may be doubted, however, whether such a series of maps necessarily proves that the boundary which they unite in prescribing is necessarily the correct one, to be accepted as the juridical basis of the proper frontier, especially when they are contradicted by trustworthy evidence of title.<sup>9</sup>

## (ii)

**§ 151B. Official and Other Geographical Statements.** Official geographical statements issued in behalf of a State may, like maps published under its auspices, establish authoritatively what it deems to be the limits of its domain. Such statements may emanate from various sources, and assume differing forms. Thus a constitution may proclaim what are regarded as national boundaries or the basis on which they rest; <sup>1</sup> or a statute may set forth similar declarations.<sup>2</sup> In consequence of both or either, the territorial sovereign may find itself embarrassed if subsequently it claims as its own, as at the time of such declarations, areas extending beyond the limits which it then formally proclaimed to be such.<sup>3</sup>

Again, there may be official geographical statements by the appropriate agencies of a State addressed to scientific or administrative bodies, foreign or domestic; and these statements, in view of the unlikelihood of an under-estimate of national pretensions, may be fairly deemed to be indicative of the extent thereof. It is not suggested, however, that they may not be contradicted by the State in whose behalf they have been issued, which is not necessarily bound by them.

<sup>9</sup> "It is true that maps and their tables of explanatory signs cannot be regarded as conclusive proof, independently of the text of the treaties and decisions; but in the present case they confirm in a singularly convincing manner the conclusions drawn from the documents and from a legal analysis of them, they are certainly not contradicted by any document." (Eighth Advisory Opinion, Polish-Czechoslovakian Frontier, Dec. 6, 1923, Publications, Permanent Court of International Justice, Series B. No. 8, 33.)

In an exchange of notes between representatives of the United States and Mexico, Feb. 1, 1933, simultaneously with the signature of the convention for the Rectification of the Rio Grande, U. S. Treaty Vol. IV, 4462, it was declared: "In proceeding to the signature of the Convention relative to the rectification of the river channel of the Rio Grande in the El Paso-Juarez valley, it is understood by both Governments that the documents annexed to the Convention, as provided in Article VIII thereof, are copies of Minute 129 of July 31, 1930 of the International Boundary Commission, and of the report, maps, plans, and specifications annexed to said Minute, and that in case any difference exists between such copies so annexed to the Convention and their originals, the originals shall control."

§ 151B. <sup>1</sup> See, for example, Art. IV, Constitution of Honduras, of 1839, Brit. and For. St. Pap., XXX, 1192; Art. I, Constitution of Salvador, of 1841, Brit. and For. St. Pap., XXIX, 206.

<sup>2</sup> See, for example, Art. XXXV of the decree of the Constituent Assembly of Guatemala, Oct. 11, 1825, respecting its political Constitution.

<sup>3</sup> A treaty of limits may obviously fulfill a like function. See, for example, the Treaty of Peace between the United States and Great Britain, of Nov. 30, 1782, which purported to lay down boundaries, Miller's Treaties, II, 96; also Arts. 27-30 of the Treaty of Peace of Versailles of June 28, 1919, U. S. Treaty Vol. III, 3346-3349.

Still again, officials in high office may through governmental channels or otherwise, announce what they understand to be the territorial limits of their country. The announcements may be registered in reports or instructions, or historical or geographical writings proclaiming to the world the understandings of the authors. Such utterances do not prevent the State in whose behalf they are made from contradicting them by sufficient evidence. When, however, a series of statements attributable to high officials reflects a united understanding over a long term of years that the territorial limits of their country did not extend beyond, for example, a particular range of mountains, the admission may prove to be an insurmountable obstacle to the recognition of a later claim that ignores the range as the frontier.<sup>4</sup>

The geographical statements of foreign historians and cartographers of high repute, may be as useful as maps attributable to geographers of equal standing. The competence of such authors must be dependent upon personal explorations or close familiarity with reliable data. When fortified by, or based upon, both of these foundations, their statements may shed light which is entitled to a respect that is enhanced by reason of the likelihood of impartiality in the preparation of them.

(c)

§ 151C. **The Doctrine of Uti Possidetis.**<sup>1</sup> When, early in the nineteenth century, Republics came into being in Central and South America that had been fathered and mothered by a single monarchy—that of Spain—and whose territories were bounded by those of neighbors of like descent, a unique factual situation presented itself. Spain, as the sovereign, had deemed itself entitled to all of the territory concerned, despite the failure or inability of its agents or peoples to explore, still less to occupy, large tracts thereof. There was no *res nullius*. When, therefore, the Republics succeeded the Monarchy, they asserted that they fell heir to all that Spain had claimed as her own, that their titles were coextensive with hers, and that no areas remained without a sovereign. When Spain had been the sovereign thereof, difficulties, if any, as between neighboring administrative provinces or units, were of relatively slight concern to the Crown, and a purely domestic matter. No principle of international law, as between rival independent States was involved; and even the encroachments of one province at the expense of another, by virtue of the application of the doctrine of constructive occupation or of any other, were hardly a matter of vital concern, and had no international significance. When, however, the Republics came into being they were immediately confronted with an essentially international problem the solution of which demanded arrangement for the adjustment of their common boundaries. They undertook to seek and make use of one that would be workable.

<sup>4</sup> See Col. Lawrence Martin, "Geographical Descriptions of the Northwestern Boundary of Honduras by Distinguished Hondurans in High Office," constituting Chapter XII, *Counter Case of Guatemala, Guatemala-Honduras Boundary Arbitration*, under treaty of July 16, 1930.

§ 151C.<sup>1</sup> In this section full use is made of a portion of Chapter I, of the *Case of Guatemala in the Guatemala-Honduras Boundary Arbitration*, under treaty of July 16, 1930, prepared by the author with the assistance of Durward V. Sandifer, Esq.

If boundaries were to be fixed between supposedly contiguous countries of common descent from Spain, and which were like her in claiming title to areas that were both unexplored and unoccupied, the obviously equitable method was to accept as a basis of limits what the Spanish sovereign had acknowledged or permitted them to be at the time when it last could fairly claim the territory concerned as its own. This was the course that was generally followed unless, as will be noted, other supervening conditions simultaneous with the revolution, or following close upon its heels, demanded a different one. The new States, to quote an eminent Chilean jurist, "took as the basis of their frontiers, the administrative divisions of the mother country which existed at the date when the movement for independence broke out."<sup>2</sup> That date, in the case of Central America, was commonly regarded as 1821; in the case of South America, it was 1810.<sup>3</sup>

The early constitutions expressed the prevailing thought in simple form. Article V of the Constitution of Venezuela of 1830 announced that: "The territory of Venezuela comprises all that which, previously to the political changes of 1810, was denominated the Captain-Generalship of Venezuela. . . ." <sup>4</sup> The Central American Constitution of 1824 declared in Article V that: "The territory of the Republic is that which formerly composed the Ancient Kingdom of Guatemala, with the exception, for the present, of the Province of Chiapas."<sup>5</sup> According to Article I of the Constitution of Salvador, of 1841: "Salvador is composed of the ancient provinces of San Salvador, Tonsonate, San Vincente, and San Miguel."<sup>6</sup> The early treaties of the new Republics revealed respect for the same idea.<sup>7</sup> Both the constitutions and the treaties thus purported to test the

<sup>2</sup> Alejandro Alvarez, *Consultation pour le Gouvernement de Colombie, Annex I, Affaire de Limites entre la Colombie et le Venezuela, Réplique de la République de Colombie, le 30 juin, 1920, 185.*

<sup>3</sup> To quote the words of two eminent Spanish jurists:

"When the common sovereign power was withdrawn, it became indispensably necessary to agree on a general principle of demarcation, since there was a universal desire to avoid resort to force, and the principle adopted was the colonial *uti possidetis*; that is, the principle involving the preservation of the demarcations under the colonial régimes corresponding to each of the colonial entities that was constituted as a state." (Don Segismundo Moret y Prendergast and Don Vicente Santamaria de Paredes, in Opinion concerning the Question of Boundaries between the Republics of Costa Rica and Panama, Washington, 1913, 164.)

<sup>4</sup> Brit. and For. St. Pap., XVIII, 1119.

<sup>5</sup> *Id.*, XIII, 725.

<sup>6</sup> *Id.*, XXIX, 206.

See also Art. I, Constitution of Mexico of 1824, *id.*, XIII, 695; Art. I, Constitution of Nicaragua of 1858, *id.*, LXXII, 1045; Art. IV, Constitution of Honduras of 1839, *id.*, XXX, 1192; Art. II, Constitution of Ecuador of 1869, *id.*, LIX, 1229.

<sup>7</sup> The Treaty of Alliance between Peru and Chile of April 26, 1823, declared in Art. IX: "For greater security of payment, the Government of Peru pledges in favor of the State of Chile, first the sums received from the cited loans contract of London in favor of Peru, and subsidiarily all the fiscal income of the Peruvian Republic, including all the extent of its territory as it was under the Spanish dominion, comprised in the ancient Viceroyalty of Peru in January 1810." (*Colección de los Tratados, Convenciones del Peru, por Ricardo Aranda*, Lima, 1892, Vol. IV, 3, 5.)

According to Art. V of the Treaty of Union, League and Perpetual Confederation between Colombia and Central America of March 15, 1825: "Both contracting parties mutually guarantee the integrity of their respective territories against the claims and invasions of the subjects of the King of Spain, and his adherents, on the same footing as they existed before the present war of independence." (*Tratados Públicos y Acuerdos Internacionales de Venezuela, Edición Conmemorativa*, Caracas, 1924, Vol. I, 43.)

According to Art. VIII of the Treaty of Union, League and Confederation of Oct. 3, 1823,

limits of territorial rights by reference to a fact rather than to a theory; and that fact was the situation which the Spanish Monarch had himself permitted to exist, or had acknowledged or acquiesced in, during the final days of his régime. There was no challenging of the soundness of that Monarch's concessions or yieldings to particular Provinces at the time when he was last sovereign over the areas concerned; and there was no inquisition into the rightfulness, under the colonial law or régime, of the actual assertions of territorial control made by the Provinces, as such, at that time. There was a mere acceptance of the situation as the Spanish Sovereign had accepted it. Obviously, what he had yielded to a particular Province was a matter of fact; and if the former had permitted the latter to treat as its own areas which it could not completely occupy, that again was a matter of fact. Doubtless, he had oftentimes tolerated or permitted a particular Province to encroach upon the territory of another adjacent to it, and in this way to defy what history, tradition, custom, and even royal cédulas themselves had united to confer upon the latter.

A formula or phrase was borrowed from the Roman Law as a convenient means of describing the simple practice that was being followed. It was *uti possidetis*.<sup>8</sup>

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between Colombia and Mexico: "Both parties mutually guarantee the integrity of their territories on the footing on which they stood before the present war [of Independence], also recognizing as integral parts of either nation, every province which, though formerly governed by an authority entirely independent of the late Viceroyalties of Mexico and New Granada, may have agreed or shall agree in a lawful manner to become incorporated with it." (*Derecho Internacional Mexicano: Tratados y Convenciones, Edición Oficial, Mexico, 1878, Vol. I, 351.*)

According to Art. V of the Treaty of Peace between Colombia and Peru of Sept. 22, 1829: "Both parties recognize as the limits of their respective territories those that the ancient Viceroyalties of New Granada and Peru held before their independence, with only the variations that they judge convenient to accord between themselves, with which object they obligate themselves to make reciprocally those small concessions of territory that will contribute to fixing the dividing line in a manner more natural, more exact, and capable of preventing disputes between the authorities and inhabitants of the frontiers." (*Tratados Públicos de Venezuela, Vol. I, 65.*)

According to Art. XXXIX of the Treaty of Friendship between Argentina and Chile of Aug. 30, 1855: "Both contracting parties recognize as the limits of their respective territories those which they possessed as such at the time of their separation from the Spanish dominion in 1810, and they agree to reserve the questions which have arisen, or may hereafter arise upon this matter, in order to discuss them pacifically and amicably afterwards, without ever having recourse to violent measures, and in case a complete settlement shall not be arrived at, to submit the decision to the arbitration of a friendly nation." (*República Argentina: Tratados, Convenciones, Vol. 7, 28.*) The boundary treaty of 1881, between Argentina and Chile, in its preamble, made the following reference to Art. XXXIX of the Treaty of 1855: "The Governments of the Chilean and of the Argentine Republics, wishing to solve in a friendly and dignified spirit the boundary question which has existed between the two countries, and in fulfillment of Article XXXIX of the treaty of April, 1856 [signed Aug. 30, 1855], have resolved to conclude a boundary treaty." (A. Bascunan Montes, *Recopilación de Tratados y Convenciones de Chile, Edición autorizada por el Supremo Gobierno, Santiago de Chile, 1894, Vol. II, 120.*)

According to Art. VII of the Treaty of Confederation signed at the Congress of Lima, Feb. 8, 1848, by New Granada, Chile, Bolivia and Peru: "The confederated Republics declare that they have a perfect right to the conservation of the limits of their territories as they existed at the time of the independence from Spain, those of the respective Viceroyalties, captaincies-general or presidencies into which Spanish America was divided." (Ricardo Aranda, *Congresos y Conferencias Internacionales, en que ha tomado parte el Peru, Lima, 1909, Vol. I, 171.*) This treaty was not ratified by the signatory States. Art. VII is, nevertheless, a significant indication of the views of the parties at this time on the question under discussion, as all the signatories definitely approved the use of administrative divisions as the basis of delimitation, as set forth therein. Failure to ratify arose from other causes. (See Aranda, *Congresos y Conferencias, Vol. I, 87, 92-97, 104, 109, 117.*)

<sup>8</sup> That term in that law, to quote Professor John Bassett Moore, "designated an interdicit

Statesmen needed little philological acumen to perceive the insufficiency of the phrase for practical purposes. As will be noted later, the word "*juris*" was frequently coupled to it, a circumstance that served in itself to breed doubt concerning what the words *uti possidetis* signified with or without that appendage.

It should be observed that the term *uti possidetis* was in reality a description of a practice that was being roughly followed. The Latin American States of Spanish origin did not at the time regard the phrase, despite its significance in the Roman Law or its place in the laws of war, as expressive of a legal principle to which they owed deference or were endeavoring to conform in the establishment of new frontiers. The facts were quite the contrary. Those States for reasons of expediency or necessity were merely resorting to a feasible practice for their own convenience, and for which they sought an appropriate name. They rarely employed the term *uti possidetis* in their constitutions.<sup>9</sup> With the exception of arrangements to which Brazil was a party, it found a place in very few treaties of limits,<sup>10</sup> and it was never, prior to 1930, employed by itself with-

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of the Praetor, by which the disturbance of the existing state of possession of immovables, as between two individuals was forbidden. . . . The right of the possessor was not affected if his possession was begun by violence, clandestinely or by permission as regards any other person than the adversary; and, as to the latter, there was simply a prohibition to disturb the *status quo*, even the question as to which of the parties was in possession and which was forbidden to interfere being left open. . . . The substance of the decree is embraced in the words *Uti possidetis, ita possideatis*: 'As you possess, so may you possess.'" (Memorandum on *Uti Possidetis*, Costa Rica-Panama Arbitration, printed at Rosslyn, Virginia, 1913, 5-7.)

<sup>9</sup> An exception is to be noted in the terms of the Constitutions of Costa Rica. In that of 1848, it was declared that "the limits of the territory of the Republic are those of the *uti possidetis* of 1826." (Brit. and For. St. Pap., XXXVII, 777, 778.) In the Constitution of 1871 it was announced that "the limits of the territory of the Republic are as follows: the Atlantic Ocean on the north, the Pacific on the south, next to the United States of Colombia, those of the *uti possidetis* of 1826, and next to Nicaragua those fixed by the Treaty of April 15, 1858." (Brit. and For. State Pap., LXIII, 294.)

<sup>10</sup> The Treaty of Peace, Friendship and Alliance between Ecuador and Peru of 1860, contains the following provision in Art. VI: "In the meantime they [Ecuador and Peru] accept for such boundaries those which arose from the *uti possidetis* acknowledged in Art. V of the Treaty of September 22, 1829, between Colombia and Peru, and which were those of the ancient Viceroyalties of Peru and Santa Fé, according to the Royal Cédula of July 15, 1802." (Brit. and For. St. Pap., L, 1086.) "This treaty was ratified by President Guillermo Franco of Ecuador, January 27, 1860, but was disapproved by the Government which succeeded him, and was disapproved by the Congress of Peru, January 13, 1863." (See *Colección de los Tratados del Peru*, Vol. V, 304, 366.)

Reference to the royal decree of that late date as the basis of the *uti possidetis* (of 1810) simply reveals the desire of the contracting States to rely upon an official act almost contemporaneous in point of time, to establish the factual condition then prevailing. In a word, the decree was evidence of the administrative division existing shortly thereafter.

A special use of the term *uti possidetis* is made in a treaty between the Dominican Republic and Haiti of 1895, providing for the arbitration of their boundary dispute before the Pope, the dispute having its origin in conflicting interpretations of a treaty of 1874. Art. IV provides: "The High Contracting Parties formally obligate themselves to establish the boundary lines which separate their present possessions in the manner most in harmony with equity and the mutual interests of the two peoples. This obligation shall be the subject of a special treaty; and for this purpose commissioners shall be appointed by the two Governments as soon as possible." After quoting this article, the preamble of the treaty of 1895 proceeds: "In consideration of the contrary interpretation given to the said Article IV by the two Governments; On the one hand, the Haitian Government affirming that the *uti possidetis* of 1874 is the principle which has been conventionally accepted and established for the demarcation of our boundary lines; that, in fact, the term present possessions means the possessions occupied at the time of the signing of the treaty; On the other hand, the Dominican Government affirming that the *uti possidetis* of 1874 is not conventionally accepted nor established in the said Art. IV, because, in fact, by actual possessions, nothing else can be meant than what in law should belong to each of the two peoples, that is to say the *uti possidetis* to which the clause of Art. IV can reasonably refer, concerns only

out qualification or explanation in an arbitration treaty between Spanish-American republics to indicate the test of the rights of opposing States or as a guide to the tribunal burdened with the task of determining a juridical line.<sup>11</sup>

The settlement of boundaries as between Brazil and her neighbors demanded respect for a different set of facts. Brazil was the successor to the sovereignty of Portugal; its neighbors were the successors to that of Spain. This circumstance was an obstacle that served to prevent the taking of formerly existing administrative divisions as the basis of new frontiers. The rights of neither Brazil nor Portugal as sovereign over territorial areas could be impaired or affected adversely by the administrative acts of the Spanish Crown; nor could such acts on the part of Portugal diminish the corresponding rights of Spain or its successors.<sup>12</sup> Brazil was, moreover, unwilling to accept as binding upon itself the treaties concluded between Spain and Portugal, such as the Treaty of Limits of 1750, and that of San Ildefonso of 1777.<sup>13</sup> The treaties which Brazil actually succeeded in concluding with its neighbors announced a fresh and different basis for the establishment of new frontiers. It was heedless of previously existing divisions whether administrative or international. It was heedless also of the doctrine of constructive occupation. It followed simply the actual possessions of the respective countries, when they acquired independence. This basis or method was commonly referred to as the *uti possidetis*. Moreover, the treaties of limits, in sharp contrast to those to which Brazil was not a party, frequently if not usually, contained reference to the phrase to describe the theory that was being followed. They thus made literal employment of the

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the possessions determined by the *status quo post bellum* of 1856." (*Nouv. Rec. Gén.*, 2 Sér., XXIII, 79.) The Pope abstained from rendering an award. See Paul de Lapradelle, *La Frontière*, Paris, 1928, p. 365.

<sup>11</sup> Attention should perhaps be called to Art. VIII of the General Arbitration Treaty between Bolivia and Peru, of Nov. 21, 1901, providing that "The arbitrator shall decide in strict obedience to the provisions of international law, and, on questions relating to boundary, in strict obedience to the American principle of *uti possidetis* of 1810, whenever in the agreement mentioned in Article II, the application of the special rules shall not be established, or in case the arbitrator shall (not?) be authorized to decide as an amicable referee." (*Am. J., Supplement*, III, 378, 379.) According to Art. II, "In each case that may arise the contracting parties shall conclude a special agreement for the purpose of determining the subject matter of the controversy, and fixing the points that are to be settled, the extent of the powers of the arbitrators, and procedure to be observed." When, however, Bolivia and Peru undertook to submit their boundary dispute to arbitration, they did not in fact rely upon the strict provisions of Art. VIII, but saw fit to lay down specific rules for the guidance of the arbitrator. The treaty of Dec. 30, 1902, embracing the terms of their agreement provided, for example, in Art. III that "The arbitrator in pronouncing his decision shall conform to the collection of the laws of the Indies, royal writs and orders, the ordinances of the governors, the diplomatic acts relative to the demarcation of frontiers, maps and official descriptions and in general to *all* the *documents* which, having an official character, were dictated to give true significance and execution to the said royal orders." Again, in Art. IV it was provided that "In case the acts or royal orders do not define the dominion of a territory in a clear manner, the arbitrator shall decide the question equitably, approximating as far as possible, their significance and the spirit which actuated them." Moreover Art. V provided that, "The possession of a territory exercised by one of the high contracting parties can not stand in the way of or prevail against royal titles or orders established by the opposite party." (*Id.*, 383.)

<sup>12</sup> "As Brazil was not in a relation of subordination to Spain, it cannot, naturally, be considered as bound by the sovereign acts of the Spanish Monarch." (Clovis Bevilacqua, *Direito Público Internacional*, Rio de Janeiro, 1911, Vol. I, 348.)

<sup>13</sup> See in this connection, J. B. Moore, *Brazil and Peru Boundary Question*, New York, 1904, 5-6.

Latin words to give expression to the plan to which recourse was being had. Inasmuch as actual possession was the predominant idea which guided Brazil, and by inference, those States which accepted its terms, it was natural and perhaps reasonable to utilize a phrase which accentuated the fact of possession, by way of explanation or description of the method being employed in establishing new frontiers as between Brazil and its neighbors.<sup>14</sup>

The common avoidance of the phrase *uti possidetis* in treaties other than those to which Brazil was a party is noteworthy. In those contemplating the arbitration of a boundary dispute other tests appear to have been preferred by litigating States at least prior to the conclusion of the Convention between Guatemala and Honduras, of July 16, 1930, for the arbitration of their boundary dispute.<sup>15</sup>

The establishment of new frontiers between the territories of republican States according to a scheme that deferred to administrative divisions existing in the last days of the Spanish régime involved a reckoning with the fact that those divisions had embraced unoccupied and even unexplored areas, and also that the precise extent of the territorial claims of particular provinces, or in the case of adjacent provinces, the exact position of a boundary between them, had oftentimes not been proclaimed or definitely asserted up to the hour of independence. When, therefore, the phrase *uti possidetis* was employed to describe a method of establishing boundaries that paid respect to such conditions, it was not unreasonable to enlarge the terms of that description which, in a linguistic sense, appeared to accentuate the idea of actual possession. Accordingly, there came to be added to the phrase the word *juris* which perhaps gave a more comprehensive intimation as to the methods that had been followed.<sup>16</sup>

<sup>14</sup> See Art. VII of Treaty between Brazil and Peru of Oct. 23, 1851, Aranda, *Colección de los Tratados del Peru*, Vol. II, 517; Arts. II and IV of Treaty of Limits between Brazil and Uruguay of Oct. 12, 1851, Brit. and For. St. Pap., XL, 1151; Art. II of Treaty of Friendship and Limits between Brazil and Venezuela of Nov. 25, 1852, *id.*, XLIX, 1213; Art. II of Boundary Convention between Brazil and Paraguay of April 6, 1856, *id.*, XLVI, 1304; Art. II of Treaty of Friendship, Commerce, Navigation and Boundaries between Brazil and Bolivia of March 27, 1867, *id.*, LIX, 1161.

<sup>15</sup> See Art. V.

<sup>16</sup> According to the Arbitral Award of the Swiss Federal Council of March 24, 1922, concerning certain boundary questions between Colombia and Venezuela:

"When the Spanish colonies of Central and South America proclaimed themselves independent in the second decade of the nineteenth century, they adopted a principle of constitutional and international law to which they gave the name of *Uti Possidetis Juris* of 1810, with the effect of laying down the rule that the bounds of the newly created Republics should be the frontiers of the Spanish Provinces for which they were substituted. This general principle offered the advantage of establishing an absolute rule that there was not in law in the old Spanish America any territory without a master; while there might exist many regions which had never been occupied by the Spaniards and many unexplored or inhabited by non-civilized aborigines, these regions were reputed to belong in law to which ever of the Republics succeeded to the Spanish Province to which these territories were attached by virtue of the old Royal Ordinances of the Spanish Mother Country. These territories although not occupied in fact were by common consent deemed as occupied in law from the first hour by the new Republic. Encroachments and untimely attempts at colonization on the part of the adjacent State, as well as occupations in fact became without importance and without consequence in law. This principle had also the advantage of suppressing as it was hoped, disputes as to limits between the new states. . . .

"The limits of the administrative circumscriptions between the Spanish provinces of South America of the Colonial epoch were at times insufficiently known; the maps were imperfect, the names of localities, of rivers and of mountains mentioned in the documents of the ancient régime were disfigured or were no longer to be found. From this uncertainty contests arose little by little among many of the Spanish American States, not on the principle



In so far as the word *juris* served to focus attention on the method that had been, or was being frequently employed in establishing the boundaries between the new republics it did not beget confusion of thought. A fresh element projected itself, however, and the character of the phrase *uti possidetis juris* seemed to accentuate its importance. A Spanish province, shortly before its transformation into an American republic might have been the occupant or controller or administrator of territory that rightfully belonged to a neighboring province, and might so have encroached in a domestic or colonial sense upon its domain without the knowledge or formal acquiescence of the Spanish Crown. In such a situation there was ground for the argument that fresh lines of demarcation between the new republics should rectify the wrongs done during the colonial régime. Accordingly, in numerous subsequent treaties providing for the adjustment by arbitration of boundaries between such republics, specific provision was made for judicial investigation of and respect for documents probative of the validity of ancient colonial titles.<sup>17</sup> Moreover, it is an impressive fact that in no instance where Spanish Central or South American States sought to test the soundness of pretensions according to the validity or rightfulness of provincial titles at a particular time did they employ the bare term *uti possidetis* in their agreement as a token of their design or as a guide for the tribunal. The Latin phrase, whenever it was incorporated in the agreement to arbitrate assumed the form *uti possidetis juris*. The deliberate use of the word *juris* in such instruments, especially in the light of accompanying phrases, marked an effort on the part of the contracting republics to qualify rather than clarify the signification which might well have been deemed to attach to the words *uti possidetis* when used without that appendage.

The practices of Spanish American States as they entered into their lives as such revealed a sense of freedom on the part of the new entities which has not been generally perceived.<sup>18</sup> Thus, when they purported to accept as bases

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admitted by all of *Uti Possidetis Juris*, but on the details of the ancient boundaries. It became necessary to negotiate to arrive at exact limits." (*Sentence Arbitrale du Conseil Fédéral Suisse sur diverses Questions de Limites pendantes entre la Colombie et le Venezuela*, Berne, March 24, 1922, Neuchâtel, 1922, 5, 8.)

<sup>17</sup> Here then were two distinct ideas which were before the minds of statesmen. They used the phrase *uti possidetis juris* with seeming reference to both. In the first place, they were inclined to find in the word *juris* a convenient explanation of the acceptance of colonial administrative divisions that embraced unoccupied territory, and that simply took cognizance of actual assertions of sovereignty regardless of the theory behind them. In the second place, they were not indisposed to use the word *juris* as indicative of a new test for the proper demarcation of boundaries of the new States, that placed reliance on the jural and historical foundations of colonial titles. Treaties reflecting such a design, and contemplating the use of relevant and probative historical data in support of the rightfulness of provincial assertions made clear the fact, and commonly enunciated the issue in terms that yielded ample and express authority to the tribunal to which recourse was to be had. See Preamble and Art. I, of Treaty between Colombia and Venezuela of Sept. 14, 1881, Brit. and For. St. Pap., LXXIII, 1107; Treaty between Bolivia and Peru, of Dec. 30, 1902, *Am. J., Supplement*, III, 383; Treaty between Honduras and Nicaragua, of Oct. 7, 1894, *Nouv. Rec. Gén.*, 2 Sér., XXXV, 563; Treaty between Guatemala and Honduras of March 1, 1895, Brit. and For. St. Pap., LXXXVII, 531, of which the relevant provisions were duplicated in a treaty between the same States of Aug. 1, 1914, Brit. and For. St. Pap., CVII, 902.

<sup>18</sup> In relation to this particular phase of the matter under discussion the author makes free use of a memorandum which, with the assistance of Oliver J. Lissitzyn, Esq., he

of frontiers lines that had been seemingly laid down or acquiesced in by the Spanish sovereign in the final hour of the monarchical régime, no particular form or size of colonial entity was necessarily adhered to. If adjacent provinces became States the agreements which registered the wills of the interested parties, and which might be said to be illustrative of what was referred to as instances of *uti possidetis*, failed to establish that the new States felt themselves obliged to respect the old Spanish colonial circumscriptions known as viceroyalties, *audiencias*, *presidencias*, or *provincias*, although such molds could be used and oftentimes were used to determine the precise limits of any of these entities when once it was agreed that the boundaries of the new State should follow those of a particular colonial predecessor.<sup>19</sup>

The thought productive of practices referred to as manifestations of *uti possidetis* had no reference to, or bearing upon, the legal significance of revolutionary or post-revolutionary acts in aligning particular areas or entities with particular States. That thought served merely to reveal and accentuate a practical mode of testing or establishing a line of demarcation when independence dawned, and that by reference to certain conditions at the last moment before the dawning; events after the dawn being at times useful to portray how things looked just before it came. The exact picture in the last monarchical hour was wanted as a means of providing for the future. Nevertheless, no matter what the picture might reveal, and regardless of its possible value as a guide to the

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prepared for a certain foreign government in 1937. He acknowledges his special indebtedness to him for the substance of two of the footnotes that follow.

<sup>19</sup> Paraguay and Uruguay were both formerly included in the Viceroyalty and the *audiencia* of Buenos Aires. Yet when in 1810 Buenos Aires revolted against Spain and invited Paraguay to join in the acts of independence, the latter entity (a *provincia*) refused to do so and repulsed an armed expedition from Buenos Aires. Shortly afterwards the independence of Paraguay as a separate entity was recognized by Buenos Aires. Moreover, the acts of Paraguayan authorities in establishing, shortly after independence, some degree of control (in the form of fortresses) over the wildernesses of the Chaco region, were later relied upon by Paraguay in its dispute over the Chaco with Argentina and apparently given due consideration in the arbitration before the President of the United States which settled the controversy wholly in favor of Paraguay. (Moore, *Arbitrations*, II, 1923.) Nor were the boundaries of *audiencias* respected universally in other parts of Spanish America. In Central America, the old *audiencia* of Guatemala, after a brief existence as part of the Mexican Empire of Iturbide and as a single independent State, broke up into States roughly corresponding to the old *provincias*. Moreover, the province of Chiapas, which had formed a part of the Guatemalan *audiencia*, remained with Mexico which also embraced the *audiencias* of Mexico and Guadalajara. It seems clear that although the old *audiencias* were in some cases considered as the proper entities on which to found the new States, there was no thought that the new States had to coincide with the old *audiencias* as a matter of law. When convenience and local sentiment, as well as the realities of force, allowed it, the new States might embrace several *audiencias* (as in the case of Colombia prior to 1830, or of Mexico or of Peru), or be coextensive merely with minor subdivisions of an old *audiencia* (as in the case of Paraguay and Uruguay). In fact, an examination of the formation of the Spanish American States shows that strict adherence to the circumscriptions of the old *audiencias* was the exception rather than the rule. Thus, Argentina, Paraguay, and Uruguay had all been parts of the old *audiencia* of Buenos Aires; Peru embraced the *audiencias* of Lima and of Cuzco, as well as a part of Quito (Jaén and Tumbes); Bolivia was formed of the *audiencia* of Charcas with the addition of the district of Tarijax formerly belonging to the *audiencia* of Buenos Aires; old Colombia was composed of the *audiencias* of Santa Fé, Quito (with the exception of Jaén and Tumbes), Panama, and Caracas. The Central American Republic did not completely correspond to the *audiencia* of Guatemala, since Chiapas joined Mexico; and Mexico was originally formed of the *audiencias* of Mexico, Guadalajara, and Guatemala, the last named seceding shortly afterwards.

delimitation of a frontier at the moment of independence, it could not compete on an equal plane with subsequent events that altered the factual situation, save by definite agreement between the new neighboring States. It may well be doubted whether interested States of Spanish America ever felt that it could so compete. The point needs constantly to be emphasized that the idea expressed in the phrase *uti possidetis* was not calculated to be applicable to situations characterized by post-revolutionary activities that shifted the control of areas bordering on what had been a colonial frontier, and that it was not in fact allowed to affect the consequences of those activities.

The practice of Spanish-American Republics, in so far as it manifested deference for limits fixed by the Spanish monarch in his final hour as sovereign, was confined to situations where the new States had been adjacent neighboring entities of varying types and descriptions, and where the Spanish line of demarcation served well to indicate a frontier which it was wise for the republican successors to observe partly because it marked the continuity of a boundary that had existed between different and (perhaps in a domestic sentence) opposing provinces of entities. The same line betokened also the same differentiation in the republican régime. If the new States were frequently disposed to accept a line of demarcation which Spain had decreed, it was, as has been suggested, due to the circumstance that the continuance of that line did no violence to political alignments of the new régime, and also to the fact that the neighboring States were not generally bent on the seizure of each others' territories. The issues between them were chiefly those growing out of the question concerning how or where the Spanish monarch had in fact drawn the line between preceding colonial entities. There were, of course, instances where it was alleged that the Spanish line carved out great slices of territory, especially when reliance was placed on an early decree long antedating the coming of independence; yet such claims were valueless when they failed to correspond with what the Spanish monarch had decreed in the final monarchical hour,<sup>20</sup> or when they demanded respect for a line which was contemptuous of achievements after the dawn of independence. The significant feature of the use of the Spanish line by the new American Republics was the existence of a condition that was always present — that the Spanish line did no violence to the factual situation that followed on the heels of the revolution. But when or if it did, there was no room for agreement to accept what Spain had decreed. Accordingly, there is no evidence of a practice productive of any rule to the effect that any line of Spanish origin or making in the last monarchical hour sufficed to carve out of a new Republican State areas which it in fact acquired contemporaneously with its birth or immediately thereafter, and which yielded to the beneficiary under such decree the right to demand the transfer of any areas to itself.

There are numerous instances where new Republics of Spanish American

<sup>20</sup> See, for example, claim of Honduras in the Guatemala-Honduras Boundary Arbitration, under treaty of July 16, 1930, to a large area between the Motagua River and British Honduras in consequence of a royal cédula of 1745, conferring certain powers upon Col. Don Juan de Vera, Governor of the Province of Honduras, Opinion and Award, Jan. 23, 1933, 17-18.

origin declined to allow a Spanish-made line to be applied as against conflicting achievements wrought in connection with, or shortly following the revolution.<sup>21</sup> Briefly, in terms of fact, the American Republics of Spanish origin felt no obligation to agree to respect, and were not in fact disposed to respect, a boundary line laid down by the Monarch even in the last monarchical hour if for any reason it did not correspond with what revolutionary or post-revolutionary acts served to place within the control of neighboring States.

The phrase *uti possidetis* has at times found expression in the diplomatic correspondence of the United States. It was employed, for example, by the Chevalier Don Luis de Onís in a note to Mr. John Quincy Adams, Secretary of State, January 24, 1818,<sup>22</sup> and by the latter in his response of March 12, 1818.<sup>23</sup>

<sup>21</sup> Thus, the district of Nicoya, which had belonged to the Province of Nicaragua under the Spanish régime, expressed a desire to be attached to Costa Rica after the successful independence movement of 1821 in Central America, and was tentatively transferred to the latter province by an act of the Federal Congress of Central America in 1825. After the break-up of the Central American Republic, Costa Rica remained in possession of Nicoya, succeeding, by a successful assertion of control, in making its dominion over the district permanent, in spite of the fact that in the last hour of the monarchical régime, Nicoya had belonged to Nicaragua. (Mr. Rives' Report to President Cleveland, Costa-Rican-Nicaraguan Arbitration, Moore, Arbitrations, II, 1849-1850.) When in 1818 Buenos Aires asked for recognition of its independence by the United States, at a time when General Artigas was seemingly successful in resisting the endeavor of Buenos Aires to control Banda Oriental (which had been a part of the Viceroyalty and the *audiencia* of Buenos Aires in the Spanish colonial system), Secy. of State Adams inquired of Mr. Aguirre, the representative of Buenos Aires, as to the situation in Banda Oriental and also in Montevideo (then occupied by the Portuguese), and "whether General Artigas might not advance a claim of independence for these provinces." (Report of Mr. Adams, March 25, 1818, *Am. State Pap. For. Rel.*, IV, 173-174.) Declared Mr. Adams in his communication to the President of Aug. 24, 1818: "In the draft of a letter to Mr. Aguirre . . . I have stated to him the grounds upon which the Government of the United States have been deterred from an acknowledgment of that of Buenos Ayres as including the dominion of the whole viceroyalty of the La Plata . . . If Buenos Ayres confined its demand of recognition to the provinces of which it is in actual possession, and if it would assert its entire independence by agreeing to place the United States upon the footing of the most-favored nation, . . . I should think the time now arrived when its government might be recognized without a breach of neutrality." (Moore, Dig., I, 78-79.) It thus appears that the United States was not prepared to admit that a new Spanish-American State was entitled to claim as its own all of the territory embraced in a former colonial subdivision of which it had been the major part unless it had succeeded in establishing actual possession thereof. Another example where the boundary between two American States was established at variance with the boundaries of colonial subdivision in the last hour of the monarchical régime is that of Chiapas. Chiapas was one of the provinces embraced in the Captaincy-General and the *audiencia* of Guatemala; in common with certain other provinces of that *audiencia*, it joined the Mexican Empire of Iturbide, and then separated from it; and finally decided to rejoin Mexico. It is not necessary to consider here the question whether that decision was entirely voluntary on the part of Chiapas. The outcome was at variance with the colonial boundary of the *audiencia* of Guatemala, the remaining provinces of which united to form the Central American Republic, which unsuccessfully demanded on that ground (as well as on the ground of the allegedly involuntary character of the choice of Chiapas) that Mexico restore the province to it. It is hardly necessary to add that Paraguay which had been a part of the Viceroyalty and the *audiencia* of Buenos Aires, succeeded in establishing and maintaining an independent existence as a State, in spite of early attempts to bring it under Argentinian sovereignty; and that Uruguay, also a part of Buenos Aires under the monarchical régime, had done likewise.

<sup>22</sup> He said in part: "In case this proposal should not appear admissible to your Government, the following may be substituted: 'The *uti possidetis*, or state of possession in 1763, to form the basis, etc.'," (*Am. State Pap. For. Rel.*, IV, 464, 466.)

<sup>23</sup> Declared Mr. Adams: "You have the goodness to inform me, in the name of the King, your master, that Spain has an indisputable right to all the right bank of the Mississippi, but that His Majesty has resolved to claim it solely with a view to adhere to

In relation to the question whether the conduct of Great Britain in regard to Central America was at variance with the provisions of the Clayton-Bulwer Treaty of April 19, 1850, Mr. Marcy, Secretary of State, declared in a communication to Mr. Dallas, American Minister to Great Britain, July 26, 1856:

My first prefatory observation is this: The United States regard it as an established principle of public law and of international right, that when a European Colony in America becomes independent, it succeeds to the territorial limits of the Colony as it stood in the hands of the parent country. That is the doctrine which Great Britain and the United States concurred in adopting in the negotiations of Paris, which terminated this country's war of Independence. It has been followed by Spain and Portugal in regard to their former Colonies in America and by all those Colonies as between one another and the United States. No other principle is legitimate, reasonable, or just. When a Colony is in revolt, and before its independence has been acknowledged by the parent Country, the colonial territory belongs, in the sense of revolutionary right, to the former, and in that of legitimacy, to the latter. It would be monstrous to contend that in such a contingency, the colonial territory is to be treated as derelict, and subject to voluntary acquisition by any third nation. That idea is abhorrent to all the notions of right, which constitute the international code of Europe and America.<sup>24</sup>

It may be observed that Secretary Marcy was not discussing the question touching the freedom or lack of freedom of an American Republic upon its acquisition of independence by process of revolution from a European monarch to adjust or fix a boundary with a neighboring Republic according to any particular rule. He was rather concerned, as his words indicate, with the impropriety of conduct whereby a third State, in the form of a European Monarchy, might endeavor to take advantage of the turmoil begotten of revolution by seizing the territory of the nascent republic.<sup>25</sup>

As a result of the good offices of the Department of State of the United States, and in pursuance of its specific suggestion, Guatemala and Honduras, after unsuccessful attempts to adjust their protracted boundary dispute according to the theory of *uti possidetis juris* as enunciated in conventions of 1895 and 1914,<sup>26</sup> concluded at Washington on July 16, 1930, a fresh agreement whereby the contracting States accepted a new test of their respective rights. They agreed

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the *uti possidetis* of 1764. If, sir, you will exhibit *any* evidence of right in Spain to the right bank of the Mississippi, it will be considered by the Government of the United States with all the attention to which it can be entitled. In the mean time, you cannot but perceive that this pretension is utterly incompatible both with that advanced in another part of your note, of a right in Spain to the whole circumference of the Gulf of Mexico, and with that of the *uti possidetis* of 1764." (*Id.*, 468, 475.)

<sup>24</sup> Manning's Diplomatic Correspondence, VII (Great Britain), document 2767.

<sup>25</sup> Accordingly, one may be permitted to doubt whether the document quoted sustains the contention that "the United States supported the theory [of *uti possidetis*] for all of America in the Bulwer Treaty correspondence in 1856," as has been suggested by a recent commentator. See Gordon Ireland, *Boundaries, Possessions, and Conflicts in South America*. Cambridge, Mass., 1938, 328.

<sup>26</sup> See in this connection *Mediation of the Honduran-Guatemalan Boundary Question* held under the good offices of the Department of State, 1918-1919, 2 Vols., Washington, Government Printing Office, 1920.

that the only juridical line that could be established between their respective territories was that of "the *uti possidetis* of 1821" and that an arbitral tribunal should determine that line.<sup>27</sup> It is not without significance that the Government of the United States felt in 1930 that an appropriate line of demarcation could be judicially ascertained by the application of such a test to the factual situation prevailing in Central America more than a hundred years earlier. When the convention of 1930 was signed, the Governments of Guatemala and Honduras appeared to be far from agreed (as subsequent events showed) as to the sense in which "the *uti possidetis* of 1821" should be taken as a guide by the tribunal that was to adjust their controversy. This circumstance showed the unwisdom of reliance upon a phrase such as *uti possidetis*, not in itself indicative of a rule of law and constituting little more than a rough description of a practice that had been variously followed when no supervening policy interposed and in itself easily susceptible to divergent interpretations, as a basis for an adjudication on a boundary dispute, unless the precise and common design of the States at

<sup>27</sup> The special Arbitral Tribunal that in its opinion and award of January 23, 1933, undertook to do so, declared that the expression *uti possidetis* undoubtedly referred to possession; that it made possession the test; that the only possession of either colonial entity before independence "was such as could be ascribed to it by virtue of the administrative authority it enjoyed." (Guatemala-Honduras Special Boundary Tribunal, Opinion and Award, Washington, 1933, 6.)

Declared the tribunal in this connection: "In determining in what sense the Parties referred to possession, we must have regard to their situation at the moment the colonial regime was terminated. They were not in the position of warring States terminating hostilities by accepting the status of territory on the basis of conquest. Nor had they derived rights from different sovereigns. The territory of each Party had belonged to the Crown of Spain. The ownership of the Spanish monarch had been absolute. In fact and law, the Spanish monarch had been in possession of all the territory of each. Prior to independence, each colonial entity being simply a unit of administration in all respects subject to the Spanish King, there was no possession in fact or law, in a political sense, independent of his possession." (*Id.*)

The concept of the *uti possidetis* of 1821, thus, it was said, "necessarily refers to an administrative control which rested on the will of the Spanish Crown. For the purpose of drawing the line of '*uti possidetis* of 1821' we must look to the existence of that administrative control." (*Id.*, 6-7.) The tribunal, nevertheless, deemed the *uti possidetis* of 1821 to embrace the Amatique coast region, an area "largely unexplored and unpopulated" because "its relation to territory shown to be under the provincial administration of Guatemala was such as to justify the understanding that it was the will of the Spanish Monarch that, subject to the demands of the Kingdom in relation to defense and illicit traffic, civil and criminal jurisdiction should be exercised in that region, as well as in the region of Golfo Dulce, by the provincial authorities of Guatemala so far as progressive activity in the development of that territory made the exercise of such jurisdiction necessary." (*Id.*, 19-20.) The tribunal was not, however, disposed to apply this principle in every section of the disputed area. The test of administrative control gave little play for the application of the theory of constructive possession, and so by its very inadaptability to the actual condition in Central America at the close of the Spanish régime, proved in large degree to be unworkable.

Thus the tribunal found that the evidence afforded no sufficient basis for establishing the line of *uti possidetis* of 1821 so as to assign to either Province in that year "by virtue of proved provincial administrative control" four sections of the frontier. (*Id.*, 66-67.)

Accordingly, the tribunal, invoking the authority deemed to be conferred upon it by certain other sections of the treaty of July 16, 1930, endeavored to fix the boundary in those areas having regard "(1) to the facts of actual possession; (2) to the question whether possession by one Party has been acquired in good faith, and without invading the right of the other Party; and (3) to the relation of territory actually occupied to that which is as yet unoccupied." (*Id.*, 70.) The boundary thus laid down by the tribunal was accepted by the States at variance.

See F. C. Fisher, "The Arbitration of the Guatemalan-Honduran Boundary Dispute," *Am. J.*, XXVII, 403.

variance was definitely set forth in the terms of their agreement or in authoritative and available extrinsic data.

At the present time, when the adjustment of a dispute concerning an international boundary in the Western Hemisphere is sought to be effected by arbitration, it is believed to be highly desirable to avoid reference to the words *uti possidetis*, with or without the explanatory or qualifying word *juris*, as the basis of a judicial conclusion, regardless of the date to which the tribunal is to look for evidence of conditions that are to be decisive of title. Those conditions should, moreover, be expressed in simplest terms in the preliminary agreement, and reveal complete deference for the factual situation at a particular time.

b

### Certain Limitations of the Right of Control over What Pertains to the Territory of a State

(1)

§ 152. **In General. Servitudes.** The supremacy of a State as sovereign over what constitutes the national domain, embracing the land and territorial waters and superjacent air space, must be recognized as a fundamental principle of international law, to which the United States avows attachment.<sup>1</sup> There exist, however, certain definite limitations which in practice are acknowledged to restrict the territorial sovereign in the exercise of rights of control, and which vary somewhat according to the nature of the thing over which those rights are asserted, and its geographical relationship with, and importance to, outside States. It will be seen that with respect to certain of its territorial waters a State is not deemed to enjoy the same measure of control that it commonly asserts over its lands, and again, that the restrictions to which it is subjected in relation to different classes of water areas are not identical in kind or extent. Thus the duty of a State to yield to foreign vessels a so-called innocent passage along its marginal seas differs widely from that to accord them any privileges of navigation through a river forming an international boundary. It becomes, therefore,

§ 152.<sup>1</sup> "The development of the national organization of states during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations." (Huber, Sole Arbitrator, in Award in Island of Palmas Arbitration, April 4, 1928, *Am. J.*, XXII, 867, 875.)

"The Court is not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law. Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation." (Judgment in the case of the S. S. "Wimbledon," Publications, Permanent Court of International Justice, Series A, No. 1, p. 24.)

*Cf.* The Supremacy of the Territorial Sovereign over the National Domain, In General, *infra*, § 199.

necessary to observe closely both the character of the places wherein the territorial sovereign finds itself especially restricted, and the extent to which the law of nations, in varying degree, appears to check its freedom in relation to them. After such scrutiny it may be concluded that the limitations assignable to that law are relatively narrow in scope, attributable to geographical considerations rather than to any other, and are usually supported by abundant evidence of general acquiescence.

Apart from the task of taking cognizance of what is to be regarded as the full measure of the restrictions imposed by the existing law upon the individual State, in differing types of areas, there is also that of noting the extent of current efforts to obtain the yielding by a territorial sovereign of what the law does not as yet oblige it to concede. At the present time there is evidence of fresh and increasing demands upon the individual State to make various concessions heretofore not regarded as obligatory. It is thus called upon to permit, under conditions not hurtful to itself, foreign powers to make limited use of the air space over the national domain,<sup>2</sup> and to afford them also certain privileges of transit by land,<sup>3</sup> as well as inland water.<sup>4</sup> These demands will be found to differ sharply in character. They may reflect the desires of particular States having a unique geographical or economic relationship with the foreign area within or through which special privileges are needed. Again, they may embody the common aspirations of numerous States in every quarter, for identical privileges in a particular area or in the territory belonging to any country of any continent.

When the limitation of the right of control possessed by the territorial sovereign is so widely recognized and uniformly applied that every foreign power may reasonably demand observance of it for the benefit of itself or its nationals, it becomes unnecessary to record the fact in treaties. When, however, the limitation is one which is commonly acknowledged to be applicable without discrimination solely in favor of States possessed of a special geographical or economic relationship to the particular area concerned, the need of an appropriate convention is usually conceded. In such case the duty of the territorial sovereign to agree specifically with other States within the favored class, with respect at least to certain limitations, may be and sometimes seems to be recognized. Nevertheless, it will be found that the restrictions of a treaty may be such as the territorial sovereign is far from acknowledging the slightest obligation to agree to impose upon itself, and which it yields on grounds of expediency, or in return for a substantial concession. Thus conventions which register what each of the parties thereto appears to regard as common and necessary limitations of the exercise of control over its domain by a contracting territorial sovereign are to be distinguished from those which reveal no such design.<sup>5</sup>

<sup>2</sup> Cf. Air Space over the National Domain, In General, *infra*, § 188.

<sup>3</sup> Cf. Transit by Land, In General, *infra*, § 194.

<sup>4</sup> See Arts. 380-386 of the Treaty of Versailles, of June 28, 1919, in relation to the Kiel Canal, U. S. Treaty Vol. III, 3502.

<sup>5</sup> It will be seen that a territorial sovereign is called upon to relinquish the right to exercise jurisdiction over certain classes of aliens, such, for example, as diplomatic officers accredited to itself, and in some cases also with respect to broad categories of foreign nationals for whose benefit privileges of extraterritorial jurisdiction may be sought. Such a



That a State is obliged to limit its freedom of control over anything pertaining to its territory, such as land or water or air, is due to the interest of the international society in the restriction. That interest has only been acute when it has been clearly and widely perceived to be mutually advantageous for all States under like circumstances. The clearness of the perception has resulted from a common understanding of commercial and economic needs, and has been aided according to their growth. Those needs early demanded a right of innocent passage for ships of every flag through the waters in close proximity to the ocean coasts of States adjacent to the sea. Later, privileges of navigation through international rivers by foreign vessels of riparian and even non-riparian States were increasingly sought and obtained. In the advocacy of relevant principles American statesmen played no small part. At the present time, the potentialities of existing agencies of communication and of transportation strengthen the plea that no longer should any remote and interior State remain isolated from the sea when access thereto is to be had through foreign territory, by air or by land, as well as by water. It will be found, however, that in some quarters statesmen still evince reluctance to impose or accept fresh restrictions of general applicability in relation to matters over which the territorial sovereign has hitherto been deemed to possess rights of exclusive control which have been exercised by it with slight restraint. The limitations thus far imposed by convention in relation to the use of air space, or transit by land, constitute concessions which the contracting parties would doubtless oftentimes be reluctant to acknowledge as declaratory of existing legal duties towards each other.<sup>6</sup>

The needs of the international society can never be deemed to justify the attempt to restrict anew the freedom of its individual members in what pertains to the control of their respective territories until it is agreed on all sides not only that the limitation is beneficial for its entire membership, but also that a failure to apply it is subversive of justice among the nations. Differing sets of

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check upon the freedom of a State in the administration of justice, regardless of its place in international law, or the source to which it may be attributable, is not necessarily or exclusively identified with the control of territory as such, even though it is usually apparent within areas that the restricted sovereign claims as its own. Concessions of jurisdiction that a State is obliged to make appear to differ, therefore, from limitations of control over territory, although the former may in their application frequently reveal a challenge of the supremacy of a territorial sovereign within its own domain. Accordingly, the limitations upon a jurisdictional freedom of a State are dealt with elsewhere.

<sup>6</sup> At a time when strong economic reasons, as well as political considerations, encourage the yielding to States of privileges on foreign soil which their geographical situation in consequence of acknowledged boundaries appears to render imperative, there may be a tendency to overlook the source of the concession and to impute to the law of nations what is attributable to the consent of the territorial sovereign in the particular case. The instruments that register such consent obviously betoken the true source of what is given up, and may also, doubtless, in certain cases emphasize the temporary character of what is yielded. Nevertheless, the conventional law of the present day is a portent as to the future. It suggests that limitations imposed upon a territorial sovereign, in consequence of a treaty, may in time be regarded as irrevocable and sufficiently numerous to imply that either they reflect what the law of nations itself prescribes, or that the right to oppose or withhold them has sunk into desuetude. At the present time, however, such a modification of the law of nations is not apparent. For that reason, it is believed to be important to distinguish what that law, especially in the estimation of the United States, is acknowledged to demand, from what some of the most modern treaties may suggest as desirable.

circumstances may combine to produce such conclusions. It suffices to observe that the necessary combination may be recurrent.

§ 153. **The Same.** Treaties that impose upon a territorial sovereign limitations of control over its domain which are not required by international law, either for the sake of States generally, or for that of special groups of them, differ widely in scope and design. They may embrace leases of particular areas in perpetuity, vesting in the lessee substantial rights of sovereignty;<sup>1</sup> they may purport to yield for all time to the inhabitants of foreign territory, as did the convention between the United States and Great Britain of October 20, 1818,<sup>2</sup> purely economic rights such as fishing privileges within specified places; they may confer a right of passage across territory; they may burden the territorial sovereign with a duty not to fortify places along its frontier;<sup>3</sup> they may contemplate no arrangement that shall survive the time when the grantor ceases to maintain its sovereignty over the territory concerned. Sometimes what is granted is called a servitude. There is disagreement, however, as to the character and scope of concessions that are to be so described. It is thus unfortunate that the word "servitude" has crept into the nomenclature of international law, for the term is a mere label which itself calls for definition before its precise significance is understood. For that reason its use is believed to obscure rather than clarify the perception of what takes place when contracting States undertake to burden territory with restrictions in favor of a non-territorial sovereign.<sup>4</sup>

§ 153.<sup>1</sup> See, for example, convention between the United States and Panama, of Nov. 18, 1903, for the construction of a ship canal, Malloy's Treaties, II, 1349. Cf. Panama, *supra*, § 20.

<sup>2</sup> Malloy's Treaties, I, 631.

<sup>3</sup> Art. 42 of the Treaty of Peace of Versailles, of June 28, 1919, whereby Germany was forbidden to maintain or construct any fortifications either on the left bank of the Rhine or on the right bank to the west of a specified line. In the area defined, the maintenance and the assembly of armed forces, either permanently or temporarily, and military maneuvers of any kind, as well as the upkeep of all permanent works for mobilization, were in the same way forbidden. See Art. 43. U. S. Treaty Vol. III, 3351-3352.

<sup>4</sup> In the course of the North Atlantic Coast Fisheries Arbitration it was alleged by the United States that the liberties of fishery granted to it by Art. I of the convention of Oct. 20, 1818, constituted an international servitude over the territory of Great Britain, thereby involving a derogation from the sovereignty of Great Britain, the servient State, and that, therefore, Great Britain was deprived, by reason of the grant, of its independent right to regulate the fishery. The Tribunal in its award disagreed with this contention for various reasons. It was declared that there was no evidence that the doctrine of international servitudes was one with which either American or British statesmen were conversant in 1818. It was said that "a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a *praedium dominans* and a *praedium serviens*; whereas by the treaty of 1818, one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State." It was declared that the doctrine of international servitude, in the sense sought to be attributed to it, originated in the peculiar and obsolete conditions prevailing in the Holy Roman Empire of which the *domini terrae* were not fully sovereigns, they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the courts of that Empire, their right being of a civil rather than of a public nature, partaking more of the character of *dominium* than of *imperium*, and, therefore, not a complete sovereignty. In contra-distinction to this "quasi-sovereignty," the modern State, and particularly Great Britain, it was added, had never admitted partition of sovereignty, "owing to the constitution of a modern State requiring essential sovereignty and independence." It was said that "this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present international relations of sovereign States, has found little, if any, support from modern publicists." It could, therefore, it was declared, "in the general

It should be noted that the proposal of the President of the United States of May 14, 1929, to the Governments of Chile and Peru regarding Tacna-Arica, which appears to have been accepted by them, stated that certain canals should remain the property of Peru, with the understanding, however, that "wherever these canals pass through Chilean territory they shall enjoy the most complete servitude in perpetuity in favor of Peru"; and also that "this servitude includes the right to widen the actual canals, change their course, and appropriate all waters that may be collectible in their passage through Chilean territory."<sup>5</sup>

It is said that the "conception of servitudes suitably covers those restrictions on the territorial supremacy of the State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State."<sup>6</sup> The international society is vitally interested in efforts to impose such restrictions and in the continuity of them. No doubt a territorial sovereign may validly agree to subject its territory to a distinct service to another State that shall endure so long as the former retains its dominion over the area concerned. Whether that sovereign may subject that area to privileges or services which shall accrue to the benefit of a foreign country after the former shall have relinquished its sovereignty, and thereby impose upon the territory a burden which shall truly run with the land, regardless of the will of the particular State which later acquires it, raises a difficult question. The solution is to be found in the design of the original contracting parties, and also in the character of the service or privilege yielded. If it is one pertaining to reciprocal benefits, such as, for example, a common régime within, or use of

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interest of the Community of Nations, and of the parties to this treaty, be affirmed by this Tribunal only on the express evidence of an international contract." See text of Award, G. G. Wilson, *Hague Arbitration Cases*, 145, 158-159, *Proceedings*, North Atlantic Coast Fisheries Arbitration, Sen. Doc. No. 870, 61 Cong., 3 Sess., I, p. 110-111.

Concerning the character and scope of the fishery privileges acquired by the United States from Great Britain through Art. I of the convention of Oct. 20, 1918, as enunciated in the award of the North Atlantic Coast Fisheries Arbitration Tribunal, see succinct statement in Hackworth, *Dig.*, I, 783. See also *Fishing Claims—Group I*, *American-British Claims Arbitration*, under convention of Aug. 18, 1910, Nielsen's Report, 554-567, especially statements in the award of No. 6, 1925, *id.*, 565-566; award in the case of the *David J. Adams*, *id.*, 526; award in the case of the *Thomas F. Bayard*, *id.*, 573; award in the case of the *Frederick Gerring, Jr.*, *id.*, 577; award in the case of the *Horace B. Parker*, *id.*, 570; award in the case of the *Tattler*, *id.*, 490. See also S. S. "May" v. The King, (1931) 3 D.L.R. 15. All of the foregoing cases are referred to in Hackworth, *Dig.*, I, 788-790, footnote.

Statesmen and jurists alike are concerned with ascertaining the precise content of restrictions which, by customary or conventional law, check the freedom of the territorial sovereign in what pertains to its territory, rather than with the attempt to attach to them an appropriate name, unless the appellation is one that points unerringly to a limitation that is to be readily distinguished from any others. Analogies from private law as well as philological exactness may justify the demand that a term borrowed from a particular legal system should, when employed in international law, enjoy a distinctive signification that pays deference to both. Yet statesmen and those who discuss their achievements may not be disposed to heed that demand, and by loosely attaching to a particular word, such as servitude, a variety of significations, may ruin its value as an aid to clearness of thinking or as an instrument for the portrayal of legal concepts.

<sup>5</sup> *Am. J.*, XXIII, *Supplement, Official Documents*, 183-187.

Declared the Permanent Court of International Justice in its judgment in the case of the SS. "Wimbledon": "The Court is not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exists servitudes analogous to the servitudes of private law." (*Publications*, Permanent Court of International Justice, Series A, No. 1, p. 24.)

<sup>6</sup> Lauterpacht's 5 ed. of Oppenheim, I, 420.

boundary waters, the permanence of the concession may in many situations be fairly acknowledged. If, however, the concession creative of the special interest of the foreign State is one that not only fetters the freedom of the succeeding territorial sovereign, but also may be fairly regarded as detrimental to its welfare as such, that sovereign may be expected to deny the right of the grantor to attach permanently such a burden to the soil, and to prevent any subsequent transferee from acquiring the same without accepting the burden. Circumstances when such a denial may well be made are increasing in frequency. They inspire the thought which is pervading the international society and which challenges the right of a State to load down its own territory perpetually with burdens that may prove to be detrimental to it when a change of sovereignty shall have taken place. Deference for this fact on the part of contracting States is to be anticipated, and to produce evidence of designs that preclude the imputation of efforts to ignore it. If such deference calls for the use of a test that may at times be difficult to apply, it at least has the merit of accentuating the fact that the final conclusion as to what may or may not be deemed detrimental to the welfare of a particular area must ever await the judgment of the new sovereign thereof, and that its right freely to judge can not be cut off by its predecessor in the course of its contracting with a foreign State. While States may be expected to continue to manifest a disposition to endeavor in a variety of situations to yield by treaty to foreign entities enduring privileges pertaining to particular areas, it remains to be seen whether and to what extent such concessions will be acknowledged to survive not only the agreements in which they have been registered, but also changes of sovereignty over the areas with which they were associated.<sup>7</sup>

## (2)

§ 154. **Marginal Seas.** Over its territorial waters along the marginal sea the control of the territorial sovereign is limited.<sup>1</sup> While it may regulate at will matters pertaining to fisheries, the enjoyment of the underlying land, coastal trade, police and pilotage, the use of particular channels, as well as maritime ceremonial,<sup>2</sup> it is not permitted to debar foreign merchant vessels from the enjoyment of what is known as the right of "innocent passage."<sup>3</sup> This obligation

<sup>7</sup> See, generally, Lauterpacht's 5 ed. of Oppenheim, I, §§ 203-208 (with bibliography); H. Lauterpacht, *Private Law Sources and Analogies of International Law*, §§ 51-52, 106-108; Arnold D. McNair, "So-Called State Servitudes," *Brit. Y.B.*, 1925, 111; F. A. Váli, *Servitudes of International Law*, London, 1933; Helen D. Reid, *International Servitudes in Law and Practice* (with bibliography), Chicago, 1932.

See *Case of Dutch State Servitude in Prussia*, Supreme Court of Cologne, VII, Civil Division, April 21, 1914, *Am. J.*, VIII, 907; *Case of German Railways Station at Basle*, Dist. Labour Court of Karlsruhe, 1928, McNair and Lauterpacht, *Annual Dig.*, 1927-1928, Case No. 90.

See in this connection, Mr. Lansing, Secy. of State, to Mr. Morgenthau, American Ambassador at Constantinople, Nov. 4, 1915, *For. Rel.* 1915, 1305, quoted *infra*, § 265.

§ 154.<sup>1</sup> See, generally, bibliographical material referred to under Marginal Seas, *supra*, § 141.

<sup>2</sup> Fuller, C. J., in *Louisiana v. Mississippi*, 202 U. S. 1, 52; the Mark Gray case, *Venezuelan Arbitrations*, 1903, Ralston's Report, 33, where it was held that a State might grant a monopoly of towage privileges within its territorial waters.

<sup>3</sup> Declares Woolsey: "No vessel pursuing its way on the high seas can commit an offense

is commonly acknowledged.<sup>4</sup> The right of passage, although incidental to the privilege of navigating the high seas, may be said to owe its existence to the circumstance that, as Hall has pointed out, "the interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States."<sup>5</sup> It is believed that at the present time the concern of those interests for that liberty has even a larger purpose than Hall has disclosed, and does not fail to embrace the common needs in time of peace of vessels that may not be engaged in trade.

Vessels of war, although serving no commercial purpose, are not necessarily deprived of the right of passage under normal conditions, and still less, other public ships devoted to scientific purposes.<sup>6</sup>

Thus the Preparatory Committee<sup>7</sup> for the Codification Conference on International Law, that ultimately convened at The Hague, in 1930, found it possible to observe that in the replies to the request addressed to the governments of interested States for information, "the right of innocent passage for warships and the right of the coastal State to regulate the conditions of such passage and the conditions in which they may anchor in its territorial waters are accepted

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by sailing within a marine league of the shore." 6 ed., 69. Said Mr. Bayard, Secy. of State, in the course of a communication to Mr. Manning, Secy. of the Treasury, May 28, 1886: "We do not, in asserting this claim [as to the territorial limit of the marginal sea], deny the free right of vessels of other nations to pass, on peaceful errands, through this zone, provided they do not by loitering produce uneasiness on the shore or raise a suspicion of smuggling." 160 MS. Dom. Let., 348, Moore, Dig., I, 718, 720, 721.

<sup>4</sup> League of Nations, Conference for the Codification of International Law, Bases of Discussion, II, Territorial Waters, Basis No. 19, League of Nations Doc. No. C.74.M.39.1929.V., p. 71.

Also, Art. 4 of the provisions for "The Legal Status of the Territorial Sea," annexed to the Final Act of the Hague Conference for the Codification of International Law, April 12, 1930, *Am. J.*, XXIV, *Special Supplement* (July, 1930), 184, 185.

See, in this connection, Mr. Gresham, Secy. of State, to Mr. Taylor, American Minister to Spain, For. Rel. 1895, II, 1177.

<sup>5</sup> Higgins' 8 ed., § 42, p. 198.

<sup>6</sup> See commentary of Prof. Higgins in his 8th edition of Hall, 198-199, on the conclusion of that author that "a state has therefore always the right to refuse access to its territorial waters to the armed vessels of other states, if it wishes to do so." § 42.

Declared Mr. Elihu Root, in the course of his oral argument in the North Atlantic Coast Fisheries Arbitration: "Warships may not pass without consent into this zone, because they threaten. Merchant-ships may pass and repass because they do not threaten." (*Proceedings*, XI, 2007.) It may be observed that Mr. Root cited no authority in support of his conclusion; and also that in time of peace vessels of war do not necessarily or commonly "threaten" the foreign territorial sovereign within whose coastal waters passage is sought and enjoyed. Obviously, the right to exclude, even in time of peace, any foreign threatening vessel, public or private, is the privilege of that sovereign. That fact fails, however, to warrant the inference that public vessels generally, embracing vessels of war, are normally to be deemed, or are in fact normally regarded, as in any way hostile to the State whose waters they seek to traverse. Mr. Root's statement, quoted by Prof. Wilson in his Comment on Art. 14 of the Harvard Convention on Territorial Waters, of 1929, appears to have encouraged the framers thereof to conclude that the provision calling for innocent passage of foreign vessels through the marginal seas should be designed to exclude vessels of war from enjoying that right. *Research in International Law*, Harvard Law School, 1929, p. 295-296.

It may be noted that Prof. Wilson, in the second edition of his *Handbook on International Law*, appearing in 1927, declared, without qualification, that "within the three-mile limit innocent passage of vessels sailing the open sea is uniformly permitted" (p. 103).

See, also, A. S. de Bustamante y Sirven, *The Territorial Sea*, Oxford, 1930, §§ 172-178.

<sup>7</sup> The Committee consisted of Professor Basdevant (France), Chairman, M. Carlos Castro-Ruiz (Chile), M. François (Netherlands), Sir Cecil Hurst (Great Britain), and M. Massimo Pilotti (Italy).

without difficulty. The divergences of view on points of detail are of little importance.”<sup>8</sup> Accordingly, the Committee offered as a basis of discussion (No. 20) the following statement:

A coastal State should recognize the right of innocent passage through its territorial waters of foreign warships, including submarines navigating on the surface.

A coastal State is entitled to make rules regulating the conditions of such passage without, however, having the right to require a previous authorisation.

A coastal State is entitled to make rules governing the anchoring of foreign warships in its territorial waters, but it may not forbid anchoring in case of damage to the ship or of distress.<sup>9</sup>

While no convention on the territorial sea was concluded at the Conference at The Hague of 1930, certain articles described as “The Legal Status of the Territorial Sea” annexed to a Resolution embraced in the Final Act of the Conference of April 12, 1930, and which were designed for communication to the governments of the several interested States, made provision in Article 12 that:

As a general rule, a Coastal State will not forbid the passage of foreign warships in its territorial sea and will not require a previous authorisation or notification.

The Coastal State has the right to regulate the conditions of such passage. Submarines shall navigate on the surface.<sup>10</sup>

So long as the conduct of a vessel of any kind is not essentially injurious to the safety and welfare of the littoral State, there would appear to be no reason to exclude it from the use of the marginal sea. The provisions above quoted reveal the fact that maritime States are disposed to act upon such a theory, and

<sup>8</sup> League of Nations, Conference for the Codification of International Law, Bases of Discussion, II, Territorial Waters, C.74.M.39.1929.V., p. 75.

See response of the United States, of March 16, 1929, *id.*, 73, and 66, where the statement of Mr. Root, in his oral argument in the North Atlantic Coast Fisheries Arbitration was set forth.

<sup>9</sup> *Id.*, 75.

<sup>10</sup> *Am. J.*, XXIV, *Special Supplement* (July, 1930), 184, 187.

According to Art. 10 of Draft Convention on Law of Maritime Jurisdiction in Time of Peace, of the International Law Association, 1926: “The ships of all countries, public as well as private, have the right to pass freely through territorial waters, but are subject to the regulations enacted by the State through whose territorial waters they pass, provided that such regulations do not infringe any of the provisions contained in this Convention.” (Report, 34th Conference at Vienna, 101, 102.)

“All ships without distinction shall enjoy the right of inoffensive passage through littoral waters, conforming themselves to any rules which may be laid down by the adjacent State for the security of navigation, for the police of the seas, or for the defence and security of its own territory.” (Art. 6 of Rules concerning the Extent of Littoral Waters and of Powers exercised therein by the Littoral State, prepared by the Kokusaiho-Gakkwai in conjunction with the Japanese branch of the International Law Association, Appendix No. 7, to Harvard Draft Convention on Territorial Waters, *Am. J.*, *Supplement*, XXIII, 376.)

According to Art. 11 of the Plan of Regulation relative to the Territorial Sea in Time of Peace, adopted by the Institute of International Law at Stockholm in 1928: “The free passage of vessels of war may be subjected to special regulations by the riparian State.” (*Annuaire*, XXXIV, 755, 758.)

suggest that from the practice of permitting unoffending vessels of war to enjoy passage therein, the right to withhold it has sunk into desuetude.<sup>11</sup>

The Institute of International Law, in its Rules adopted in 1894, announced that all ships without distinction should have the right of innocent passage, saving to belligerents the right of regulating passage and, with a view to defense, of forbidding it to any ship, and saving also to neutrals the right of regulating the passage of vessels of war of every nationality.<sup>12</sup> It may be open to question whether this declaration does not place too great restriction upon the neutral. It must be apparent that such a State enjoys the right to prevent as well as regulate the passage through the marginal sea of a belligerent ship of whatsoever kind, in case of its failure to abstain from acts therein which would, if knowingly permitted by the neutral, constitute a violation of neutrality.<sup>13</sup> The right of so-called innocent passage vanishes whenever the conduct of a ship is harmful to the territorial sovereign. To the latter, whether a belligerent or a neutral, must be accorded the right to determine when acts of a passing ship lose their innocent character.

The passage of foreign vessels through the marginal sea serves at the present time to bring them in closer contact with the life and interests of the territorial sovereign than ever before. Such passage calls, therefore, for constant effort on the part of persons in control of such ships to respect local requirements for safety of traffic and the protection of channels and buoys, to guard against the pollution of the waters that are traversed, to avoid causing injury to the products of the marginal sea, and to refrain from interference with, or destruction of, the fisheries, as well as the animal and bird life appurtenant to the area. Opportunities for smuggling, that are accentuated by the proximity of a passing vessel to the shore afford temptations that require constant avoidance.<sup>14</sup> Accordingly, the territorial sovereign enjoys large freedom in imposing regulations designed to protect itself in such matters, which the passing foreign vessel is deemed to be obliged to respect.<sup>15</sup> When that vessel, such as a war ship, belongs to the public service of a foreign State, its failure to comply with the local regulations that have been communicated to its commander, justifies the territorial sovereign in demanding its departure.<sup>16</sup>

<sup>11</sup> Cf. P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, 120-123.

<sup>12</sup> Art. V, *Annuaire*, XIII, 329, J. B. Scott, *Resolutions*, 114.

<sup>13</sup> See Art. XXV of Hague Convention of 1907, concerning the Rights and Duties of Neutral Powers in Naval War, Malloy's *Treaties*, II, 2362.

<sup>14</sup> "Passage is not *innocent* when a vessel makes use of the territorial sea of a Coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State.

"Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress." (Art. 4 of the provisions for "The Legal Status of the Territorial Sea," annexed to the Final Act of the Hague Conference for the Codification of International Law, April 12, 1930, *Am. J., XXIV, Special Supplement* (July, 1930), 184, 185.)

<sup>15</sup> See, for example, Arts. 5 and 6, *id.*

<sup>16</sup> "In foreign territorial waters, warships must respect the local laws and regulations. Any case of infringement will be brought to the attention of the captain: if he fails to comply with the notice so given, the ship may be required to depart." (Basis of Discussion No. 21, League of Nations, Conference for the Codification of International Law, Bases of Discussion, II, Territorial Waters, C.74.M.39.1929.V., p. 75.)

It will be observed that in the assertion of that form of control manifested by the doing of justice, or, as it is commonly described, by the exercise of rights of jurisdiction, within territorial waters constituting the marginal sea, the territorial sovereign finds itself subjected to certain restraints with regard to foreign vessels and their occupants. It will be found that in the case of merchant vessels or private ships, those restraints depend in large degree upon the character of the activities of the occupants, as well as upon the place where their acts are committed or take effect,<sup>17</sup> and that in the case of public vessels and their occupants, they are attributable to other causes.<sup>18</sup>

## (3)

## STRAITS

## (a)

§ 155. **In General.** A strait which serves as a passage from one open sea to another ought not on principle to be closed.<sup>1</sup> This is believed to be true although the waterway is a part of the domain of the States adjacent to it. It is the relation which the channel of communication bears to navigation generally as a means of access to the seas thus connected which, rather than any other circumstance, is decisive of the equities of foreign maritime States. That a territorial sovereign ought to be permitted to protect itself as against hostile acts in times of peace or war, and regardless of its status as a belligerent or neutral, should be clear. The mode of protection should, however, be one designed to oppose the least possible obstacle in the way of navigation. The neutralization of a strait offers an appropriate means of achieving this two-fold object.

A channel of water, whether or not described as a strait, lying wholly within the territory of a single State, may afford a convenient means of access to, or

<sup>17</sup> See Rights of Jurisdiction, The Marginal Sea, *infra*, § 226.

<sup>18</sup> See, *infra*, §§ 251-253, 256-257.

§ 155.<sup>1</sup> Art. X, Section 3, of Rules on the Definition and Régime of the Territorial Sea adopted by the Institute of International Law in 1894, *Annuaire*, XIII, 331, J. B. Scott, Resolutions, 115.

"A strait connecting high seas shall remain open to navigation by the private and public vessels of all States, including vessels of war." (Art. X, of Harvard Convention on Territorial Waters, *Am. J. Supplement*, XXIII, 244.) See, also, comprehensive comment, *id.*, 281-287.

The right of navigation of Fuca's Straits contained in the treaty between the United States and Great Britain of June 15, 1846, was not, in the opinion of Mr. Wharton, Acting Secy. of State, May 22, 1891, in a communication to the Secretary of the Treasury, regarded as violated by the prohibition to engage in the coasting trade. 182 MS. Dom. Let. 79; Moore, Dig., I, 664.

Through Art. V of the Treaty between the Argentine Republic and Chile, defining the boundaries between those States, signed at Buenos Aires, July 23, 1881, the Straits of Magellan were declared to be neutralized forever, and free navigation was guaranteed to the flags of all nations. Brit. and For. St. Pap., LXXII, 1103. See Jules Escudero Guzman, *La Situation Juridique Internationale des Eaux du Détroit de Magellan*, 2 ed., Santiago, Chile, 1930. See, in this connection, The Bangor (1916), Probate, 181, 185.

According to Art. VII of The Declaration between Great Britain and France respecting Egypt and Morocco, of April 8, 1904: "In order to secure the free passage of the Straits of Gibraltar, the two Governments agree not to permit the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebou.

"This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean." (Brit. and For. St. Pap., XCVII, 39, 40.)



connection between, different parts of the same sea where it is contiguous to the coasts of the same State, and without also becoming a necessary channel of communication for international commerce. Long Island Sound is an instance. It is useful chiefly for coastwise traffic. There would seem to be no obligation on the part of the United States to permit foreign ships generally to pass through it save on such terms as American authority may prescribe.<sup>2</sup> That both termini of a territorial strait, as well as the entire waterway, lie within the domain of a single State would not, however, appear to create a right to bar the navigation of foreign ships, if two different seas are thus connected and the use of the waterway is a matter of vital concern to commerce generally.<sup>3</sup> The Kiel Canal, were it a natural waterway, would be illustrative.<sup>4</sup>

## (b)

§ 156. **The Danish Sound Dues.** Since 1857 the navigation of the sound and belts connecting the Baltic with the North Sea has been free from the duties previously levied by Denmark under a claim of right based upon "immemorial prescription, sanctioned by a long succession of treaties with foreign powers."<sup>1</sup> This freedom was established, in so far as concerned the maritime powers of Europe, by the Treaty of Copenhagen of March 14, 1857, providing for the capitalization of the Sound dues;<sup>2</sup> and with respect to the United States, by its treaty with Denmark of April 11, 1857, providing for the payment by the former of \$393,011, and for the proper lighting and buoying of the passages and other necessary improvements thereof by Denmark without charge.<sup>3</sup>

## (c)

§ 157. **The Bosphorus and the Dardanelles.** When Turkey in the eighteenth century ceased to retain control over all of the territory surrounding the Black Sea, and the waters thereof were no longer regarded as territorial, the Straits of the Bosphorus and the Dardanelles, although remaining within the Turkish domain, formed a passage between two open seas. Turkey necessarily yielded the right of navigation through those waterways to foreign merchant vessels. According, however, to a series of treaties, of which the first was concluded with Great Britain, January 5, 1809, the European Powers agreed that Turkish authority might bar the passage of foreign vessels of war.<sup>1</sup> By the terms of the Treaty of London of July 13, 1841, as well as of the Treaty of Paris of March

<sup>2</sup> See Extent of the National Domain, Straits, *supra*, § 150.

<sup>3</sup> See Naval War College, Int. Law Topics, 1913, 46.

<sup>4</sup> See clauses relating to the Kiel Canal in Arts. 380-386, of treaty of Versailles with Germany, June 28, 1919, U. S. Treaty Vol. III, 3331, 3502.

§ 156. <sup>1</sup> Mr. Buchanan, Secy. of State, to Mr. Flenniken, Minister to Denmark, No. 7, Oct. 14, 1848, House Ex. Doc. No. 108, 33 Cong., 38, 39, Moore, Dig., I, 659, 661. Dana's Wheaton, 262-264; Woolsey, 6 ed., 77-79; Fauchille, 8 ed., § 509; T. E. Holland, Studies in International Law, 277-279; Rivier, I, 158-159.

<sup>2</sup> Brit. and For. St. Pap., XLVII, 32.

<sup>3</sup> Malloy's Treaties, I, 380; statement in Moore, Dig., I, 659-664, and documents there cited; Dana's Wheaton, 264-267; correspondence between the United States and Denmark, 1841-1854, contained in British and Foreign State Papers, XLV, 807-863; Eugene Schuyler, American Diplomacy, 306-316; Charles E. Hill, The Danish Sound Dues and the Command of the Baltic, Durham, North Carolina, 1926, Chap. X, 269-286.

§ 157. <sup>1</sup> *Nouv. Rec.* I, 160; Coleman Phillipson and Noel Buxton, The Question of the Bosphorus and Dardanelles. London. 1917.

30, 1856, and that of London of March 13, 1871, the Sultan reserved the right to permit the passage of light vessels of war employed in the service of foreign legations; and by the terms of the treaty of 1871, it was declared that he might open the Straits in times of peace to the vessels of war of friendly and allied powers, should he deem it necessary for the execution of the treaty of March 30, 1856.<sup>2</sup>

The position of the United States, in the years preceding World War I, appears to have been one of reluctant acquiescence.<sup>3</sup> Secretaries Cass and Fish were unwilling to admit the right of Turkey, in conjunction with a group of European Powers, by means of conventions to which the United States was not a party to bar the passage of American vessels of war through the Straits.<sup>4</sup> Moreover, certain requests made by American naval commanders and addressed to Turkish authorities, for permission to pass through the Dardanelles, were said to have been unauthorized.<sup>5</sup> On two occasions, however, in 1895, permission was requested by the American Minister at Constantinople, without the apparent disapproval of the Department of State. In both instances consent was refused.<sup>6</sup>

President Wilson, in his address to the Congress on conditions of peace, January 8, 1918, declared that "the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees."<sup>7</sup>

(i)

§ 158. **The Same.** According to the Turkish treaty of peace signed at Sèvres, August 10, 1920, which failed to be consummated, the navigation of the Straits, including the Dardanelles, the Sea of Marmora, and the Bosphorus, were to be

<sup>2</sup> See protocol of London, July 10, 1841, signed by plenipotentiaries of Great Britain, Austria, Russia, Prussia and Turkey, *Nouv. Rec. Gén.*, II, 126; Art. I, Treaty of London, July 13, 1841, concluded by Great Britain, Austria, Prussia and Russia with Turkey, *Nouv. Rec. Gén.*, II, 128; Art. X, Treaty of Paris, March 30, 1856, and Art. I of convention annexed thereto, *Nouv. Rec. Gén.*, XV, 770 and 785; Art. II, Treaty of London, March 13, 1871, *Nouv. Rec. Gén.*, XVIII, 303, 305; T. E. Holland, *The European Concert in the Eastern Question*, 224-226; Eugene Schuyler, *American Diplomacy*, 317-328; Moore, *Dig.*, I, 664-666; Maurice Lozé, *La question des détroits*, Paris, 1908.

Also, McNair's 4 ed. of *Oppenheim*, I, 415, note 4.

<sup>3</sup> Mr. Fish, in the course of a communication to Mr. Boker, Minister to Turkey, Jan. 3, 1873, declared: "The right [of Turkey], however, has for a long time been claimed and has been sanctioned by treaties between Turkey and certain European States. A proper occasion may arise to dispute the applicability of the claim to United States men-of-war. Meanwhile it is deemed expedient to acquiesce in the exclusion." *MS. Inst. Turkey*, II, 452, Moore, *Dig.*, I, 667.

<sup>4</sup> Mr. Cass, Secy. of State, to Mr. Pickens, Minister to Russia, Jan. 14, 1859, *MS. Inst. Russia*, XIV, 159, Moore, *Dig.*, I, 665; Mr. Fish, Secy. of State, to Mr. McVeagh, Minister to Turkey, No. 29, May 5, 1871, *For. Rel.* 1871, 902, Moore, *Dig.*, I, 666; Mr. Fish, Secy. of State, to Mr. Boker, Minister to Turkey, Jan. 25, 1873, *MS. Inst. Turkey*, II, 456, Moore, *Dig.*, I, 668. Compare Mr. McVeagh, Minister to Turkey, to Mr. Fish, Secy. of State, Jan. 24, 1871, and March 27, 1871, *For. Rel.* 1871, 892 and 897, Moore, *Dig.*, I, 667, note.

<sup>5</sup> Mr. Fish, Secy. of State, to Mr. Boker, Minister to Turkey, Jan. 3, 1873, *MS. Inst. Turkey*, II, 452, Moore, *Dig.*, I, 667; Same to Same, Jan. 25, 1873, *MS. Inst. Turkey*, II, 456, Moore, *Dig.*, I, 668.

<sup>6</sup> Mr. Terrell, Minister to Turkey, to Mr. Olney, Secy. of State, Nov. 21, and Dec. 6, 1895, concerning the U.S.S. *Marblehead*, *For. Rel.* 1895, II, 1344 and 1383, Moore, *Dig.*, I, 668; Mavroyeni Bey, Turkish Minister, to Mr. Olney, Secy. of State, Jan. 16, 1896, concerning the U.S.S. *Bancroft*, *For. Rel.* 1895, II, 1461, Moore, *Dig.*, I, 668, note.

<sup>7</sup> *Official Bulletin*, Jan. 8, 1918.

opened in time of peace and war, to every vessel of commerce or of war, and to military and commercial aircraft without distinction. These waters were not to be blockaded; nor was any belligerent right or act of hostility to be committed therein, "unless in pursuance of a decision of the Council of the League of Nations."<sup>1</sup> A so-called "Commission of the Straits" was to exercise control in the name of the Turkish and Greek Governments, and with authority over all waters between the Mediterranean mouth of the Dardanelles and the Black Sea mouth of the Bosphorus, embracing waters within three miles of the mouths.<sup>2</sup> The Commission was accorded complete independence of local authority in the exercise of its powers, and concerning its own flag, budget and organization.<sup>3</sup> The Commission was to inform the representatives of the Allied Powers in case of interference with the right of passage through the Straits, as a means of invoking their forcible aid.<sup>4</sup> In matters of navigation all ships were to be treated on terms of absolute equality;<sup>5</sup> and the levying of any dues or charges was to be without discrimination.<sup>6</sup> The transit of vessels of war was to be in conformity with the regulations.<sup>7</sup> The conditions established for the transit of belligerent vessels of war were specified in terms resembling those of the Suez Canal Convention of October 29, 1888, subject, however, to the reservation that they should not limit belligerent rights exercised in pursuance of a decision of the Council of the League of Nations.<sup>8</sup>

(ii)

§ 158A. **The Treaty of Lausanne of July 24, 1923.** In negotiations with the Allied Powers that were broken off early in 1923, and of which the resumption later in the same year was productive of a treaty of peace, Ismet Pasha, the head of the Turkish Delegation, announced the readiness of his country to abandon the "principle" of the closing of the Straits, and its willingness to accept demilitarization as a mode of safeguarding Constantinople.<sup>1</sup> The Treaty

§ 158.<sup>1</sup> Arts. 37-61. For the text of the Treaty of Sèvres, see Sen. Doc. No. 7, 67 Cong., 1 Sess., 320.

<sup>2</sup> Arts. 38-39. The Commission was to be composed of representatives of the United States (if it should be willing), Great Britain, France, Italy, Japan, Russia (when belonging to the League of Nations), Greece, Roumania, Bulgaria and Turkey (when the last two should belong to the League of Nations). Art. 40. Each Power was to appoint one representative; but representatives of the United States, Great Britain, France, Italy, Japan and Russia were to have two votes each, while representatives of the other three Powers were to have one vote each. Large rights of administrative control were conferred upon the Commission. Art. 43.

<sup>3</sup> Art. 42.

<sup>4</sup> Art. 44. The Commission was clothed with power to acquire property or permanent works, raise loans, and levy dues. Art. 45. Functions formerly exercised by certain specified sanitary organizations were to be discharged under the control of the Commission which was to cooperate with the League of Nations in measures for the combating of diseases. Art. 46. Provision was made with respect to the exercise of jurisdiction. Arts. 49-50.

<sup>5</sup> Art. 52.

<sup>6</sup> Art. 54.

<sup>7</sup> Art. 56.

<sup>8</sup> Arts. 57-60. "For the purpose of guaranteeing the freedom of the Straits," provision was made for the disarming and demolishing of fortifications within a so-called Zone of the Straits and specified islands; and the limits of the zone, both in Europe and Asia were laid down. Arts. 177-180.

§ 158A.<sup>1</sup> "We have abandoned the principle of the closing of the Straits, a principle which, as has been proved by past experience, is historically that which most adequately secures

of Lausanne of July 24, 1923, that marked the termination of the war with respect to Turkey, announced that the High Contracting Parties were agreed "to recognise and declare the principle of freedom of transit and of navigation, by sea and by air, in time of peace as in time of war, in the strait of the Dardanelles, the Sea of Marmora and the Bosphorus," as prescribed in a separate Convention signed on the same day, regarding the régime of the Straits, which was to have the same force and effect with respect to the Contracting Parties as if it formed a part of the treaty.<sup>2</sup> The Convention Relating to the Régime of the Straits, reflected the desire of the Contracting Parties "of ensuring" in the Straits freedom of transit and navigation between the Mediterranean and the Black Sea for all nations.<sup>3</sup> The method of so doing embraced a plan of demilitarised zones together with the broad uses of an international commission. This method was relinquished by the terms of the Convention Regarding the Régime of the Straits, signed at Montreux, July 20, 1936, through which the Turkish Government secured the transfer to itself of the functions of the International Commission set up under the convention of 1923, which the later instrument served to replace.<sup>4</sup> The Montreux Convention marked the success of the Turkish Government in gaining acknowledgment that the chief control of the régime of the Straits should be lodged in the Turkish sovereign.<sup>5</sup>

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the safety of our capital, and we have agreed that the waters of the Straits shall be open to the ships of all nations. Further, in spite of the fact that in many cases where both shores of an open waterway belong to a single Power, that Power retains by usage the right of fortification, we have agreed in the present instance to demilitarization.

"We have also abandoned our request regarding the maintenance of a garrison in the Gallipoli peninsula." (Turkey No. 1 [1923], Lausanne Conference on Near Eastern Affairs 1922-1923, Cmd. 1814, p. 838, quoted by Edgar Turlington, in his illuminating article, "The Settlement of Lausanne," *Am. J.*, XVIII, 696, 702.)

<sup>2</sup> For the text of the Treaty of Lausanne, see *Am. J.*, XVIII, *Official Documents*, 1; British Treaty Series, No. 16 (1923), Cmd. 1929; League of Nations, Treaty Series, Vol. XXVIII, p. 11.

<sup>3</sup> For the text of the Convention Relating to the Régime of the Straits see, *Am. J.*, XVIII, *Official Documents*, 53; British Treaty Series, No. 16 (1923), Cmd. 1929, p. 109; League of Nations, Treaty Series, Vol. XXVIII, p. 117.

See, in this connection, *Rapport de la Commission des Détroits, à la Société des Nations*, Istanbul, 1933.

<sup>4</sup> *Am. J.*, XXXI, *Official Documents*, 1, 9.

By Article X of the treaty between the United States and Turkey of August 6, 1923, which failed to be consummated, merchant and war vessels and aircraft of the United States were to enjoy complete liberty of navigation and passage of the Dardanelles, the Sea of Marmora and the Bosphorus, on the basis of equality with similar craft of the most-favored nation, subject to the requirements of the Straits Convention of July 24, 1923. See, Edgar Turlington, "The American Treaty of Lausanne," World Peace Foundation Pamphlets, 1924, VII, No. 10, p. 598.

<sup>5</sup> See telegram from the Turkish Minister for Foreign Affairs to the Secretary-General of the League of Nations, April 10, 1936, in which it was declared that "the Government of the Republic has the honour to inform the Powers which took part in the negotiations for the conclusion of the Straits Convention that it is prepared to enter into negotiations with a view to arriving in the near future at the conclusion of agreements for regulation of the régime of the Straits under the conditions of security which are indispensable for the inviolability of Turkey's territory, and in the most liberal spirit, for the constant development of commercial navigation between the Mediterranean and the Black Sea." (League of Nations, *Official Journal*, 1936, 504, 505.)

See the Montreux Convention Regarding the Régime of the Straits, *infra*, § 198B.

## (4)

## NAVIGATION OF RIVERS

## (a)

§ 159. **National Streams.** When the entire course of a river is within the territory of a single State, it is generally agreed that a right of exclusive control is possessed by the territorial sovereign, which may, therefore, lawfully close the navigation of the stream to foreign ships. Any privilege of transit enjoyed by them must be regarded as due to the consent of that sovereign.<sup>1</sup> It may see fit to give that consent and permit vessels of foreign flags to navigate its rivers.<sup>2</sup>

## (b)

## INTERNATIONAL STREAMS OF NORTH AMERICA

## (i)

§ 160. **Preliminary.** When a navigable river flows through the territory of two or more States, or forms an international boundary, the broad question arises as to the nature and extent of the right of one of them to exercise privileges of navigation within waters outside of the national domain, whether downstream or upstream, or on the opposite side of a line of demarcation. The inquiry also arises respecting the claims of non-riparian States.<sup>1</sup>

§ 159.<sup>1</sup> "It is not doubted that rivers such as the Hudson and the Mississippi, which are navigable only within the territory of one country, are subject to that country's exclusive control." J. B. Moore, *Principles of American Diplomacy*, 1918, 130. Mr. Foster, Secy. of State, to Sir Julian Pauncefote, British Minister, at Washington, Dec. 31, 1892, *For. Rel.* 1892, 335, 337; Moore, *Dig.*, I, 626-627; Oppenheim, *Lauterpacht's* 5 ed., I, § 176.

*Compare* instructions of Mr. Clay, Secy. of State, to Mr. Gallatin, Minister to Great Britain, June 19, 1826, *Am. State Pap.*, *For. Rel.*, VI, 762, 763.

Concerning tests of the navigability of a river, see Hackworth, *Dig.*, I, § 85, and cases there cited, particularly *Brewer-Elliott Oil and Gas Company v. United States*, 260 U. S. 77, 86.

<sup>2</sup> See Constitution of Honduras, of Sept. 2, 1904, Art. 141, *Brit. and For. State Pap.*, XCVII, 1255, 1272.

§ 160.<sup>1</sup> Concerning the navigation of international rivers generally, see, Ruth Bacon, "British Policy and the Regulation of European Rivers of International Concern," *Brit. Y.B.*, 1929, 128; same author, "British and American Policy and the Right of Fluvial Navigation," *id.*, 1932, 76;

Alphonse Bergès, *Du Régime de Navigation des Fleuves Internationaux*, Toulouse, 1902;

Calvo, 5 ed., I, 433-465;

Étienne Carathéodory, *Du Droit International Concernant les Grands Cours d'Eau*, Leipzig, 1861;

J. C. Carlomagno, *El Derecho Fluvial Internacional*, with bibliography, Buenos Aires, 1913;

J. P. Chamberlain, *The Régime of the International Rivers: Danube and Rhine*, New York, 1923; same author, *Foreign Flags in China's Internal Navigation*, American Council, Institute of Pacific Relations, 1931;

Clunet, *Tables Générales*, I, 462-465, 882-883;

Ed. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, Paris, 1879; same writer, *Histoire du Droit Fluvial Conventionnel*, Paris, 1889;

W. J. M. Van Eysinga, *Evolution du Droit Fluvial International du Congrès de Vienne au Traité de Versailles, 1815-1919*, Leyde, 1920; same writer, "Les Fleuves et Canaux Internationaux," *Bibliotheca Visseriana*, II (1924), 123;

Fauchille, 8 ed., §§ 520-531, with bibliography;

R. Hennig, "Die Unklarheit des Begriffes 'Internationalisierung' von Strömen," *Zeit. Int.*, XXXVI, 100;

Higgins' 8 ed. of Hall, § 39;

In testing the pretensions of claimant States by the practice of the past hundred and fifty years, it will be found that not infrequently there has been a willingness to yield principle for the sake of actual privileges greatly needed. Those accorded have commonly been acknowledged by treaty. Inasmuch as conventional arrangements have been shaped according to geographical and commercial considerations, and in response to the particular requirements of the contracting parties, there has been lack of uniformity of action save with respect to navigation through rivers offering the same fundamental problems peculiar to the same continent. Nevertheless, from the conventions illustrative of the practice observed, it is believed to be possible to draw conclusions indicating the extent to which riverain States appear to respect an obligation to consent to the exercise of privileges of navigation within their respective waters by vessels under foreign flags.

## (ii)

§ 161. **The Mississippi.** According to Article VIII of the treaty of peace between the United States and Great Britain, of September 3, 1783, it was agreed that the navigation of the Mississippi, from its source to the ocean, should forever "remain free and open to the subjects of Great Britain and to the citizens of the United States."<sup>1</sup> By virtue of its treaty of the same year with Great

Jean Hostie, "*Notes sur le Statut Relatif au Régime des Voies Navigables d'Interet International*," *Rev. Droit Int.*, 3 sér., II, 532;

Max Huber, "*Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen*," *Zeit. Völk.*, I, 29 and 159;

G. Kaackenbeeck, *International Rivers*, Grotius Society Publications, No. 1, London, 1918 (subjected to a notable review by Joseph P. Chamberlain, in *Yale L.J.*, XXVIII, 519);

Akio Kasama, *La Navigation Fluviale en Droit International*, Paris, 1928;

Ismael López, *Régimen Internacional de los Ríos Navegables*, Bogotá, 1905;

Martens, II, 345-355;

J. B. Moore, *Principles of American Diplomacy*, New York, 1918, 130-134; same author, *Dig. of Int. Law*, I, §§ 128-132;

E. Nys, "*Les fleuves internationaux traversant plusieurs territoires*," *Rev. Droit Int.*, 2 Sér., V, 517; same author, *Le Droit International*, I, 423-437;

P. M. Ogilvie, *International Waterways*, New York, 1920;

Lauterpach's 5 ed. of *Oppenheim*, I, §§ 176-178a, with bibliography;

Pierre Orban, *Étude de Droit Fluvial International*, with bibliography, Paris, 1896;

A. W. Quint, *Internationaal Rivierenrecht*, Amsterdam, 1930;

Eugene Schuyler, *American Diplomacy*, New York, 1886, 265-305, 319-366; G. E. Sherman, "The International Organization of the Danube under the Peace Treaties," *Am. J.*, XVII, 438;

H. A. Smith, *The Economic Uses of International Rivers*, London, 1931;

J. Vallotton, "*Du Régime Juridique des Cours d'Eau Internationaux de l'Europe*," *Rev. Droit Int.*, 2 sér., XV, 271; same author, *Le Régime Juridique du Danube Maritime devant la Cour Permanente de Justice Internationale*, Lausanne, 1928;

Charles de Visscher, *Le Droit International des Communications*, Gand, 1924;

Dana's *Wheaton*, 274-288;

Woolsey, 6 ed., 79-83.

See, also, Draft of International Regulations for the Navigation of Rivers, adopted by the Institute of International Law at Heidelberg in 1887, *Annuaire*, IX, 182, J. B. Scott, *Resolutions*, 78;

Resolutions adopted by the Institute at Madrid in 1911, on the subject of International Regulation of the Use of International Streams, *Annuaire*, XXIV, 365, J. B. Scott, *Resolutions*, 168;

Barcelona Conference, *Verbatim Records and Texts relating to the Convention on the Régime of Navigable Waterways of International Concern*, League of Nations Publication, Geneva, 1921.

§ 161. <sup>1</sup> Malloy's *Treaties*, I, 589.

Britain, Spain acquired east and west Florida, becoming thereby the riparian sovereign on both sides of the Mississippi at its mouth.<sup>2</sup> The United States thereupon sought Spanish recognition of a right of navigation through the lower waters to the sea. That claim, vigorously advocated by Mr. Jefferson, then Secretary of State, was said to rest upon the law of nature and of nations.<sup>3</sup> After protracted discussions, a treaty was concluded October 27, 1795. With respect to the Mississippi it was provided in Article IV that—

His Catholic Majesty has likewise agreed that the navigation of the said river, in its whole breadth from its source to the ocean, shall be free only to his subjects and citizens of the United States, unless he should extend this privilege to the subjects of other powers by special convention.<sup>4</sup>

According to Article III of the Jay Treaty, concluded with Great Britain November 19, 1794, the United States had agreed that the Mississippi should, "according to the treaty of peace, be entirely open to both parties."<sup>5</sup>

In 1796, the United States and Great Britain annexed to the Jay Treaty an explanatory Article relative to the navigation of the rivers and waters of the contracting parties, and to the effect that no stipulations in any convention subsequently concluded by either of the contracting parties with any other State could be understood to derogate in any manner from the rights of commerce and navigation of their respective citizens and subjects and for which provision had been made in the Jay Treaty.<sup>6</sup> Spain made complaint, contending that this

<sup>2</sup> Letter from the Minister of Spain to Mr. Pickering, Secy. of State, May 6, 1797, American State Pap., For. Rel., II, 14-15.

<sup>3</sup> Mr. Jefferson, Secretary of State, in support of the claim of his Government, relied first, upon Article V of the treaty between Great Britain and France of Feb. 10, 1763, providing for free navigation of the Mississippi by the subjects of those countries; secondly, upon the treaty of peace between the United States and Great Britain of 1782-1783; and finally upon the "law of nature and nations." He asserted that the sentiment was written in deep characters on the heart of man that "the ocean is free to all men, and their rivers to all their inhabitants." Accordingly he declared that: "When their rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream is in any case obstructed, it is an act of force by a stronger society against a weaker, condemned by the judgment of mankind." He said that the writers on the subject were agreed that an innocent passage along a river was the natural right of those inhabiting its borders above; that although this right was regarded as an imperfect one, inasmuch as the modification of its exercise depended to a large degree on the convenience of the nation through whose territory foreign vessels passed, it was, nevertheless, "still a right as real as any other right, however well defined; and were it to be refused, or to be so shackled by regulations, not necessary for the peace or safety of its inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation is the counterpart to that of those possessing the shores below, and founded in the same natural relations with the soil and water." He said also: "We might add, as a fifth *sine qua non*, that no phrase should be admitted in the treaty which could express or imply that we take the navigation of the Mississippi as a *grant* from Spain. But, however disagreeable it would be to subscribe to such a sentiment, yet, were the conclusion of a treaty to hang on that single objection, it would be expedient to waive it, and to meet, at a future day, the consequences of any resumption they may pretend to make, rather than at present, those of a separation without coming to any agreement." Instructions to Messrs. Carmichael and Short, commissioners to negotiate a treaty with Spain, Mar. 18, 1792. American State Pap., For. Rel., I, 252-257.

<sup>4</sup> Malloy's Treaties, II, 1642.

<sup>5</sup> Malloy's Treaties, I, 592.

<sup>6</sup> Malloy's Treaties, I, 607.

Article was contrary to the treaty with the United States of 1795, and which, it was declared, was the basis of the American right of navigation.<sup>7</sup>

It may be observed that the treaties concluded by the United States with both Great Britain and Spain purported to secure rights of navigation for the benefit of the contracting parties exclusively. No statement of principle as to the freedom of navigation of international rivers was made. Moreover, the language of the convention of 1795 gave some color to the Spanish claim that the American right to navigate the Mississippi was in the nature of a grant from His Catholic Majesty.

Through the acquisition of Louisiana and the Floridas, by virtue of treaties respectively with France, of April 30, 1803, and with Spain, of February 22, 1819, the United States found the Mississippi wholly within its own domain. The river ceased to be an international stream.<sup>8</sup>

(iii)

§ 162. *The St. Lawrence.* Between 1823 and 1827, the United States made vigorous effort to secure from Great Britain recognition of a right to navigate the lower waters of the St. Lawrence. In view of the principles ably enunciated yet vainly advocated by Secretaries Adams and Clay, as well as by Messrs. Rush and Gallatin, the basis of the subsequent arrangement was significant.<sup>1</sup> By means of sacrifices doubtless regarded as offering sufficient compensation to British interests, the United States, through Article IV of the reciprocity treaty of June 5, 1854, secured temporarily the privilege of free navigation.<sup>2</sup>

<sup>7</sup> Correspondence in 1797, between Mr. Pickering, Secy. of State, and the Spanish Minister, Am. State Pap., For. Rel., II, 14-15, 16-17.

<sup>8</sup> It had been supposed by the negotiators of the earliest treaty between the United States and Great Britain, that the source of the Mississippi was in Canada, and it was, therefore, agreed that the boundary line should run from the most northwestern point of the Lake in the Woods on a due west course to the Mississippi. As a matter of fact, such a line could not touch or intersect that river, inasmuch as its waters were wholly south thereof. Moore, Dig., I, 625; also Moore, Arbitrations, I, 705-707.

§ 162.<sup>1</sup> See documents communicated to the House of Representatives by President J. Q. Adams, Jan. 7, 1828, Am. State Pap., For. Rel., VI, 757-777. It is believed that the cause of an upstream State was never more forcibly pleaded than by the American secretaries and plenipotentiaries of this period. Attention is particularly called to a memorandum prepared by Mr. Rush and submitted to the British plenipotentiaries in 1824. *Id.*, 769-772. In the course of it he said: "The right of the upper inhabitants to the full use of the stream rests upon the same imperious wants as that of the lower; upon the same intrinsic necessity of participating in the benefits of this flowing element. Rivers were given for the use of all persons living in the country of which they make a part, and a primary use of navigable ones is that of external commerce. The public good of nations is the object of the law of nations, as that of individuals is of municipal law. The interest of a part gives way to that of the whole; the particular to the general. The former is subordinate; the latter paramount. This is the principle pervading every code, national or municipal, whose basis is laid in moral right, and whose aim is the universal good."

<sup>2</sup> Malloy's Treaties, I, 671. The provisions of Article IV for the navigation of the St. Lawrence and Canadian canals used as a means of communication between the Great Lakes and the Atlantic, by citizens and inhabitants of the United States on the same basis as British subjects, contained also the declaration that the British Government retained the right to suspend the privilege on giving due notice thereof, and that in case of such suspension the United States might suspend also the operation of Article III (providing for the free admission of certain specified articles into the British Colonies and into the United States), for such period as the rights of navigation were suspended. Article IV also gave to British subjects the right to navigate Lake Michigan for a term of years. The United States engaged to urge the State Governments to give British subjects the use of the State canals on terms of



According to Article XXVI of the Treaty of Washington, of May 8, 1871, the navigation of the St. Lawrence ascending and descending to and from the sea, from the point where the river ceased to be the international boundary —

Shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation.<sup>3</sup>

In Article I of the convention concluded January 11, 1909, concerning the boundary waters between the United States and Canada, it was declared that the navigation of all navigable boundary waters should

forever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.<sup>4</sup>

It was further agreed that so long as the treaty should remain in force, the same right of navigation should extend to the waters of Lake Michigan and to all canals connecting boundary waters, then existing or which might thereafter be constructed on either side of the line.<sup>5</sup>

(iv)

§ 163. **The Yukon, the Porcupine and the Stikine. The St. John. The Columbia.** Article XXVI of the treaty with Great Britain of May 8, 1871, provided for the free navigation forever of the rivers Yukon, Porcupine and Stikine, ascending and descending to the sea, to the citizens and subjects of the two countries, subject to any regulations of either within its own territory not inconsistent with free navigation. Thus, the United States, the lower riparian

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equality with the inhabitants of the United States. It was further agreed that duties should not be levied by Great Britain on Maine lumber floated down the river St. John and its tributaries when shipped to the United States from New Brunswick. Concerning this Article see comment of Hall, Higgins' 8 ed., § 39.

<sup>3</sup> Malloy's Treaties, I, 711.

<sup>4</sup> U. S. Treaty Vol. III, 2607, 2608.

<sup>5</sup> It was also provided that either of the contracting parties might adopt rules and regulations governing the use of such canals within its own territory and charge tolls for the use thereof, but that all such rules and regulations and all tolls charged should apply alike to the nationals of the contracting parties, and to the ships, vessels and boats of both of those parties, and that they should be placed on terms of equality in the use thereof. *Id.*

According to Article VII of a proposed Great Lakes-St. Lawrence Deep Waterway Treaty between the United States and Canada, signed at Washington, July 18, 1932, the rights of navigation accorded under the provisions of existing treaties "between the United States of America and His Majesty" were to be maintained, notwithstanding the provisions for termination contained in any of such treaties. Moreover, it was declared that those treaties "confer upon the citizens or subjects and upon the ships, vessels and boats of each High Contracting Party, rights of navigation in the St. Lawrence River, and the Great Lakes System, including the canals now existing or which may hereafter be constructed. (See Great Lakes-St. Lawrence Deep Waterway Treaty, Dept. of State Publication No. 347, Washington, 1932.)

proprietor of those Alaskan rivers, secured a right of navigation through the upper waters wholly within British territory.<sup>1</sup>

Article III of the treaty between the United States and Great Britain of August 9, 1842, provided that where the river St. John formed the boundary line between the territories of the contracting parties, navigation should be free and open to both. It was provided that the produce of the forest or of agriculture ("not being manufactured") grown in such parts of the State of Maine as might be watered by the river or its tributaries, should have free access into and through the St. John and its tributaries having their source within the State of Maine, to and from the seaport at the mouth of the river, and to and around the falls of the river, by boats, rafts or other conveyance. Such produce while within the Province of New Brunswick was to be treated as if it were the produce of that Province. In like manner the inhabitants of the territory of the upper St. John, where the river was a British stream, were to have access to and through the river for their produce where the river ran wholly through the State of Maine. It was declared that the treaty should not give to either party a right to interfere with any regulations not inconsistent with the terms of the agreement, and which the Governments of Maine and New Brunswick might make respecting the navigation of the river where both banks should belong to the same party.<sup>2</sup>

According to Article II of the treaty between the United States and Great Britain of June 15, 1846, the north branch of the Columbia River within American territory as far as the junction with the main stream, and thence down that stream to the sea, was opened to the Hudson's Bay Company and to all British subjects "trading with the same," subject, however, to such regulations not inconsistent with the treaty as the United States might prescribe.<sup>3</sup> Attention has been called to the fact that the treaty contained no stipulation concerning the navigation of the upper waters of the stream within British territory.<sup>4</sup>

§ 163.<sup>1</sup> Malloy's Treaties, I, 711. "This stipulation is understood to secure 'the right of access and passage,' but not 'the right to share in the local traffic' between American and British ports, as the case may be." Moore, Dig., I, 635, citing Mr. Adey, Second Assist. Secy. of State, to Mr. Woodbury, Jan. 6, 1898, 224 MS. Dom. Let. 229. Concerning the whole article see, also, Eugene Schuyler, *American Diplomacy*, 290-291.

Article XXVII contained an engagement by the British Government to urge upon that of the Dominion to secure for the inhabitants of the United States on terms of equality with those of the Dominion the use of the Welland, St. Lawrence and other canals; the United States, on the other hand, engaging that British subjects might on similar terms enjoy the use of the St. Clair Flats; and agreeing also to urge the State Governments to secure for such subjects, on like terms, the use of the several State canals connected with the navigation of the lakes or rivers traversed by or contiguous to the international boundary. Malloy's Treaties, I, 711.

<sup>2</sup> Malloy's Treaties, I, 653. Concerning the right of New Brunswick under the treaty to impose an export duty on all timber shipped from the Province, including that floated down from Maine, see Moore, Dig., I, 636-637, and documents there cited.

Art. XXXI of the treaty of May 8, 1871, contained an engagement by Great Britain to urge upon the Parliament of the Dominion and the Legislature of New Brunswick that no export or other duty should be imposed on lumber of any kind in that part of Maine watered by the St. John and its tributaries, and floated down that river to the sea, when the same was shipped to the United States from the Province of New Brunswick. Malloy's Treaties, I, 713.

<sup>3</sup> Malloy's Treaties, I, 657.

<sup>4</sup> See statement by J. B. Moore in Moore, Dig., I, 639. Concerning the claims of the Hudson's Bay Co., cf. Moore, *Arbitrations*, I, 253, 262. See communication of Mr. Bayard,

## (v)

§ 164. **The Colorado and the Rio Grande.** By the treaty with Mexico of Guadalupe-Hidalgo, of February 2, 1848, the United States, as the upper riparian proprietor, secured a right of navigation through the lower waters of the Colorado River below its confluence with the Gila, to and through the Gulf of California. No provision was made, however, for the navigation by the inhabitants of Mexico of the upper waters of the Colorado within the territory of the United States.<sup>1</sup> It was declared that the river Gila, and the part of the Rio Grande (described as the Rio Bravo del Norte) lying below the southern boundary of New Mexico, should be "free and common to the vessels and citizens of both countries," and that neither should, "without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation."<sup>2</sup> By the Gadsden Treaty of December 30, 1853, the United States became the sovereign over the territory traversed by the Gila, and over that on both sides of the Rio Grande as far south as latitude 31° 47' 30", below which point the river remained the international boundary. That treaty provided that the previous arrangement as to the Rio Grande should remain in force only below latitude 31° 47' 30". The previous provisions as to the Gila were abrogated.<sup>3</sup>

## (vi)

§ 165. **Conclusions.** From the practice of the United States as indicated by the foregoing treaties with respect to rivers in part traversing or bounding its own territory, the following conclusions are to be drawn:

First, no right of navigation is known to have been exercised in foreign territory or permitted in American territory except by virtue of a treaty.

Secondly, no treaty has declared it to be a principle of international law that international navigable rivers are generally open to navigation by vessels of foreign riparian or non-riparian States.<sup>1</sup>

Thirdly, notwithstanding the principles advocated by its statesmen, the United States, as the upstream sovereign, on at least one occasion accepted a treaty the terms of which afford some basis for the contention that the right of navigation

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Secy. of State, to Mr. Lundy, July 25, 1885, 156 MS. Dom. Let. 358, Moore, Dig., I, 639, in which a distinction was made between the rights of the upper and lower riparian inhabitants.

<sup>1</sup> § 164. <sup>1</sup> Art. VI, Malloy's Treaties, I, 1111.

<sup>2</sup> Art. VII, where the following provision was added: "Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both Governments."

"The stipulations contained in the present Article shall not impair the territorial rights of either Republic within its established limits."

<sup>3</sup> Art. IV, *id.*, 1123. See, also, Art. III of boundary convention of Nov. 12, 1884, *id.*, 1160; Art. V of boundary convention of March 1, 1889, *id.*, 1168.

§ 165. <sup>1</sup> Compare Art. XXVI, treaty between the United States and Bolivia of May 13, 1858, with respect to the rivers Amazon and La Plata, Malloy's Treaties, I, 122.

secured thereby was conferred as a grant by the sovereign downstream; and on another occasion substantial concessions were yielded for the privilege of access to the sea.

Fourthly, in two cases where the upper stream was wholly within the territory of a single State, no permission was accorded the inhabitants of the territory downstream to navigate the upper waters.

Fifthly, in a treaty of the twentieth century concerning the Canadian boundary waters, the broad rights of navigation reciprocally agreed upon for the benefit of the riparian States were subjected to the operation of local regulations of either country not at variance with the compact.

(c)

INTERNATIONAL STREAMS OF SOUTH AMERICA

(i)

§ 166. **In General.** South America is traversed by rivers which, together with their confluents, afford navigable channels of communication with the sea to States remote therefrom, and so afford an indispensable means of access to the outside world.<sup>1</sup> To overseas as well as to interior riparian States, the importance of freedom of navigation has been apparent. The United States has frequently urged the opening of such streams to foreign maritime commerce, and has entered into treaties so providing.<sup>2</sup> In one of them freedom of navigation is declared to be a principle of international law.<sup>3</sup> Certain others imply that the privilege is a grant by a riparian sovereign.<sup>4</sup>

(ii)

§ 167. **The Amazon. The Orinoco. The Rio de la Plata.** Brazil, across the domain of which the streams of the Amazon and its affluents flow to the sea, announced by a decree of December 7, 1866, that that river would be "opened

§ 166.<sup>1</sup> See Pierre Orban, *Étude de Droit Fluvial International*, 163-164.

<sup>2</sup> Mr. Marcy, Secy. of State, in a communication to Mr. Trousdale, Minister to Brazil, Aug. 8, 1853, declared: "You are instructed to claim for our citizens the use of this natural avenue of trade. This right is not derived from treaty stipulations—it is a natural one—as much so as that to navigate the ocean—the common highway of nations. By long usage it is subject to some restrictions imposed by nations through whose territories these navigable rivers pass. This right, however, to restrict or regulate commerce, carried to its utmost extent, does not give the power the exclude such rivers from the common use of nations." MS. Inst. to Brazil, XV, 215, Moore, Dig., I, 642, 643.

<sup>3</sup> Thus in Art. XXVI of the treaty with Bolivia of May 13, 1858, it is declared that "In accordance with fixed principles of international law, Bolivia regards the rivers Amazon and La Plata, with their tributaries, as highways or channels opened by nature for the commerce of all nations." Malloy's Treaties, I, 122.

<sup>4</sup> Art. I of the treaty with the Argentine Confederation of July 10, 1853, declared that "The Argentine Confederation, in the exercise of her sovereign rights, concedes the free navigation of the rivers Paraná and Uruguay, wherever they may belong to her, to the merchant vessels of all nations, subject only to the conditions which this treaty establishes, and to the regulations sanctioned or which may hereafter be sanctioned, by the national authority of the Confederation." Malloy's Treaties, I, 18. See, also, Art. II of treaty with Paraguay of Feb. 4, 1859, *id.*, II, 1365. See Ismael López, *Régimen Internacional de los Ríos Navegables*, 53-54.

to vessels of all nations" from September 7, 1867, as far as the frontiers of that State.<sup>1</sup> This action contrasted sharply with the narrower position taken by the Brazilian Government in previous years.<sup>2</sup>

It should be observed, however, that the Brazilian Government appears to take the stand that rights of foreign (and even riparian) States to privileges of navigation in streams traversing its territory rest upon concessions from itself as set forth in treaties or declarations.<sup>3</sup>

According to the treaty between Brazil and Colombia regarding Frontiers and Inland Navigation, concluded at Rio de Janeiro, November 15, 1928, the contracting parties recognized reciprocally and in perpetuity the right of free navigation on the rivers Amazon, Yapurá or Caquetá, Iza or Putumayo, and all their affluents or confluents, "vessels, their crews and passengers being only subject to the fiscal and river police regulations, which shall be in every case identical for Colombians and Brazilians, and be inspired by the object of facilitating navigation and commerce between both States."<sup>4</sup> No duties or other type of charge on navigation were to be established except by common agreement between the contracting parties. It was understood and declared that such navigation did not include that from port to port in the same country, or coasting trade, which should continue to be subject in each of the two States to its respective laws.<sup>5</sup> Colombian vessels and transports of war were to be permitted to "navigate freely the waters of the common rivers under Brazilian jurisdiction." Similarly, Brazilian vessels and transports of war were to be permitted to "navigate freely the waters of the common rivers under Colombian jurisdiction."<sup>6</sup>

§ 167.<sup>1</sup> British and For. St. Pap., LVIII, 551, 552-567. See, also, decree of Jan. 25, 1873, *id.*, LXV, 607; Moore, Dig., I, 645.

*Cf.*, also, J. C. Caromagno, *El Derecho Fluvial Internacional*, 129-144; Ismael López, *Régimen Internacional de los Ríos Navegables*, 57-62; Pierre Orban, *Étude de Droit Fluvial International*, 170-173.

With respect to the permission granted by Brazil at various times to American vessels of war to ascend the upper Amazon, see For. Rel. 1899, 115-124, Moore, Dig., I, 648-649.

*Cf.* Art. IV of treaty of boundaries and navigation between Brazil and Colombia of April 24, 1907, For. Rel. 1907, I, 110; *modus vivendi* between same States of same date relative to navigation and commerce on the Iça or Putumayo, *id.*, 110; statement of Baron do Rio-Branco, Brazilian Minister of Foreign Relations, to the President of Brazil, Sept. 30, 1907, respecting the *modus vivendi* with Colombia, *id.*, 113.

Concerning the effect of the Constitution of Brazil on the right of that State to impose transit taxes, see opinion of Mr. L. Renault, For. Rel. 1903, 38-39.

<sup>2</sup> Concerning the efforts of the United States to secure freedom of navigation in the Amazon between 1850 and 1860, and the stand taken by Brazil, see Moore, Dig., I, 640-645, and documents there cited, especially communication of Mr. Marcy, Secy. of State, to Mr. Trousdale, American Minister to Brazil, Aug. 8, 1853, MS. Inst. Brazil, XV, 215; also Schuyler, *American Diplomacy*, 329-344.

<sup>3</sup> This was shown by the attitude of Brazil in its controversy with Bolivia respecting the Acre question. See Baron do Rio-Branco, Minister for Foreign Affairs, to Mr. Seeger, American Consul-General, Feb. 20, 1903, For. Rel. 1903, 42, 43, Moore, Dig., I, 646. Also statement by Baron do Rio-Branco to the President of Brazil, Sept. 30, 1907, For. Rel. 1907, Vol. I, 111. *Cf.* Art. V of treaty between Brazil and Peru, Sept. 8, 1909, concerning the navigation of the Amazon basin, Brit. and For. State Pap., CII, 199, 201; also treaty of commerce and fluvial navigation between Bolivia and Brazil, of Aug. 12, 1910, *Nouv. Rec. Gén.*, 3 Sér., VII, 632; treaties between Brazil and Colombia of April 24, 1907, For. Rel. 1907, I, 108, and of Aug. 21, 1908, *Am. J.*, V, *Supplement* 79.

<sup>4</sup> Art. 5, Brit. and For. St. Pap., CXXIX, 262, 263.

<sup>5</sup> *Id.*

<sup>6</sup> Art. 6.

In January, 1933, the Republic of Colombia, in the effort to subdue Leticia, then controlled by Peruvians, proceeded to send a fleet transporting troops up the Amazon. A voyage of more than two thousand miles was successfully made.<sup>7</sup>

By a law of May 14, 1869, and a decree of July 1, of the same year, Venezuela opened the Orinoco and its branches to foreign merchant vessels.<sup>8</sup> Venezuela appears, however, in discussions and negotiations with Colombia, the riverain proprietor of the upper waters, to have contested its claim to a right, founded on the laws of nations, of access to the sea. The former has asserted that any privilege of navigation through the waters traversing Venezuelan territory is in the nature of a grant from the sovereign thereof.<sup>9</sup>

Pursuant to numerous treaties, the Rio de la Plata and its affluents, the Paraná and the Uruguay, have been opened to the navigation of non-riparian as well as riparian States.<sup>10</sup> To certain of these agreements the United States is, as has been observed, a party. Notwithstanding the jurisdictional claims of the Argentine Republic, and the prevailing theory on which rights of navigation are yielded, there has resulted a régime which, according to Pierre Orban, "has been little by little unified on a very broad basis."<sup>11</sup>

The eminent Chilean publicist, Dr. Alejandro Alvarez, in the course of his report as chairman of the Sub-Committee on navigable waterways at the Barce-

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It was provided that this concession was, however, subject to the obligation upon each State to notify the other beforehand of the number and type of the ships or transports to enjoy this privilege. It was also provided that vessels or transports of war carrying articles for mercantile use should be subject to the fiscal and police regulations in the country of transit. *Id.*

<sup>7</sup> See L. H. Woolsey, "The Leticia Dispute between Colombia and Peru," *Am. J.*, XXVII, 317, 318-319.

According to Art. 8 of the boundary treaty between Colombia and Peru of March 24, 1922: "Peru and Colombia shall recognise reciprocally and in perpetuity, in the most ample manner, the liberty of land transit and right of navigation of the rivers forming their common frontier, and of their affluents and confluents, subject to the laws and regulations of the Government and the river police, reserving the right to grant one another mutual and ample customs and any other facilities as may be necessary for the development of the interests of the two States. The fiscal and police regulations shall be as uniform in their dispositions and as favourable to commerce and navigation as possible." (Brit. and For. St. Pap., CXXII, 275, 277.)

<sup>8</sup> Moore, *Arbitrations*, II, 1696-1698. Concerning the concession in 1873, of an exclusive right of navigation to Gen. Perez, *cf. id.*, 1701. See, also, decree of July 1, 1893, closing all of the channels of the Orinoco to foreign commerce except the Boca Grande, reserving the Macareo and Pedernales channels for the coasting trade, and absolutely prohibiting the navigation of its other channels, For. Rel. 1893, 730; also decree of June 6, 1894, For. Rel. 1894, 794; decision of the High Federal Court sustaining validity of decree of July 1, 1893, *id.*, 798. *Cf.*, also, in this connection, Moore, *Dig.*, I, 649-650.

<sup>9</sup> See J. C. Carlomagno, *El Derecho Fluvial Internacional*, 118, 126-128; Ismael López, *Régimen Internacional de los Ríos Navegables*, 96-100. See, also, report of Colombian Minister of Foreign Affairs, For. Rel. 1894, 193, 200, Moore, *Dig.*, I, 151. See reasoning of the umpire in the Faber case, sustaining certain Venezuelan decrees suspending traffic on the river Zulia during 1900, 1901, and 1902, Ralston's Report (Venezuelan Arbitrations, 1903), 600, 620; also bibliographical note of the reporters, *id.*, 603.

<sup>10</sup> See Fauchille, 8 ed., § 529<sup>b</sup>, and conventions there cited; also J. C. Carlomagno, *El Derecho Fluvial Internacional*, Chap. VI; Ismael López, *Régimen Internacional de los Ríos Navegables*, 53-56.

<sup>11</sup> *Étude de Droit Fluvial International*, 162, 170. See "The Jurisdiction of the Rio de la Plata," *Am. J.*, IV, 430; also Supp., *id.*, 138, with text of protocol between Uruguay and Argentina of Jan. 6, 1910.

See Art. 4 of Treaty between Bolivia and Germany, of July 22, 1908, *Nouv. Rec. Gén.*, 3 Sér., IV, 284, in relation to privileges of navigation yielded to German merchant vessels within rivers flowing through Bolivian territory.

lona Conference of 1921, took occasion to emphasize what he regarded as the distinctive treatment of rivers of South as well as North America. He said in part:

The principle of freedom of navigation on rivers has not evolved in the same manner in the American Continent. Freedom of navigation on international rivers has been admitted there, not as an extension of the European principle, but as a concession accorded voluntarily by the riparian States through the medium of *inter partes* agreements or of legislative acts. . . .<sup>12</sup>

The differences between European and African public law on the one hand and American public law on the other, as regards navigation on international rivers, may be summed up as follows: — In Europe, the principle of free navigation on international rivers is almost absolute, and is, moreover, usually enunciated in the conventions concluded between the Great Powers. As regards the régime to which free navigation is subject, recourse has sometimes been had, in determining it, to Commissions which even include Delegates from non-riparian States. In the New World the question is governed by a number of conventions between riparian States, and also by certain legislative provisions of these States. Thus it cannot be said that the principle of free navigation is in the position of a recognized principle there; moreover, the system of administrative commissions is unknown. There are also other differences between European and American public law; in particular, in America local transport is always reserved for the national flag.<sup>13</sup>

The differences to which Dr. Alvarez directs attention, which are due in large degree to geographical considerations, need still to be reckoned with when attempt is made to establish by convention a fluvial régime applicable to the rivers of South America.

(d)

INTERNATIONAL STREAMS OF EUROPE

(i)

§ 168. **Relation of the United States to Navigation Generally.** The navigation of European rivers, while of much concern to riparian States and others of the same continent, was, during the nineteenth century, of less moment to oversea Powers.

The United States doubtless felt the influence of the tendency towards free-

<sup>12</sup> League of Nations, Barcelona Conference, Verbatim Reports and Text Relating to the Convention on the Régime of Navigable Waterways of International Concern, Geneva, 1921, 225–226. See also statement by Dr. Alvarez, *id.*, 20–21.

<sup>13</sup> Attention was called, in this connection, to the objection raised by Mr. Kasson, Plenipotentiary of the United States, to the Draft Preamble of the Act of Berlin of 1885, as set forth in a communication of Dec. 6, 1884, to Mr. Frelinghuysen, Secy. of State, in which he said: "The original draft implies the admission that the principles of the Congresses of Vienna and Paris regarding the free navigation of international rivers *have passed into the domain of public law* as a result of their application to a large number of rivers in Europe and America. To this I objected that hitherto we have never admitted the right of any European Congress to regulate, directly or indirectly, the rights applicable to American jurisdiction. My scruples were respected, and the phrase was altered by the Committee."

dom of navigation expressed by and resulting from the Peace of Paris of 1814, and the Treaty of Vienna of 1815. Its chief concern was, however, in the effect of such conventions upon practices which did or should prevail in relation to American streams.

In the elaborate arrangement for the navigation of international rivers established by the German and Austrian peace treaties of 1919, the United States, although not a party thereto, has a substantial commercial interest with respect to provisions designed to facilitate the transit of goods, as well as to those pertaining to the treatment of vessels.

(ii)

*The Treatment of Certain Rivers in the Nineteenth Century*

(aa)

§ 169. **The Rhine.** The Rhine has long been an artery of vast importance to commerce between Central Europe and the sea. The matter of navigation during the century or more before the Treaty of Paris of May 30, 1814, revealed a conflict between two opposing claims. One was that of riparian States to enjoy some form of transportation with the least possible interference and by the cheapest means over portions of the stream that were not their own. The other was the interest of a riparian proprietor in deriving from the transportation of foreign commerce through its own waters a profitable income and of thus utilizing the stream as a source of enrichment. The claim to freedom of transportation did not necessarily involve a mere right of navigation as such. There was no special concern or interest in the mere navigation by a boat of foreign waters when such was physically possible. The claim to the right to regard the stream as a legitimate source of local income found expression in the levying of tolls, or demands for transfers of cargoes to local vessels on which transportation through a particular section should be exclusively had. It required a long experience to determine which of these opposing theories should obtain. With the French Revolution the idea gained strength that interested States, such as the riparian proprietors of various sections, possessed a common interest in minimizing the burdens of international commerce through the stream.<sup>1</sup> It began to be perceived that this might be of greater benefit to each riparian State than its treatment of the waterway primarily as a source of independent income, exacted either for the privilege of transit, or for the carriage of goods through its own territory. Another kindred idea was gaining strength which the political changes at the end of the eighteenth century served to clarify. It manifested itself in the conclusion that some form of common or international administration was a necessary safeguard for the community of interest of numerous States in conditions of transportation through an international river such as the Rhine.<sup>2</sup>

§ 169.<sup>1</sup> See decree of the French Executive Council of Nov. 20, 1792, Ed. Engelhardt, *Histoire du Droit Fluvial Conventionnel*, Paris, 1889, 51.

<sup>2</sup> See convention on the Octroi of the Rhine between France and Germany, of Aug. 15, 1804, *Rec. des Principaux Traités*, 2 ed., VIII, 261.



Such were the principles that had gained headway when the Treaty of Paris of May 30, 1814, was consummated.<sup>3</sup>

The treaty of peace of Paris of May 30, 1814, announced in Article V that the navigable portions of the Rhine, to and from the sea, should be free, and in such a way that their use should be forbidden to no one. To the future Congress (of Vienna) was left the burden of fixing the principles by which should be regulated the duties to be raised by the riparian States, in a manner equal and most favorable for the commerce of all nations. That Congress, in order to facilitate communications between peoples, and to render them constantly less strangers to each other, was also to examine and decide in what manner the foregoing provisions could be extended to all other rivers which in their navigable courses separated different States.<sup>4</sup>

The rules of the Congress of Vienna, of 1815, were so expressed as to give room for a narrow construction of the principles laid down in the Treaty of Paris of May 30, 1814.<sup>5</sup> In consequence, those rules were oftentimes so interpreted and applied in later conventions between the riparian States as to indicate that rights of navigation in the Rhine were the sole possession of States whose territories were traversed or separated by its streams, and that the riparian proprietors could themselves lawfully fix the terms of navigation therein.<sup>6</sup>

<sup>3</sup> See, in this connection, illuminating statement by Joseph P. Chamberlain, in *The Régime of the International Rivers: Danube and Rhine*, 1923, 141-174.

<sup>4</sup> Brit. and For. St. Pap., XIX, 86.

<sup>5</sup> "By the Treaty of Vienna of June 9, 1815, the powers whose States were 'separated or traversed by the same navigable river' engaged 'to regulate, by common consent, all that regards its navigation,' and for this purpose to name commissioners who should adopt as the bases of their proceedings certain principles, the chief of which was that the navigation of such rivers, 'along their whole course, . . . from the point where each of them becomes navigable to its mouth shall be entirely free, and shall not, in respect to commerce, be prohibited to any one,' subject to regulations of police. In order to assure the application of this principle, Articles were inserted expressly regulating in certain respects the free navigation of the Rhine; and it was provided that 'the same freedom of navigation' should 'be extended to the Necker, the Mayne, the Moselle, the Meuse, and the Scheldt, from the point where each of them becomes navigable to their mouths.' And in order to 'establish a perfect control' over the regulation of the navigation, and to 'constitute an authority which may serve as a means of communication between the States of the Rhine upon all subjects relating to navigation,' it was stipulated that a central commission should be appointed, consisting of delegates named by the various bordering States, which commission should regularly assemble at Mayence on the 1st of November in each year." Moore, Dig., I, 628. Arts. CVIII-CXVI of the so-called Act of the Congress of Vienna of June 9, 1815, contain the provisions for the navigation of international rivers. For the text thereof see Brit. and For. St. Pap., II, 7, 52-53. Annex XVI contains the Rules of Navigation. *Id.*, 162. Attached to the rules were a series of Articles concerning the navigation of the Rhine. *Id.*, 163-178.

<sup>6</sup> E. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, 32-41, 73-93, in which attention is called to the work of Baron Humboldt in securing acceptance of the ambiguous provision that the navigation of the Rhine should not be prohibited to any one "with respect to commerce" (*sous le rapport du commerce*). See, also, Pierre Orban, *Étude de Droit Fluvial International*, 97-129.

<sup>6</sup> Engelhardt (in *Du Régime Conventionnel des Fleuves Internationaux*, p. 81) adverts to the opinion expressed by the Prussian Government in a despatch addressed in 1857 to its delegates on the European Danube Commission in the following terms: "According to the negotiations of the Congress at Vienna respecting Art. 109, it is not to be doubted that it was not within the design of that act to accord to non-riparians a right of navigation on the rivers dealt with conventionally." Citing despatch of Baron de Manteuffel of Aug. 26, 1857. That author adds that practice served to confirm this interpretation with respect to the rivers traversing Prussian territory—that is, the Elbe, the Weser, the Ems, and the Rhine, as well as to Austro-Russian streams, such as the Vistula, the Dnieper and the Pruth. He calls attention also to the formality and rigor of Rhenish legislation of 1831. He *cites* Art.

This was illustrated by regulations adopted by the riparian States in the convention of Mayence, March 31, 1831,<sup>7</sup> and by those (which replaced them) of the convention of Mannheim, October 17, 1868.<sup>8</sup> A distinctive feature of these conventions was the scheme of river administration that had been exemplified in differing form and theory in the Octroi Convention of 1804. The Convention of 1831 established the so-called Central Commission of the Rhine whose powers were somewhat altered by the Convention of 1868.<sup>9</sup>

In the course of its judgment of September 10, 1929, in the Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder,<sup>10</sup> the Permanent Court of International Justice took occasion to observe that the "international river law, as laid down by the Act of the Congress of Vienna of June 9th, 1815, and applied or developed by subsequent conventions," was undoubtedly based upon a conception that had demanded a solution of the problem, not in the idea of a right of passage in favor of upstream States, but in that of a community of interest of riparian States. "This community of interest in a navigable river becomes," it was said, "the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others."<sup>11</sup> While the interest referred to may have been the basis of the conventional arrangements registered in the Act of the Congress of Vienna, as well as in subsequent treaties, it may be greatly doubted whether, in 1815, any requirement of international law was commonly acknowledged to yield or grant to all riparian States the user of the whole course of an international river or proscribed the exclusion of any preferential privilege of any one riparian State in relation to another. Inasmuch as the Tribunal was concerned with the basis of a conventional policy rather than with the precise requirements of international law in 1815, its inti-

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IV of the convention of June 23, 1821, respecting the navigation of the Elbe (Brit. and For. State Pap., VIII, 954); Arts. III and XLII of the convention concluded at Mayence March 31, 1831, relative to the navigation of the Rhine (*id.*, XVIII, 1078 and 1092); Art. VI of the Act concerning the Ems of 1843; Art. I of the Act concerning the Weser of 1823; as well as the convention between Austria and Russia of Aug. 5-17, 1818. (Brit. and For. St. Pap., V, 938.)

Declares Professor J. P. Chamberlain: "Freedom of navigation for all flags was no more in the thought of the statesmen of the powers at Vienna than in the thought of France and Germany in 1798 and 1804, and British attacks on restrictions of navigation to riparians and against the taking of tolls for revenues were shattered against the wall of local interest. The principle of the French declaration of 1792 and of the convention of 1804, that a river should be under a common management, was partly preserved. A common set of regulations was to be drafted which could be changed only by common consent and a common supervisory authority established, but the administrative power which the strong French empire had assured to the octroi entirely disappeared in the consultative commission of the treaty of 1815." (*Op. cit.*, 190.)

See, also, G. Kaeckenbeeck, *International Rivers*, 62-66.

<sup>7</sup> Brit. and For. St. Pap., XVIII, 1076.

<sup>8</sup> Brit. and For. St. Pap., LIX, 470. See, also, in this connection, British memorandum opposing demands of the United States in 1824, respecting the navigation of the St. Lawrence, Am. State Pap., For. Rel., VI, 772, 775.

<sup>9</sup> For an analysis of the administrative provisions of the three Conventions mentioned, see Chamberlain, *op. cit.*, Appendix I, 288-289.

<sup>10</sup> Publications, Permanent Court of International Justice, Series A, No. 23.

<sup>11</sup> *Id.*, 27.

mation by way of dictum as to the latter need not be accepted as an authoritative exposition respecting those requirements at that time.

(bb)

§ 170. **The Danube.** The principles of the Act of the Congress of Vienna designed to regulate the navigation of international rivers were applied to the Danube and its mouths by Article XV of the Treaty of Paris of March 30, 1856. It was declared that the navigation of that river should not be subjected to any impediment or charge not expressly provided for by the accompanying stipulations, and that consequently, there should not be levied any toll founded solely upon the fact of the navigation of the river, or any duty upon goods which might be on board of a vessel. With the exception of regulations of police and quarantine, no obstacle whatever was to be opposed to free navigation.<sup>1</sup>

With a view to carrying out the foregoing arrangement it was provided in Article XVI that a commission (referred to elsewhere in the treaty as the European Commission), in which Great Britain, Austria, France, Prussia, Russia, Sardinia and Turkey were each to be represented by one delegate, should be charged to designate and to cause to be executed certain necessary works to clear the mouths of the Danube as well as neighboring parts of the sea from obstructing impediments, for the benefit of navigation.<sup>2</sup>

By Article XVII provision was made for the establishment of a permanent commission (described in Article XVIII as the "River Commission") to be composed of delegates of Austria, Bavaria, the Sublime Porte and Wurtemberg (one for each of those powers), to whom should be added commissioners from the three Danubian Principalities whose nomination should have been approved by the Porte. This commission was to prepare regulations of navigation and river police, to remove impediments of whatever nature which might serve to prevent the application to the Danube of the arrangements of the treaty of Vienna, to order and cause to be executed the necessary works throughout the whole course of the river, and, after the dissolution of the European Commission, to see to the maintaining of the mouths of the Danube and the neighboring parts of the sea in a navigable state.<sup>3</sup>

The Treaty of Berlin of July 13, 1878, made numerous further provisions. In order to increase the guaranties assuring freedom of navigation on the Danube

§ 170. <sup>1</sup> Brit. and For. State Pap., XLVI, 8, 12, Moore, Dig., I, 630.

According to Art. XV it was declared that the arrangement applied to the Danube thenceforth formed a part of the public law of Europe and that the contracting parties took it under their guaranty.

<sup>2</sup> See statement in Moore, Dig., I, 630-631.

"By the Treaty of London of March 13, 1871, the existence of the European Commission was extended to April 24, 1883. It was further provided that 'the conditions of the reassembling of the riverain commission,' established by Art. XVII of the Treaty of Paris, should 'be fixed by previous understanding between the riverain powers, without prejudice to the clause relative to the three Danubian principalities,' and that, so far as any modification of the Article should be involved, it should 'form the subject of a special convention between the consignatory powers.'" Moore, Dig., I, 630. For the text of the treaty, see Brit. and For. St. Pap., LXI, 7.

<sup>3</sup> Brit. and For. St. Pap., XLVI, 14. According to Art XIX it was agreed that the contracting parties should have the right to station at all times two light vessels at the mouths of the Danube. *Id.*, 14.

and "recognized as of European interest," Article LII declared that all existing fortresses and fortifications on the course of the river from the Iron Gates to its mouths should be razed, and no new ones erected; and that below that point, no vessel of war, with the exception of ships of light tonnage in the service of the river police and customs, should navigate the stream.<sup>4</sup> Other articles maintained the European Commission and extended its functions.<sup>5</sup>

"The historical development of the Danube question resulted," as an authoritative American commentator has pointed out, "in a division of the river among a large number of régimes," and "secured the actual freedom of navigation only on the lower river."<sup>6</sup> That division was doubtless partly due to the dif-

<sup>4</sup> Brit. and For. St. Pap., LXIX, 749, 765, Moore, Dig., I, 630. It was also provided that the so-called "stationnaires" of the powers at the mouths of the Danube might ascend the river as far as Galatz. Cf. Pierre Orban, *Étude de Droit Fluvial International*, 226-235.

<sup>5</sup> According to Art. LIII the European Commission of the Danube, on which Roumania was to be represented, was maintained in its functions and was to exercise them thereafter as far as Galatz in complete independence of the territorial authorities. Moreover, all treaties, arrangements, acts, and decisions relating to its rights, privileges, prerogatives, and obligations were confirmed. By Art. LIV it was provided that one year before the expiration of the term assigned for the duration of the European Commission (April 24, 1883) the Powers should come to an understanding as to the prolongation of its powers, or the modifications which they might deem necessary to introduce. Art. LV declared that the regulations respecting navigation, river police and supervision from the Iron Gates to Galatz, should be drawn up by the European Commission, assisted by delegates of the riverain States, and placed in harmony with those which had been or might be issued for the portion of the river below Galatz.

"In order to come to an understanding in regard to these last stipulations, a new treaty was concluded March 10, 1883, between Austria-Hungary, France, Germany, Great Britain, Italy, Russia, and Turkey. By this treaty the jurisdiction of the European Commission was extended from Galatz to Ibraila, and its powers were prolonged till April 24, 1904, and thereafter for successive terms of three years till a certain notice was given.

"But, besides prolonging the existence of the European Commission, the treaty also created a new commission, called the 'Mixed Commission of the Danube,' to consist of delegates of Austria-Hungary, Bulgaria, Roumania, and Servia, and a member of the European Commission, for the purpose of superintending the execution of the regulations made for the navigation of the river. This commission is to endure as long as the European Commission, to hold two sessions a year and to make its decisions 'by a majority of votes.'" Moore, Dig., I, 631. For the text of the treaty of March 10, 1883, see Brit. and For. State Pap., LXXIV, 20.

See Regulations for Navigation and Police applicable to the Danube between Galatz and the mouths, Nov. 10, 1911, Hertslet's Commercial Treaties, XXVI, 862.

See Joseph Blociszewski, "*Le Régime International du Danube*," *Recueil des Cours*, 1926, I, 253; J. P. Chamberlain, *The Regime of the International Rivers: Danube and Rhine*, New York, 1923; Gustave Demorgny, *La Question du Danube*, Paris, 1911, 295-313; Charles Dupuis, "*Liberté des Voies de Communication*," *Recueil des Cours*, 1924, I, 125, 235-241; Fauchille, 8 ed., § 528, with bibliography; Henri Hajnal, *The Danube*, The Hague, 1920; same author, "*La Commission Européenne du Danube et le Dernier Avis Consultatif de la Cour*," *Rev. Droit Int.*, 3 sér., IX, 588; *Le Droit du Danube International*, The Hague, 1929; G. Kaeckenbeeck, *International Rivers*, 83-137 and documents there cited; Fritz Krieg, "*Das Haager Rechtsgutachten über den Kompetenzstreit Rumäniens und der Europäischen Donau-Kommission*," *Zeit. Völk.*, XV, 215; E. de Kvassay, *Le Danube International*, Budapest, 1919; A. G. Pitisteano, *La Question du Danube*, Paris, 1914; V. M. Radovanovitch, *Le Danube et l'Application du Principe de la Liberté de la Navigation Fluviale*, Geneva, 1925; Roger Ravard, *Le Danube Maritime et le Port de Galatz*, Paris, 1929; G. E. Sherman, "The International Organization of the Danube under the Peace Treaties," *Am. J.*, XVII, 438.

See, also, bibliography, *supra*, at § 160.

<sup>6</sup> Joseph P. Chamberlain, *The Danube*, Dept. of State, confidential document, 1918, 102. That writer in his valuable monograph notes the treatment which was applied to eight different sections of the river: (1) "from the point where the river becomes navigable in German territory to Passau on the Austrian border"; (2) "from Passau to the point where the river becomes a boundary between Serbia and Austria"; (3) "between the point where it is the boundary between Serbia and Austria to Moldowa at the head of the Cataracts"; (4) "the Iron Gates Cataracts section"; (5) "from the Iron Gates to Braila"; (6) "Braila to Soulna,

fering relationships which various sections of the river bore to the riparian States whose territories were bounded or intersected by it, and to the differing degrees of interest felt by maritime States, whether riparian or non-riparian, in the navigation of particular sections.<sup>7</sup> No single method of administration was acknowledged to be applicable even to such parts of the river as were open to ships of every flag.

(cc)

§ 171. **The Scheldt. The Po.** According to the Treaty of Vienna of June 9, 1815, such freedom of navigation as had been fixed for the Rhine was extended also to the Scheldt and the Meuse, as has been observed, from the point where each of those rivers was navigable to its mouth.<sup>1</sup> Article IX of the annex to the treaty of London of April 19, 1839, between Great Britain, Austria, France, Prussia and Russia on the one part, and the Netherlands on the other, declared that the provisions of the General Act of the Congress of Vienna, relative to the free navigation of navigable streams, should be applied to those rivers which separated Belgian and Dutch territories or which traversed them both. Elaborate provision was made for the navigation of the Scheldt, and permission accorded the Government of the Netherlands to levy a specified tonnage duty on vessels "coming from the high sea" which should ascend the western Scheldt in order to proceed to Belgium, and also such a duty (of less amount) on vessels which, coming from Belgium, should descend that stream in order to proceed to the high sea.<sup>2</sup> On May 12, 1863, Belgium and the Netherlands concluded a treaty for the redemption of the Scheldt dues by the capitalization of the same for a

including the St. Georges arm"; (7) "that part of the Kilia arm which forms the boundary between Russia and Roumania"; and (8) "the Kilia arm and Kilia delta, wholly under Russian territory."

<sup>7</sup> Thus the general concern as to privileges between Braila and the sea, and which also differed from that as to privileges between Braila and the Iron Gates, was of wider scope and was felt by more States than that pertaining to navigation on the upper river.

See, in this connection, Advisory Opinion of Permanent Court of International Justice on the Jurisdiction of the European Commission of the Danube between Galatz and Braila, Publications, Permanent Court of International Justice, Series B, No. 14, 11-12, 38-41.

"In practical results, therefore, prior to the outbreak of the World War, the Danube in its upper course from Ulm to Orsova, and in its middle course from the Iron Gate to Braila and Galatz, as well as along the comparatively brief stretch set apart for special clearance work at the Kazan Pass and that of the Iron Gate between Orsova and Moldova, remained subject to the territorial jurisdiction of the bordering states, international jurisdiction as exerted by the European Commission only being effective on the last hundred miles from Braila to the Black Sea." (Gordon E. Sherman, "The International Organization of the Danube Under the Peace Treaties," *Am. J.*, XVII, 438, 450.)

§ 171. <sup>1</sup> Art. CXVII of the Act of the Congress of Vienna, Brit. and For. St. Pap., II, 7, 54; Articles appended to Annex XVI, *id.*, 178.

The navigation of the Scheldt had been closed by Art. XIV of the Treaty of Münster of Jan. 30, 1648. See, in this connection, E. Engelhardt, *Histoire du Droit Fluvial Conventionnel*, 40 *et seq.*; Phillimore, *Int. Law*, I, § CLXIII; bibliography of documents in P. M. Ogilvie, *International Waterways*, 244-249; Ruth Bacon, "British Policy and the Regulation of European Rivers of International Concern," *Brit. Y.B.*, 1929, 158; Ange Blondeau, *L'Escaut, Fleuve International et le Conflit Hollando-Belge*, Paris, 1932; Paul Bastid, *La Question de L'Escaut et le Différend Hollando-Belge*, Paris, 1928; A. Jaumin and M. Jottard, *La Question de L'Escaut*, Brussels, 1927.

<sup>2</sup> Brit. and For. State Pap., XXVII, 992, 994-996. It may be observed that on the same day, Belgium and the Netherlands concluded a treaty containing the several Articles embodied in the Annex mentioned in the text. According to Art. XIV of the Annex: "The port of Antwerp, in conformity with the stipulations of Art. XV of the treaty of Paris, of the 30th of May, 1814, shall continue to be solely a port of commerce."

specified sum, and in which the King of the Netherlands renounced forever the right of collecting tolls on the navigation of the Scheldt pursuant to Article IX of the treaty of 1839.<sup>3</sup> This agreement was annexed to the general treaty of July 16, 1863, concluded in behalf of seventeen interested States on the one hand, and Belgium on the other, and providing for an equitable division of the burden assumed by the convention of May 12.<sup>4</sup>

Upon the outbreak of The World War in 1914, the Dutch Government undertook the establishment of "war buoying" on the Scheldt, and with the design of maintaining navigation therein.<sup>5</sup> In its neutrality declaration communicated August 6, 1914, vessels of war or vessels assimilated thereto and belonging to a belligerent, were forbidden passage across the territory within Dutch territorial waters, and which obviously embraced the lower Scheldt and its mouths.<sup>6</sup> It must be apparent that, as Sir Walter Phillimore observed in 1917, any arrangement which prevents military or naval expeditions from passing between Antwerp and the sea is a serious detriment to the welfare of Belgium, and a reason for an adjustment giving to that State "equal rights with Holland over the west Scheldt both in war and peace."<sup>7</sup>

The relation of Antwerp both to Belgium and to oversea maritime States would appear to create a general interest in removing the barrier due to the circumstance that the estuaries of the Scheldt pass through territory foreign to Belgium, and possibly by assisting that State to become, on equitable terms, the territorial sovereign over a necessary channel between Antwerp and the sea.<sup>8</sup>

A competent observer has declared that, notwithstanding the suspension of conventional provisions concerning the navigation of the Scheldt during World War I, that fact did not result in their termination, and that the pre-war régime was put into effect after the conflict without any arrangement for its renewed application.<sup>9</sup>

<sup>3</sup> Brit. and For. St. Pap., LIII, 15; Malloy's Treaties, I, 77.

<sup>4</sup> Brit. and For. St. Pap., LIII, 8. See, also, Pierre Orban, *Étude de Droit Fluvial International*, 138-143; Auguste Parent, *Du Commerce de Belgique à propos de l'Affranchissement de l'Escaut*, Brussels, 1863; G. Kaeckenbeeck, *International Rivers*, 31-32, 71-83.

The United States, by a treaty concluded with Belgium July 20, 1863, secured the advantages of the extinguishment of the Scheldt dues through an undertaking to assume an equitable portion of the capitalization thereof as provided by a convention between the same States of May 20, 1863. Malloy's Treaties, I, 75 and 73, respectively. Annexed to the treaty of July 20, 1863, was a declaration by the Netherlands Minister at Brussels of July 15, 1863, in virtue of special powers delivered to him, that the extinguishment of the Scheldt dues, consented to by his sovereign on May 12, applied to all flags, that those dues could never be reestablished in any form whatsoever, and that their extinguishment should not affect in any way the other provisions of the treaty of April 19, 1839. *Id.*, 79. See, also, Dana's Wheaton, Dana's Note No. 116.

<sup>5</sup> Belgian Gray Book, Misc. No. 12 [1914], Cd. 7627, documents 29, 54, 55, and 56. According to document No. 49, the British Government announced Aug. 5, 1914, that "the British fleet will insure the free passage of the Scheldt for the provisioning of Antwerp."

<sup>6</sup> "During the siege of Antwerp in October, 1914, no attempt was made by the Allies to use the estuary of the Scheldt for warlike purposes, but the position of these waters in international law has never yet been precisely acknowledged or defined." Oakes and Mowat, *The Great European Treaties of the Nineteenth Century*, Oxford, 1918, p. 135.

<sup>7</sup> Misc. No. 12 [1914], Cd. 7627, document No. 53, *Am. J.*, IX, Supp., 80.

<sup>8</sup> Sir Walter G. F. Phillimore, bart., *Three Centuries of Treaties of Peace*, London, 1917, 147 and 52. That distinguished jurist was subsequently made a baron.

<sup>9</sup> See, in this connection, Temperley, *History of the Peace Conference of Paris*, II, 195-196.

<sup>10</sup> Harold J. Tobin, *The Termination of Multipartite Treaties*, New York, 1933, 92, also 167, where that author declares: "In spite of the fact that Belgium's neutralization (provi-

The general principles adopted by the Congress of Vienna for the navigation of rivers were, by Article XCVI of the General Act of 1815, made applicable to the Po.<sup>10</sup> By the treaty of July 3, 1849, between Austria and the Duchies of Parma and Modena, the navigation of that river, including all of its affluents, whether or not international streams, was rendered free to all flags.<sup>11</sup> The Treaty of Zurich, concluded November 10, 1859, in behalf of France, Austria and Sardinia, maintained the liberty of navigation within the Po and its affluents "conformably to the treaties."<sup>12</sup>

(dd)

§ 172. **The Vistula.** The principle of free navigation of international rivers was early applied to certain Polish streams. Article VIII of the treaty of Tilsit, concluded between France and Russia July 7, 1807, declared the navigation of the Vistula to be free.<sup>1</sup> On May 3, 1815, treaties concluded between Russia and Austria,<sup>2</sup> and Russia and Prussia,<sup>3</sup> provided that the navigation of all rivers and canals throughout the entire extent of the ancient Kingdom of Poland, wherever they were actually navigable or might become so, should be free, in the sense that they should not be closed to any of the inhabitants of the Polish Provinces under the Governments of Russia or Austria, and Russia or Prussia, respectively.<sup>4</sup> The principles of these and certain other provisions of both treaties were reaffirmed by Article XIV of the General Act of the Congress of Vienna.<sup>5</sup> Austria and Russia by a treaty concluded at St. Petersburg August 5/17, 1818,<sup>6</sup> and Prussia and Russia by a treaty there concluded December 19, 1818,<sup>7</sup> gave precise applications to their earlier compacts. The Austro-Russian convention declared in Article XI that the navigation of the Vistula should be free from every duty or tax with respect to the borders which belonged to the contracting parties. The Russo-Prussian convention provided in Article II that the navigation of the Vistula should be free from every charge except one collected in Prussia under the denomination of "*Schiffsgejassgelder*." This convention was

sion for which was included in the same 1839 treaty) appears to have been terminated, the balance of the treaty, including the provisions regarding the Scheldt, was considered generally as in force when the war was over."

<sup>10</sup> Brit. and For. St. Pap., II, 47.

<sup>11</sup> *Id.*, XXXVIII, 130. The Pope acceded to this treaty by an Act of Feb. 12, 1850. *Id.*, 136. See Pierre Orban, *Étude de Droit Fluvial International*, 143-145, where that author remarks: "Let us observe that the negotiators of 1815 did not dare to assimilate to rivers their affluents which were purely national. Those of 1849 were, therefore, shown to be the more courageous and also the more logical."

<sup>12</sup> Brit. and For. St. Pap., XLIX, 377, 382. According to a treaty between Portugal and Spain of Aug. 31, 1835, the river Douro was rendered free for the navigation of the subjects of the contracting parties. *Nouv. Rec.*, XIV, 97; Brit. and For. St. Pap., XXIII, 1046. See, also, Sec. 11 of Regulations concluded between Spain and Portugal, Jan. 16, 1877, Brit. and For. St. Pap., LXVIII, 145, 152.

See, also, J. Vallotton, "*Du Régime Juridique des Cours d'Eau Internationaux de l'Europe Centrale*," *Rev. Droit Int.*, 2 ser., XV, 271, 303-306.

§ 172. <sup>1</sup> *Rec.*, VIII, 639.

<sup>2</sup> Brit. and For. St. Pap., II, 56, 60.

<sup>3</sup> *Id.*, II, 63, 68.

<sup>4</sup> Pierre Orban, *Étude du Droit Fluvial International*, 133-138.

<sup>5</sup> Brit. and For. St. Pap., II, 14.

<sup>6</sup> *Nouv. Rec.*, IV, 540.

<sup>7</sup> Brit. and For. St. Pap., V, 945.

replaced by a treaty concluded by Prussia and Russia February 27 (March 11), 1825, which provided in Article V that the navigation of the Vistula and the Niemen, as well as their affluents, should be free from tolls.<sup>8</sup>

(iii)

*Certain Conventional Arrangements of 1919*

(aa)

§ 173. **Freedom of Inland Navigation.** According to the treaty of Versailles with Germany of June 28, 1919, the nationals of any of the Allied and Associated Powers, as well as their vessels and property, were accorded the right to enjoy in all German ports and on the inland navigation routes of Germany the same treatment in all respects as German nationals, vessels and property. It was declared in particular that the vessels of any one of those Powers should be entitled to transport goods of any description, and passengers also, to or from any ports or places in German territory to which German vessels might have access, under conditions which should not be more onerous than those applied in the case of national vessels.<sup>1</sup>

(bb)

§ 174. **Free Zones in Ports.** By the same treaty, free zones existing in German ports on August 1, 1914, were to be maintained; and these zones together with any others which might be established in German territory pursuant to the treaty, were to be subjected to the régime for which provision was made in subsequent Articles.<sup>1</sup> It was declared that goods entering or leaving a free

<sup>8</sup> *Id.*, XII, 927, 928.

"What is necessary to remember is that the rivers and other channels of the ancient Kingdom of Poland would have been in reality subjected to a sufficiently broad régime had not the States which established it kept the benefits solely to themselves." Pierre Orban, *Étude de Droit Fluvial International*, 138.

§ 173. <sup>1</sup> Art. 327. It was added that the vessels of the Allied and Associated Powers "shall be treated on a footing of equality with national vessels as regards port and harbour facilities and charges of every description, including facilities for stationing, loading and unloading, and duties and charges of tonnage, harbour, pilotage, lighthouse, quarantine, and all analogous duties and charges of whatsoever nature, levied in the name of or for the profit of the Government, public functionaries, private individuals, corporations, or establishments of any kind."

It was also provided that the granting by Germany of a preferential régime to any of the Allied or Associated Powers or to any other foreign Power, should be extended immediately and unconditionally to all of the Allied and Associated Powers.

It was declared that there should be no impediment to the movement of persons or vessels other than those arising from prescriptions concerning customs, police, sanitation, emigration and immigration, and those relating to the import and export of prohibited goods. Such regulations were, moreover, to be reasonable and uniform, and not to impede traffic unnecessarily.

This Article was reproduced in Art. 290 of the treaty of peace with Austria of Sept. 10, 1919, and in Art. 274 of the treaty of peace with Hungary of June 4, 1920, and in Art. 218 of the treaty of peace with Bulgaria of Nov. 27, 1919.

In the treaty of Versailles with Germany of June 28, 1919, the articles pertaining to the navigation of rivers are contained in Part XII, Section II, beginning with Art. 327. See also corresponding articles of treaty of peace with Austria, of Sept. 10, 1919, Part XII, Section II, beginning with Art. 290; also, those of treaty of peace with Hungary, of June 4, 1920, Part XII, Section II, beginning with Art. 274; and those of treaty of peace with Bulgaria, of Nov. 27, 1919, Part XI, Section II, beginning with Art. 218.

§ 174. <sup>1</sup> Art. 328. See, also, the details worked out in Arts. 329-330.



zone should not be subjected to any import or export duty, other than those provided for in a specified Article (Art. 330), where the right to levy duties on goods leaving the free zone for consumption in the country on the territory of which the port of such zone was situated, was acknowledged; and conversely, there was no prohibition of export duties to be levied on goods coming from such country and brought into the free zone. On the other hand, Germany was forbidden to levy, under any denomination, "any import, export or transit duty on goods carried by land or water across her territory to or from the free zone from or to any other State."<sup>2</sup>

(cc)

*Clauses Relating to the Elbe, the Oder, the Niemen (Russtrom-Memel-Niemen) and the Danube*

i

§ 175. **General Clauses.** The treaty declared specified rivers to be "international." The following were so described: the Elbe (*Labe*) from its confluence with the Vltava (*Moldau*), and the Vltava (*Moldau*) from Prague; the Oder (*Odra*) from its confluence with the Oppa; the Niemen (Russtrom-Memel-Niemen) from Grodno; the Danube from Ulm, as well as "all navigable parts of these river systems which naturally provide more than one State with access to the sea, with or without trans-shipment from one vessel to another; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river."<sup>1</sup> On September 10, 1929, the Permanent Court of International Justice concluded that under the provisions of the treaty the jurisdiction of the International Commission of the Oder extended to the sections of the Warthe (Warta) and Netze (Noteć) which were situated in Polish territory.<sup>2</sup>

On these waterways, declared to be international, it was provided that the nationals, property and flags of all Powers should be treated on a footing of perfect equality, "no distinction being made to the detriment of the nationals, property or flag of any Power between them and the nationals, property or flag of the riparian State itself or of the most favoured nation."<sup>3</sup>

Provision was made for a temporary régime for these waterways,<sup>4</sup> to be superseded by one to be laid down in a so-called General Convention to be drawn up by the Allied and Associated Powers and approved by the League of Nations, with reference to the waterways recognized in such convention as

<sup>2</sup> Art. 330.

§ 175. <sup>1</sup> Art. 331. It was added that the same provisions should be applied to the Rhine-Danube navigable waterway, should it be constructed under conditions laid down in Art. 353. See, also, Art. 291 of the treaty of peace with Austria, with respect to general clauses relating to the Danube.

<sup>2</sup> Publications, Permanent Court of International Justice, Judgment No. 16, Series A, No. 23.

<sup>3</sup> Art. 332, where it was added that German vessels should not be entitled to carry passengers or goods by regular services between the ports of any Allied or Associated Power, without its special authority. (See, also, Arts. 292 and 293 of the treaty of peace with Austria.)

<sup>4</sup> Arts. 333-337. (See, also, Arts. 294-298 of the treaty of peace with Austria.)

having an international character.<sup>5</sup> Such a convention was concluded at Barcelona on April 20, 1921.<sup>6</sup>

ii

§ 176. **Special Clauses Relating to the Elbe, the Oder and the Niemen (Russtrom-Memel-Niemen).** According to the Treaty of Versailles with Germany, of June 28, 1919, the Elbe was to be placed under the administration of an international Commission,<sup>1</sup> and likewise the Oder.<sup>2</sup> In each case such commission was to comprise representatives of specified non-riparian as well as riparian States. The Niemen (Russtrom-Memel-Niemen) was to be placed under such a commission upon the request made to the League of Nations by any riparian State; and in such event, the commission was to comprise one representative of each riparian State, and three representatives of other States specified by the League of Nations.<sup>3</sup>

In accordance with the stipulations of the Treaty of Versailles, of June 28, 1919, a Convention Instituting the Statute of Navigation of the Elbe was concluded at Dresden, February 22, 1922.<sup>4</sup> The so-called international system of the Elbe was thereby subjected to the administration of an international commission; and an elaborate régime regarding freedom of navigation was agreed upon.

iii

§ 177. **Special Clauses Relating to the Danube.** It was declared that the European Commission of the Danube was to re-assume the powers which it had possessed before the war. Nevertheless, "as a provisional measure," it was agreed that only representatives of Great Britain, France, Italy and Roumania should constitute the Commission.<sup>1</sup> From the point where the competence of the European Commission ceased, the Danube system, as referred to in the general clauses (Art. 331), was from Ulm, a point in the upper river in Würtemberg, to be placed under the administration of an International Commission composed of two representatives of German riparian States, one representative of each other riparian State, and one representative of each non-riparian State represented in the future on the European Commission of the Danube.<sup>2</sup>

<sup>5</sup> Art. 338, where it was declared that the General Convention should apply in particular to the whole or part of the above-mentioned river systems of the Elbe, the Oder, the Niemen and the Danube, and such other parts of those river systems as might be covered by a general definition. Art. 339 made provision for the cession by Germany to the Allied and Associated Powers of river craft.

<sup>6</sup> See The Barcelona Convention, *infra*, § 181A.

<sup>1</sup> § 176. <sup>1</sup> Art. 340.

<sup>2</sup> Art. 341.

<sup>3</sup> Art. 342. With reference to the times of meeting and the functions of these commissions see Arts. 343-345. According to Art. 343, each of these commissions was to proceed immediately to prepare a project for the revision of the existing international agreements and regulations, in conformity with the General Convention referred to in Art. 338, should it have been already concluded. In the absence of such convention, the project for revision was to conform with the principles of Arts. 332 to 337 of the treaty.

<sup>4</sup> League of Nations, Treaty Series, XXVI, 219; *Am. J., XVII, Official Documents*, 227; Hudson, *Int. Legislation*, No. 70, with bibliography.

<sup>5</sup> § 177. <sup>1</sup> Art. 346.

<sup>2</sup> Art. 347 of treaty of Versailles with Germany of June 28, 1919. This International Com-

Germany agreed to accept the régime to be established for the Danube by a Conference of the Powers to be nominated by the Allied and Associated Powers, and which should meet within one year after the coming into force of the treaty, and at which German representatives might be present.<sup>3</sup> The mandate given by the Treaty of Berlin of July 13, 1878, to Austria-Hungary, and transferred by her to Hungary, to carry out works at the Iron Gates, was abrogated.<sup>4</sup> Germany accepted the important obligation to make to the European Commission of the Danube "all restitutions, reparations and indemnities for damages inflicted on the Commission during the war."<sup>5</sup> Germany undertook to apply to such deep-draught Rhine-Danube navigable waterway as might be constructed the régime prescribed in Articles 332-338.<sup>6</sup>

(dd)

§ 178. **Clauses Relating to the Rhine and the Moselle.** It was declared that from the time of the coming into force of the treaty, the convention of Mannheim of October 17, 1868, together with the final protocol thereof, should continue to govern navigation on the Rhine, subject, however, to conditions which were laid down.<sup>1</sup> Any provisions of that convention proving to be in conflict with those of the General Convention (referred to in Article 338) were to yield to the latter. The so-called Central Commission provided for in the convention of Mannheim and by the treaty of peace was to draw up a project of revision of the convention of 1868, the project to be in harmony with the provisions of the General Convention, should it have been concluded by that time, and to be submitted to the Powers represented on the Central Commission. Germany agreed to adhere to the project so drawn up.<sup>2</sup> The Central Commission provided for in the convention of Mannheim was to consist of nineteen

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mission was to undertake provisionally the administration of the river in conformity with the provisions of Arts. 332 to 337, until such time as a definite statute regarding the Danube was concluded by the Powers nominated by the Allied and Associated Powers. Art. 348. See, also, Arts. 301-308, of the Austrian treaty of peace of Sept. 10, 1919.

<sup>3</sup> Art. 349 of the treaty of Versailles with Germany of June 28, 1919. Accordingly, a convention productive of the Definitive Statute of the Danube was concluded at Paris, July 23, 1921. See *infra*, § 180A.

<sup>4</sup> Art. 350. According to Art. 351, should the Czecho-Slovak State, the Serb-Croat-Slovene State or Roumania, with the authorization of, or under mandate from, the International Commission, undertake maintenance, improvement, weir or other works on a part of the river system forming a frontier, those States were to enjoy on the opposite bank, and also on the part of the bed outside of their territory, all necessary facilities for the survey, execution and maintenance of such works.

<sup>5</sup> Art. 352.

<sup>6</sup> Art. 353. It may be noted that the Special Clauses relating to the Danube were reproduced as Arts. 301-308, in the treaty of peace with Austria. But see Art. 309 of the latter treaty, with reference to the use by a riparian State of the hydraulic system located within the territory of another. See also special clauses relating to the Danube in Arts. 285-291 of the treaty of peace with Hungary of June 4, 1920, and in Arts. 229-235 of the treaty of peace with Bulgaria of Nov. 27, 1919.

§ 178. <sup>1</sup> Art. 354 of treaty of Versailles with Germany of June 28, 1919.

<sup>2</sup> The convention of Mannheim was to be immediately modified according to the provisions of the relevant Articles of the treaty of peace. According to Art. 354, the Allied and Associated Powers reserved to themselves the right to arrive at an understanding in this connection with Holland, Germany agreeing to accede, if required, thereto.

members, representative of specified non-riparian as well as riparian States.<sup>3</sup>

It was agreed that vessels of all nations, and their cargoes, should have the same rights and privileges as those which were granted to vessels belonging to the Rhine navigation, and to their cargoes. Moreover, none of the provisions contained in specified Articles (15–20, and 26) of the convention of Mannheim, in Article 4 of the final protocol thereof, or in later conventions, were to impede the free navigation of vessels and crews of all nations on the Rhine and on waterways to which such conventions applied, subject to compliance with pilotage regulations and police measures drawn up by the Central Commission.<sup>4</sup>

Subject to requirements of the convention of Mannheim, or of the convention which might be substituted for it, and to the stipulations of the treaty, France was to enjoy on the whole course of the Rhine included between the two extreme points of the French frontiers: (a) the right to take water from the Rhine to feed navigation and irrigation canals (constructed or to be constructed), or for any other purpose, and to execute on the German bank all works necessary for the exercise of such right; (b) the exclusive right to the power derived from works of regulation on the river, subject to payment to Germany of the value of half the power actually produced.<sup>5</sup> Similarly, Belgium was accorded the right of taking water from the Rhine to feed the Rhine-Meuse navigable waterway for which the treaty made subsequent provision. The exercise of these rights of diversion of water was not, however, to interfere with navigability, or to reduce facilities for navigation, either in the bed of the Rhine or in the derivations which might be substituted therefor. Nor was it to involve any increase in the tolls formerly levied under the convention in force. All proposed schemes were to be laid before the Central Commission in order that it might assure itself that such conditions were complied with. Germany, moreover, in order to insure the proper and faithful execution of the foregoing provisions (a) and (b), bound itself not to undertake or to allow the construction of any lateral canal or any derivation on the right bank of the river opposite the French frontiers. Germany recognized the possession by France of the right of support on, and the right of way over all lands situated on the right bank which might be required in order to survey,

<sup>3</sup> The representatives were to be apportioned as follows: two of the Netherlands; two of Switzerland; four of German riparian States; four of France (which in addition was to appoint the President of the Commission); two of Great Britain; two of Italy; two of Belgium. Whatever the number of members present, each delegation was to have the right to record a number of votes equal to the number of representatives allotted to it.

<sup>4</sup> Art. 356. It was declared that the provisions of Art. 22 of the convention of Mannheim, and of Art. 5 of the final protocol thereof should be applied only to vessels registered on the Rhine. The Central Commission was to decide on the steps to be taken to insure that other vessels satisfied the conditions of the general regulations applying to navigation on the Rhine. *Id.*

Art. 357 provided for the cession by Germany to France of river craft, etc., as well as of docks, warehouses, installations, anchorage accommodations, etc., of public or private ownership, in the port of Rotterdam.

<sup>5</sup> Art. 358. The payment by France to Germany was to take into account the cost of the works necessary for producing the power, and was to be made either in money or in power, and in default of agreement, to be determined by arbitration. For this purpose France alone was to have the right to carry out in the part of the river mentioned, all works of regulation (weirs or other works), which it might consider necessary for the production of power.

to build, and to operate weirs, which France, with the consent of the Central Commission, might subsequently decide to establish.<sup>6</sup> Switzerland, upon its demand, and with the approval of the Central Commission, was to enjoy the same rights for that part of the river forming its frontier with other riparian States.<sup>7</sup> It was declared that subject to the preceding provisions, no works were to be carried out in the bed or on either bank of the Rhine where it formed the boundary of France and Germany without the previous approval of the Central Commission or of its agents.<sup>8</sup>

It was agreed that should Belgium within twenty-five years from the coming into force of the treaty decide to create a deep-draft Rhine-Meuse navigable waterway, in the region of Ruhrort, Germany should be bound to construct, in accordance with plans communicated by Belgium, after agreement with the Central Commission, the portion of the waterway situated within German territory. The Belgian Government was, for such purpose, to have the right to carry out on the ground all necessary surveys. This navigable waterway was to be placed under the same administrative régime as the Rhine itself, and the division of the cost of initial construction, including indemnities, among the States crossed by the waterway, was to be made by the Central Commission.<sup>9</sup>

Germany agreed to offer no objection to any proposals of the Central Rhine Commission for the extension of its jurisdiction: (a) to the Moselle, below the Franco-Luxemburg frontier down to the Rhine, subject to the consent of Luxemburg; (b) to the Rhine above Basle up to the Lake of Constance, subject to the consent of Switzerland; (c) to the lateral canals and channels which might be established either to duplicate or to improve naturally navigable sections of the Rhine or the Moselle, or to connect two naturally navigable sections of those rivers, and also any other parts of the Rhine river system which might be covered by the General Convention for which provision was earlier made (in Article 338).<sup>10</sup>

<sup>6</sup> In accordance with such consent, France was to be entitled to decide upon and fix the limits of the necessary sites, and was to be permitted to occupy such lands after a period of two months after simple notification, subject to the payment to Germany of indemnities of which the total amount was to be fixed by the Central Commission. Germany was to make it its business to indemnify the proprietors whose property was burdened with such servitudes or permanently occupied by the works. Art. 358.

<sup>7</sup> Art. 358. Germany also agreed to hand over to the French Government, during the month following the coming into force of the treaty, all projects, designs, drafts of concessions and of specifications concerning the regulation of the Rhine for any purpose whatever which might have been drawn up or received by the Government of Alsace-Lorraine or of the Grand Duchy of Baden.

<sup>8</sup> Art. 359. According to Art. 360, France reserved the option of substituting herself as regards the rights and obligations resulting from agreements arrived at between the Government of Alsace-Lorraine and the Grand Duchy of Baden concerning the works to be carried out on the Rhine; and she was also permitted to denounce such agreements within a term of five years from the coming into force of the treaty.

<sup>9</sup> Art. 361. It was declared that should Germany fail to carry out all or any of such works, the Central Commission should be entitled to carry them out instead; and for such purpose might decide upon and fix the limits of the necessary sites and occupy the ground after a period of two months after simple notification, subject to the payment of indemnities to be fixed by it and paid to Germany. *Id.*

<sup>10</sup> Art. 362.

*Clauses Giving to the Czecho-Slovak State the Use of Northern Ports.* Arts. 363 and 364 comprised clauses providing for the lease by Germany to the Czecho-Slovak State for a period

(ee)

§ 179. **Poland and the Vistula.** As the territory of the new Polish State embraced the country traversed by the Vistula, save that at the mouth of the river where it passed through that assigned to the Free City of Danzig, the Principal Allied and Associated Powers undertook (in the treaty of Versailles with Germany) to negotiate a treaty between the Polish Government and the City, with a view to insure to Poland the control and administration of the river, and enjoyment of the freest use thereof.<sup>1</sup> Certain of these uses were specified, and manifested a design to remove every possible restriction which might otherwise prove an obstacle to uninterrupted navigation to and from the Baltic.

(ff)

§ 180. **General Results.** The foregoing arrangements of 1919, pertaining to navigation, presented certain significant aspects, of which the following may be noted:

(a) The privileges of inland navigation established in favor of the Allied and Associated Powers;

(b) The reestablishment of free zones in ports of Germany;

(c) The internationalization of important river systems and their appurtenances, for the benefit of non-riparian as well as riparian States;

(d) The placing of such waterways under the administration of commissions representative of both non-riparian and riparian States; and the special application of this principle with respect to the Rhine and the Danube;<sup>1</sup>

(e) The arrangement for a new régime under the General Convention to be drawn up by the Allied and Associated Powers and approved by the League of Nations, as well as the régime to be laid down for the Danube by the contemplated Conference of the Powers;

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of ninety-nine years, of areas within the ports of Hamburg and Stettin, such areas to be placed under the régime of free zones, and to be used for the direct transit of goods coming from or going to that State. The delimitation of these areas, their equipment, exploitation, and in general all conditions for their utilization, including the amount of rental, was to be decided by a specified commission. Such conditions were regarded as susceptible of revision every ten years in the same manner. Germany agreed in advance to adhere to the decisions so taken.

§ 179.<sup>1</sup> Art. 104. The following were among the objects of the proposed treaty:

"(1) To effect the inclusion of the Free City of Danzig within the Polish customs frontiers, and to establish a free area in the port;

"(2) To ensure to Poland without any restriction the free use and service of all waterways, docks, basins, wharves and other works within the territory of the Free City necessary for Polish imports and exports;

"(3) To ensure to Poland the control and administration of the Vistula and of the whole railway system within the Free City, except such street and other railways as serve primarily the needs of the Free City, and of postal, telegraphic and telephonic communication between Poland and the port of Danzig;

"(4) To ensure to Poland the right to develop and improve the waterways, docks, basins, wharves, railways and other works and means of communication mentioned in this Article, as well as to lease or purchase through appropriate processes such land and other property as may be necessary for these purposes."

§ 180.<sup>1</sup> It may be noted that the United States was not to be represented on any of these commissions.

(f) The scope of the hydrotechnical privileges with respect to the Rhine, yielded to France and Switzerland;

(g) The obligation imposed upon Germany to make restitution and reparation to the European Commission of the Danube for damages inflicted upon it during the war.

The foregoing achievements were not destined, however, to remain unchallenged. On November 14, 1936, the German Government formally declared that "for their part, they no longer recognize as binding the provisions of the Versailles Treaty which concern the German waterways, nor the international acts which depend on those provisions."<sup>2</sup> By such process Germany endeavored to free itself from the burdens of the conventional fluvial régime sought to be imposed upon it by the States which were responsible for that treaty. The final significance of that effort had, however, to await the termination of a war that was not to be initiated until 1939.<sup>3</sup>

(iv)

§ 180A. Convention Instituting the Definitive Statute of the Danube. The "Convention instituting the Definitive Statute of the Danube" was made in pursuance of Article 349 of the Treaty of Versailles of June 28, 1919 (and of the corresponding articles of the other peace treaties concluded in 1919 and 1920), which had provided that the régime for the Danube should be laid down by a conference of the Powers nominated by the Allied and Associated Powers, that such conference should meet within a year after the treaty came into force, and that representatives of Germany (Austria, Bulgaria and Hungary) might be present, those Powers having agreed to accept the régime which the conference should lay down.<sup>1</sup> The conference met at Paris in 1920, and the Definitive Statute

<sup>2</sup> Documents on International Affairs, 1936, 283, 284, where it was added: "The German Government have consequently decided, in accordance with Article 3, paragraph 2, of the Convention in question, to give notice of the termination as from to-day of the provisional convention (*modus vivendi*) for the Rhine concluded on May 4; and they have similarly decided to refrain from signing the proposed convention for the Elbe which is of the same nature. Therewith any further German co-operation in the International River Commissions ceases. The powers of the existing German representatives cease to exist." Mr. Eden, British Foreign Secretary, announced in the House of Commons on Nov. 16, 1936, that the River Commissions affected by the German declaration were the following: "International Commission of the Danube, the Central Commission of the Rhine, the International Commission of the Elbe, and the International Commission of the Oder." (*Id.*, 285.) See also Toynbee's *Survey of International Affairs*, 1937, I, 368-380.

<sup>3</sup> In the German declaration of Nov. 14, 1936, it was added: "At the same time the German Government communicate the following provisions which they have drafted: Navigation on waterways situated in German territory is open to the ships of all States who are at peace with the German Reich. There will be no discrimination in the treatment of German and foreign ships; and the same is true of the question of shipping dues. The German Government thereby assume that reciprocal treatment will be granted them on the waterways of other interested countries." (Documents on International Affairs, 1936, 285.)

§ 180A. <sup>1</sup> League of Nations, Treaty Series, XXVI, 173; *Am. J.*, XVII, *Supplement*, 13; Hudson, *Int. Legislation*, No. 47 (with editorial note and bibliography).

See, in this connection, *Conférence Internationale pour l'Etablissement du Statut Définitif du Danube*, Imprimerie Nationale, Paris, 1921; Report of the Special Committee on the Question of the Jurisdiction of the European Commission of the Danube, Publications of the League of Nations, Communications and Transit, 1927, VIII. 7. (Doc. C. C. T./C. D./8); Walker D. Hines, Report on Danube Navigation submitted to the Advisory and Technical Committee for Communications and Transit of the League of Nations, League of Nations Publication, C.444(a)M.164.(a).1925.VIII.; *La Commission Européenne du Danube et*

was signed on July 23, 1921, by representatives of Belgium, France, Great Britain, Greece, Italy, Roumania, the Serb-Croat-Slovene State, Czechoslovakia, Germany, Austria, Bulgaria and Hungary. The deposit of the ratifications of all the contracting parties having been completed on June 30, 1922, the Statute by its terms became effective on October 1 of that year.<sup>2</sup>

According to Article I, navigation on the Danube was "unrestricted and open to all flags on a footing of complete equality over the whole navigable course of the river, that is to say, between Ulm and the Black Sea," and also over all of the internationalized river system as defined in the succeeding article so that no distinction was made "to the detriment of the subjects, goods and flag of any Power, between them and the subjects, goods and flag of the riparian State itself or of the State of which the subjects, goods and flag enjoy the most favoured treatment."<sup>3</sup>

Freedom of navigation and the equal treatment of all flags were assured by two separate Commissions, the European Commission of the Danube, whose administrative sphere extended over that part of the river known as the maritime Danube (between Braila and the Black Sea), and the International Commission of the Danube, whose administrative sphere extended over the navigable fluvial Danube between Braila and Ulm, as well as those waters which were declared by Article 2 to be international.<sup>4</sup> The European Commission of the Danube was composed provisionally of one representative each of France, Great Britain, Italy and Roumania.<sup>5</sup> That Commission was to retain the powers which it had possessed before the War; and no alteration was "made in the rights, prerogatives and privileges which it possesses in virtue of the treaties, conventions, in-

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*von Œuvre de 1856 à 1931* (edited and published under the authorization of the European Commission, by Carlo Rossetti and Francis Rey), *Imprimerie Nationale*, Paris, 1931.

See bibliography *supra*, at §§ 160 and 170.

<sup>2</sup> The statement in the text is a paraphrase of that made by the Permanent Court of International Justice in its Fourteenth Advisory Opinion concerning the Jurisdiction of the European Commission of the Danube between Galatz and Braila, Publications, Permanent Court of International Justice, Series B, No. 14, 22-23.

<sup>3</sup> These provisions were to be read with reservations contained in Articles 22 and 43 of the convention. According to Article 22 "On the international waterway of the Danube, the transport of goods and passengers between the ports of separate riparian States as well as between the ports of the same State is unrestricted and open to all flags on a footing of perfect equality." Article 43 declared that the provisions of the convention should be interpreted in the sense that they should not infringe the stipulations of the Treaty of Peace of Versailles, and the corresponding articles of the Treaties of Saint Germain, Neuilly and Trianon.

According to Article 2, the internationalized river system consisted of:

"The Morava and the Thaya where, in their courses, they form the frontier between Austria and Czechoslovakia;

"The Drave from Barcs;

"The Tisza from the Mouth of the Szamos;

"The Maros from Arad;

"Any lateral canals or waterways which may be constructed, whether to duplicate or improve naturally navigable portions of the river system, or to connect two naturally navigable portions of one of these waterways."

<sup>4</sup> Art. 3.

<sup>5</sup> Art. 4, where it was declared: "Nevertheless, any European State which, in future, is able to prove its possession of sufficient maritime commercial and European interests at the mouths of the Danube may, at its request, be accorded representation on the Commission by a unanimous decision of the Governments already represented."



ternational acts and agreements relative to the Danube and its mouths.”<sup>6</sup> Moreover, its authority was declared to extend under the same conditions as before, and without any modification of its existing limits, over the maritime Danube from the mouths of the river to the point where the authority of the International Commission commenced.<sup>7</sup>

The International Commission was composed, in accordance with the provisions of the treaties of peace, of two representatives of the German riparian States, one representative of each of the other riparian States, and one representative of each of the non-riparian States which were, or which might be in the future, represented on the European Commission of the Danube.<sup>8</sup>

The functions of the two Commissions greatly differ, the International Commission finding its “chief rôle in supervision and correction,”<sup>9</sup> whereas the European Commission is possessed of a measure of judicial power.<sup>10</sup>

In relation to the fluvial Danube, it is provided that dues, when levied on navigation, shall be moderate in amount, and shall be assessed on the ship's tonnage, and in no case be based on the goods transported.<sup>11</sup> Revenues derived from navigation dues are to be “exclusively applied to the works for which they were imposed.” It is declared that “the incidence of navigation dues may in no case involve differential treatment in respect of the flag of the vessels or the nationality of persons and goods or in respect of ports of departure or destina-

<sup>6</sup> Art. 5.

<sup>7</sup> Art. 6.

On December 8, 1927, the Permanent Court of International Justice, in the course of its Fourteenth Advisory Opinion concerning the Jurisdiction of the European Commission of the Danube between Galatz and Braila, found occasion to observe: “Although the European Commission exercises its functions ‘in complete independence of the territorial authorities’ and although it has independent means of action and prerogatives and privileges which are generally withheld from international organizations, it is not an organization possessing exclusive territorial sovereignty. . . . As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfillment of that purpose, but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it.” (Publications, Permanent Court of International Justice, Series B, No. 14, 63-64.)

See also, in this connection, J. P. Chamberlain, *The Régime of the International Rivers: Danube and Rhine*, 47-98.

<sup>8</sup> Art. 8.

“The riparian states are Wurtemberg, Bavaria, Austria, Czechoslovakia, Hungary, Yugoslavia, Bulgaria and Roumania; to these eight must be added France, Great Britain and Italy as non-river bordering states, making eleven represented on the International Commission.” (Gordon E. Sherman, in *Am. J.*, XVII, 438, 453.)

<sup>9</sup> *Id.* See, for example, Arts. 10-17. Compare functions of International Joint Commission under Convention concerning the Boundary Waters between the United States and Canada, of Jan. 11, 1909, U. S. Treaty Vol. III, 2607. See Certain Contractual Arrangements of the United States, *infra*, § 184.

<sup>10</sup> “It has judicial power to impose fines and withdraw licenses for the contravention of its regulations of navigation or toll, but it has no civil or criminal jurisdiction, both of which are in the hands of the Roumanian authorities. Its judicial power is exercised in the first instance by its chief officers, the captain of the port whose jurisdiction extends over the port of Soulina, and the inspector of navigation, who decides cases arising on the river. In each case appeal may be made to the commission.” (J. P. Chamberlain, *op. cit.*, 96.)

<sup>11</sup> Art. 18, where it is also provided that the specified system of assessment may be revised by unanimous decision of the International Commission at the expiration of a period of five years.

The Commission is empowered to fix and publish the tariffs and to control the collection and the application of the dues.

tion or control of the vessels; the dues may in no case provide revenue for either the collecting State or for the Commission, nor, unless there exists a suspicion of fraud or transgression, may their collection render necessary a detailed examination of the cargo.”<sup>12</sup> On the “international waterway” (*le réseau fluvial internationalisé*), as defined in Article 2, the transport of goods and passengers between the ports of separate riparian States, as well as between the ports of the same State, is “unrestricted and open to all flags on a footing of perfect equality.”<sup>13</sup>

The conventional arrangements pertaining to the Danube from the Treaty of Paris, of March 30, 1856, until the consummation of the Definitive Statute of July 23, 1921, reveal that the navigation and transit of persons and property through a particular river system of special interest to numerous riparian States has been acknowledged to be also a matter of common concern to certain non-riparian European Powers. Accordingly, the participation of the latter has served to produce and develop certain distinct results. By the processes noted, a two-fold system of international control has been instituted as a means of assuring the broad freedom of transit that has been demanded and yielded.

(e)

#### INTERNATIONAL STREAMS OF AFRICA

(i)

§ 181. **The Congo. The Niger.** The General Act of the Berlin Conference of February 26, 1885, made significant application of the fundamental principles of the Congress of Vienna to the rivers Congo and Niger.<sup>1</sup> With respect to both, it was provided that navigation of the stream and the affluents thereof, as well as of roads, railways, or lateral canals that might be constructed with the special view of obviating unnavigability or of correcting imperfections of a river route, should be and remain “free for the merchant ships of all nations equally, whether carrying cargo or ballast, for the transportation of both merchandise and passengers.”<sup>2</sup> The subjects and flags of all nations were treated on a footing of perfect equality “not only for the direct navigation from the open sea to the inland ports,” and vice versa, “but also for the great and small coasting trade,

<sup>12</sup> Art. 18, where it is also provided that in cases where the Commission itself undertakes the execution of works, it will collect the dues necessary to cover its expenditure, through the riparian State concerned.

<sup>13</sup> Art. 22, where it is provided, however, that “a regular local service for passengers or for national or nationalised goods between the ports of one and the same State may only be carried out by a vessel under a foreign flag in accordance with the national laws and in agreement with the authorities of the riparian State concerned.”

§ 181. <sup>1</sup> For the text of the General Act, see Brit. and For. St. Pap., LXXVI, 4; also Senate Ex. Doc. No. 196, 49 Cong., 1 Sess., 297.

<sup>2</sup> Chapter IV, embracing Arts. XIII to XXV, embodied an Act for the navigation of the Congo, while Chapter V, embracing Arts. XXVI to XXXV, made provision for the navigation of the Niger. Attention should also be called to the preamble of the General Act and to Art. II thereof.

See the illuminating report of Baron de Courcel in behalf of the commission which drafted the instruments for the regulation of the navigation of the Congo and the Niger, Senate Ex. Doc. No. 196, 49 Cong., 1st Sess., 93; also protocol of the session of Nov. 15, 1884, of the Berlin Conference, *id.*, 23.

and for the boat traffic along the course of the river." It was declared that throughout the courses and in the mouths of both the Congo and the Niger, no distinction should be made between the subjects of riparian States and those of non-riparian States, and that no exclusive privilege of navigation should be granted to any companies, corporations or private persons whatsoever. These provisions were, it was said, "recognized by the signatory powers as being henceforth a part of international law." With respect to both rivers it was declared that there should be levied no maritime or river toll based on the mere fact of navigation, nor any tax on goods aboard of ships, and that there should only be collected taxes or duties having the character of an equivalent for services rendered in navigation.<sup>2</sup> Provision was also made for the neutralization of both streams in the event of war.<sup>3</sup> With respect to the Congo an international commission was created and clothed with broad powers for the purpose of executing the provisions agreed upon.<sup>4</sup>

These liberal arrangements, and particularly those dealing with the Congo, were possible partly because the waters in question traversed territory of which the occupants were chiefly a native population unfamiliar with European civilization, and of which the sovereignty was not always lodged in an independent State recognized as such. Moreover, the commercial designs of the contracting Powers, as well as the welfare of the inhabitants concerned, were deemed to be enhanced rather than thwarted by the plan adopted. It was natural that under such circumstances broadest application of some principles should have met with approval, and that they should have been supported by the creation of an international commission given large powers of control.<sup>5</sup>

<sup>2</sup> In certain other respects the provisions concerning the regulations for the navigation of the Congo were not identical with those relating to the Niger.

<sup>3</sup> Arts. XXV and XXXIII. It is significant that Belgium at the outbreak of The World War in August, 1914, after its own territory had been invaded, was solicitous, for humanitarian reasons, that the field of hostilities should not extend to Central Africa, and that pursuant to Art. XI of the General Act of the Berlin Conference, European colonies within the basin of the Congo should be neutralized. Belgian Gray Book, Misc. No. 12 [1914], Cd. 7627, Nos. 57, 58, 59, 74, 75 and 76.

<sup>4</sup> Arts. XVII-XXIV. The relation of Great Britain to Nigeria, traversed by the lower waters of the Niger, rendered inapplicable the establishment of an international commission for that river such as was designed for the Congo.

The Persian River Karun. In a note to the representatives of foreign Powers at Teheran, Oct. 30, 1888, the Persian Government announced that commercial steamers of all nations, without exception, besides sailing vessels which formerly navigated the Karun River, might undertake the transportation of merchandise in that river "from Muhammerch to the dyke at Ahvaz, but it is on the condition that they do not pass the dyke at Ahvaz upwards, as from the dyke upwards the river navigation is reserved to the Persian Government and its subjects, and the tolls which the Persian Government will organize shall be paid at Muhammerch. Such vessels are not to carry goods prohibited by the Persian Government, and vessels are not to stay longer than necessary for the unloading and loading of commercial loads." Brit. and For. St. Pap., LXXIX, 781.

<sup>5</sup> J. C. Carlomagno, *El Derecho Fluvial Internacional*, 56-72; E. Engelhardt, *Histoire du Droit Fluvial Conventionnel*, 98-102; A. Bergès, *Du Régime de Navigation des Fleuves Internationaux*, 96-109; G. Kaackenbeeck, *International Rivers*, 137-171, and documents quoted; Pierre Orban, *Étude de Droit Fluvial International*, 275-317; Fauchille, 8 ed., §§ 530 and 531, and periodical literature there cited. See also bibliography, *supra*, at § 160.

See correspondence between Great Britain and Portugal respecting the navigation of the rivers Zambesi and Shiré, 1876-1877, Brit. and For. St. Pap., LXVIII, 1345-1352; also correspondence between the same States, 1887-1888, in which the right of Portugal to close the Zambesi was not admitted by Great Britain, *id.*, LXXIX, 1062-1152; Portuguese decree of Nov. 18, 1890, with respect to free navigation of the Zambesi "in accordance with the prin-

It should be observed, however, that the Congo Commission "never had an effective life."<sup>6</sup> This circumstance, while not necessarily weakening the value of the general principles enunciated by the Berlin Conference, served to emphasize the insufficiency and inapplicability to the Congo River of the administrative régime thus sought to be established.

A convention revising the General Act of Berlin of February 26, 1885, and the General Act and Declaration of Brussels of July 2, 1890, was signed at Saint Germain-en-Laye September 10, 1919, in behalf of the United States, Belgium, the British Empire, France, Italy, Japan and Portugal.<sup>7</sup> The signatory Powers thereby undertook to maintain between their respective nationals and those of States, members of the League of Nations, which might adhere to the Convention, a complete commercial equality in the territories under their authority within the area defined by Article I of the General Act of Berlin of February 26, 1885, but subject to the reservation specified in the final paragraph of that Article.<sup>8</sup> Accordingly, merchandise belonging to the nationals of those Powers and of the States within such category was to have free access to the interior of the region specified in Article 1, free from the imposition of differential treatment on importation or exportation, "transit remaining free from all duties, taxes or dues, other than those collected for services rendered."<sup>9</sup> It was declared that subject to the provisions of "the present chapter," the navigation of the Niger, of its branches and outlets, and of all the rivers, and of their branches and outlets, within the territories specified in Article I, as well as of the lakes situated within those territories, should be entirely free for merchant vessels and for the transport of goods and passengers. Craft of every kind belonging to the nationals of the Signatory Powers and of States, members of the League of Nations, which might adhere to the Convention were to be treated in all respects on a footing of perfect equality.<sup>10</sup> Navigation was not to be subject to

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principles which the Governments of France and Great Britain agreed to establish on the Niger in virtue of the General Act of the Conference of Berlin in 1885," *id.*, LXXXII, 338; Portuguese regulations for the navigation of the Zambesi and Shiré of May 18, 1892, *id.*, LXXXVII, 1108.

See agreement between Great Britain and Germany of March 11, 1913, respecting (in part) the regulation of navigation on the Cross River, a small independent stream flowing from the Cameroons through Nigeria to the sea. Brit. and For. St. Pap., CVI, 782, 786.

<sup>6</sup> Joseph P. Chamberlain, in *Yale L. J.*, XXVIII, 519, 522; also Francis Bowes Sayre, *Experiments in International Administration*, New York, 1919, 84-87.

<sup>7</sup> League of Nations, Treaty Series, VIII, 25; Hudson, *Int. Legislation*, No. 7, U. S. Treaty Vol. IV, 4849.

As interpretative of the Convention, see Judgment of the Permanent Court of International Justice, Dec. 12, 1934, in the Oscar Chinn Case, Publications, Permanent Court of International Justice, Series A/B, No. 63.

The preamble adverted to the fact that the territories in question were at the time under the control of recognized authorities, were provided with administrative institutions suitable to the local conditions, and that the evolution of the native populations continued to make progress. The desire was expressed to ensure by arrangements suitable to modern requirements "the application of the general principles of civilization established by the Acts of Berlin and Brussels."

<sup>8</sup> Art. 1, to which was annexed Art. I of the General Act of Berlin of Feb. 26, 1885. The ratification of the United States was deposited with the Government of the French Republic Oct. 29, 1934, and the convention was proclaimed by the President Nov. 3, 1934. United States Treaty. Vol. IV, 4849.

<sup>9</sup> Art. 2.

<sup>10</sup> Art. 5.

any restriction or dues to be based on the mere fact of navigation; and it was not to be exposed to any obligation in regard to landing, station, or depot, or for breaking bulk, or for compulsory entry into port. Nor was any maritime or river toll, based on the mere fact of navigation, to be levied on vessels; nor was any transit duty to be levied on goods on board. Only such taxes or duties were to be collected as might be an equivalent for services rendered to navigation itself. Moreover, the tariff on such taxes or duties was not to admit of any differential treatment.<sup>11</sup>

The arrangement was designed to embrace the affluents of the rivers and lakes specified in Article 5 of the Convention.<sup>12</sup> Provision was also made respecting roads, railways or lateral canals which might be constructed with the special object of obviating the innavigability or correcting the imperfections of the water route on certain sections of the rivers and lakes specified in that Article, together with their affluents, branches and outlets.<sup>13</sup> The matter of tolls on such roads, railways and canals was also dealt with.<sup>14</sup> Each of the signatory Powers was to remain free to establish the rules which it might consider expedient for the purpose of ensuring the safety and control of navigation, on the understanding that such rules should facilitate, as far as possible, the circulation of merchant vessels.<sup>15</sup> It was provided that in such sections of the rivers and of their affluents, as well as on such lakes as were not necessarily utilized by more than one riparian State, "the governments exercising authority" should remain free to establish such systems as might be required for the maintenance of public safety and order, and for "other necessities of the work of civilization and colonization"; but the regulations were not to admit of any differential treatment between vessels or between nationals of the signatory Powers and of States, members of the League of Nations, which might adhere to the Convention.<sup>16</sup> Moreover, the Signatory Powers recognized the obligation to maintain in the regions subject to their jurisdiction an authority and police forces sufficient to ensure protection of persons and of property, and, if necessary, freedom of trade and of transit.<sup>17</sup> It was declared that except in so far as the stipulations contained in Article 10 of the Convention were concerned, the General Act of Berlin of February 26, 1885, and the General Act of Brussels of July 2, 1890, with the accompanying Declaration of equal date, should be considered as abrogated, in so far as they were binding between the Powers which were parties to the Convention.<sup>18</sup> It was agreed that if any dispute whatever should arise between the Signatory Powers relating to the application of the Convention, which could not be settled by negotiation, such dispute should be submitted to an arbitral tribunal, in conformity with the provisions of the Covenant of the League of Nations.<sup>19</sup>

(f)

§ 181A. The Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern. There assembled at

<sup>11</sup> Art. 6.

<sup>12</sup> Art. 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Art. 8.

<sup>16</sup> Art. 9.

<sup>17</sup> Art. 10.

<sup>18</sup> Art. 13.

<sup>19</sup> Art. 12.

Barcelona, in March, 1921, at the invitation of the League of Nations, a conference representative of numerous States which produced a Convention and Statute on the Régime of Navigable Waterways of International Concern, in harmony with Article 338 of the Treaty of Versailles. The Convention to which the Statute was annexed, and of which it was to constitute an integral part, was signed on April 20, 1921.<sup>1</sup>

According to Article 1 of the Statute, the following are declared to be navigable waterways of international concern:

1. All parts which are naturally navigable to and from the sea of a waterway which in its course, naturally navigable to and from the sea, separates or traverses different States, and also any part of any other waterway naturally navigable to and from the sea, which connects with the sea a waterway naturally navigable which separates or traverses different States.<sup>2</sup>
2. Waterways, or parts of waterways, whether natural or artificial, expressly declared to be placed under the régime of the General Convention regarding navigable waterways of international concern either in unilateral Acts of the States under whose sovereignty or authority these waterways or parts of waterways are situated, or in agreements made with the consent, in particular, of such States.

On navigable waterways of international concern each of the Contracting States agrees to accord free exercise of navigation to the vessels flying the flag of any one of the other Contracting States on those parts of navigable waterways which may be situated under its sovereignty or authority.<sup>3</sup> It is declared that in the exercise of navigation the nationals, property and flags of all Contracting States shall be treated in all respects on a footing of perfect equality; that no distinction shall be made between the nationals, the property and the flags of the different riparian States, including the riparian State exercising sovereignty or authority over the portion of the navigable waterway in question; and that

§ 181A. <sup>1</sup> League of Nations, Treaty Series, VII, 35; *Am. J.*, XVIII, *Official Documents*, 151; Hudson, *Int. Legislation*, No. 42 (with bibliography) and No. 42A.

See League of Nations, Barcelona Conference, Verbatim Records and Texts relating to the Convention on the Régime of Navigable Waterways of International Concern and to the Declaration recognising the Right to a Flag of States having no Sea-Coast, Geneva, 1921.

See bibliography, *supra*, at § 160.

Also, F. Corthésy, *Étude de la Convention de Barcelone sur le régime des voies navigables d'intérêt international*, Paris, 1927; Yin Tang Kao, *International Conferences on Ports and Waterways*, New York, 1932; G. E. Toulmin, "The Barcelona Conference on Communications and Transit and the Danube Statute," *Brit. Y.B.*, 1922-1923, 167.

<sup>2</sup> It is declared to be understood that: "(a) Transhipment from one vessel to another is not excluded by the words 'navigable to and from the sea';

"(b) Any natural waterway or part of a natural waterway is termed 'naturally navigable' if now used for ordinary commercial navigation, or capable by reason of its natural conditions of being so used; by 'ordinary commercial navigation' is to be understood navigation which, in view of the economic condition of the riparian countries, is commercial and normally practicable;

"(c) Tributaries are to be considered as separate waterways;

"(d) Lateral canals constructed in order to remedy the defects of a waterway included in the above definition are assimilated thereto;

"(e) The different States separated or traversed by a navigable waterway of international concern, including its tributaries of international concern, are deemed to be 'riparian States.'"

<sup>3</sup> Art. 3. This undertaking is, however, subject to the provisions of Articles 5 and 17 of the Statute.

similarly, no distinction shall be made between the nationals, the property and the flags of riparian and non-riparian States. Consequently, it is said to be understood that no exclusive right of navigation shall be accorded on such navigable waterways to companies or to private persons.<sup>4</sup>

Certain reservations or limitations are made with respect to what may be described as local transport.<sup>5</sup> Thus a riparian State has the right to reserve "for its own flag the transport of passengers and goods loaded at one port situated under its sovereignty or authority and unloaded at another port also situated under its sovereignty or authority."<sup>6</sup> On navigable waterways referred to in Article 2 (that is to say, navigable waterways for which there are international commissions upon which non-riparian States are represented, and navigable waterways which may be placed in that category in pursuance of unilateral acts of the States under whose sovereignty they are situated or in pursuance of agreements made with the consent of such States), it is said that "the Act of Navigation shall only allow to riparian States the right of reserving the local transport of passengers or of goods which are of national origin or are nationalised. In every case, however, in which greater freedom of navigation may have been already established, in a previous Act of Navigation, this freedom shall not be reduced."<sup>7</sup> Again, when a natural system of navigable waterways of international concern, not embracing those of the kind referred to in Article 2, separates or traverses two States only, the latter enjoy the right to reserve to their flags by mutual agreement the transport of passengers and goods loaded at one port of such system and unloaded at another port of the same system, unless such transport takes place between two ports which are not situated under the sovereignty or authority of the same State in the course of a voyage, effected without trans-shipment on the territory of either of such States, involving a sea-passage or passage over a navigable waterway of international concern not belonging to such system.<sup>8</sup>

No dues of any kind may be levied anywhere in the course or at the mouth of a navigable waterway of international concern, other than dues in the nature of payment for services rendered and intended solely to cover in an equitable manner the expenses of maintaining and improving the navigability of such waterway, and its approaches, or to meet expenditure incurred in the interest of navigation. Such dues are to be fixed in accordance with such expenses, and the tariff of dues is to be posted in the ports.<sup>9</sup> The right of a riparian State to take measures necessary for policing a river area under its sovereignty and to apply

<sup>4</sup> Art. 4, where it is added that "No distinction shall be made in the said exercise, by reason of the point of departure or of destination, or of the direction of the traffic."

<sup>5</sup> See Yin Tang Kao, *International Conferences on Ports and Waterways*, 1932, 40-42.

<sup>6</sup> Art. 5. A State which does not make such reservation may, nevertheless, refuse the benefit of equality of treatment with regard to such transport to a co-riparian which does make the reservation.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Art. 7, where it is also provided that dues shall be levied in such a manner as to render unnecessary a detailed examination of the cargo, except in cases of suspected fraud, or infringement of regulations, and so as to facilitate international traffic as much as possible, both as regards rates and the method of their application.

reasonable laws and regulations relating to customs, public health, and various kindred matters is acknowledged, subject to restrictions forbidding discrimination and the impeding of freedom of navigation "without good reason."<sup>10</sup> Provision for the use of ports, embracing equality of treatment and the manner of their equipment and enjoyment of their facilities is made.<sup>11</sup> Public services of towage or other means of haulage may be established in the form of monopolies for the purpose of facilitating the exercise of navigation, subject to the unanimous agreement of the riparian States or the States represented on the International Commission in the case of navigable waterways referred to in Article 2.<sup>12</sup>

The obligation of a riparian State to refrain from all measures likely to prejudice the navigability of the waterway, or to reduce the facilities for navigation, is acknowledged, as well as the duty "to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation."<sup>13</sup> In the application of these requirements involving the upkeep of a waterway and the execution of works appropriate therefor, elaborate provision is made, embracing (in relation to the waterways referred to in Article 2) the invocation of the services of the International Commission to which is entrusted the power to make decisions.<sup>14</sup>

In the absence of contrary stipulations contained in a special treaty or agreement, such as a convention concerning customs and police measures and sanitary precautions, the administration of navigable waterways of international concern is exercised by each of the riparian States under whose sovereignty or authority such waterway is situated.<sup>15</sup> If any of such special agreements or treaties has entrusted or thereafter entrusts certain functions to an international commission which includes representatives of States other than the riparian States, it is said to be the duty of such Commission, subject to the provisions of Article 10, to have exclusive regard to the interests of navigation; and it is to be deemed one of the organizations referred to in Article 24 of the Covenant of the League

<sup>10</sup> Art. 6. See also Art. 12.

According to Article 8, customs formalities are to be governed by conditions laid down in the Statute of Barcelona on Freedom of Transit. See Convention and Statute on Freedom of Transit, signed at Barcelona, April 20, 1921, League of Nations, Treaty Series, VII, 11.

<sup>11</sup> Art. 9, where the matter is elaborately dealt with.

<sup>12</sup> Art. 12.

<sup>13</sup> Art. 10.

<sup>14</sup> *Id.* According to section 6 of Article 10 of the Statute: "Notwithstanding the provisions of paragraph 1 of this Article, a riparian State may, in the absence of any agreement to the contrary, close a waterway wholly or in part to navigation, with the consent of all the riparian States or of all the States represented on the International Commission in the case of navigable waterways referred to in Article 2.

"As an exceptional case one of the riparian States of a navigable waterway of international concern not referred to in Article 2 may close the waterway to navigation, if the navigation on it is of very small importance, and if the State in question can justify its action on the ground of an economic interest clearly greater than that of navigation. In this case the closing to navigation may only take place after a year's notice and subject to an appeal on the part of any other riparian State under the conditions laid down in Article 22. If necessary, the judgment shall prescribe the conditions under which the closing to navigation may be carried into effect." It may be observed that reference is here made to an adjudication, as one before the Permanent Court of International Justice.

<sup>15</sup> Art. 12. Each of such riparian States has, *inter alia*, the power and duty of publishing regulations for the navigation of such waterway, and of seeing to their execution. Such regulations are to be framed and applied in such a way as to facilitate the free exercise of navigation under the conditions laid down in the Statute.



of Nations.<sup>16</sup> The powers and duties of the commissions are to be laid down in the so-called Act of Navigation of each navigable waterway, and are to embrace specified functions.<sup>17</sup>

The Statute does not prescribe the rights and duties of belligerents and neutrals in time of war, although it itself is to continue in force at such a time "so far as such rights and duties permit."<sup>18</sup> Nor does it impose upon a Contracting State any obligation conflicting with its rights and duties as a member of the League of Nations.<sup>19</sup> It is declared that, in the absence of any agreement to the contrary, to which the State territorially interested is or may be a party, the Statute has no reference to the navigation of vessels of war or of vessels performing police or administrative functions, or, in general, exercising any kind of public authority.<sup>20</sup> A Contracting State is yielded certain latitude in the event of an emergency affecting its safety or vital interests which may involve a deviation from the provisions of the Statute.<sup>21</sup> The Statute "does not entail in any way the withdrawal of existing greater facilities granted to the free exercise of navigation on any navigable waterway of international concern, under conditions consistent with the principle of equality laid down in this Statute, as regards the nationals, the goods and the flags of all the Contracting States; nor does it entail the prohibition of such grant of greater facilities in the future."<sup>22</sup>

Arrangement is made for the amicable adjustment of disputes concerning the interpretation or application of the Statute, which, under certain conditions, are to be brought before the Permanent Court of International Justice.<sup>23</sup> A navigable waterway is not to be considered as of international concern on the sole ground that it traverses or delimits zones or enclaves, the extent and population of which are small as compared with those of the territories which it traverses, and which form detached portions or establishments belonging to a State other than

<sup>16</sup> Art. 14. "Consequently, it will exchange all useful information directly with the League and its organisations, and will submit an annual report to the League." *Id.*

<sup>17</sup> *Id.* "(a) The Commission shall be entitled to draw up such navigation regulations as it thinks necessary itself to draw up, and all other navigation regulations shall be communicated to it;

"(b) It shall indicate to the riparian States the action advisable for the upkeep of works and the maintenance of navigability;

"(c) It shall be furnished by each of the riparian States with official information as to all schemes for the improvement of the waterway;

"(d) It shall be entitled, in cases in which the Act of Navigation does not include a special regulation with regard to the levying of dues, to approve of the levying of such dues and charges in accordance with the provisions of Article 7 of this Statute."

<sup>18</sup> Art. 15.

<sup>19</sup> Art. 16.

<sup>20</sup> Art. 17. According to Article 18: "Each of the Contracting States undertakes not to grant, either by agreement or in any other way, to a non-Contracting State, treatment with regard to navigation over a navigable waterway of international concern which, as between Contracting States, would be contrary to the provisions of this Statute."

It should be observed, however, that according to Article 13: "Treaties, conventions or agreements in force relating to navigable waterways, concluded by the Contracting States before the coming into force of this Statute, are not, as a consequence of its coming into force, abrogated so far as concerns the States signatories to those treaties. Nevertheless, the Contracting States undertake not to apply among themselves any provisions of such treaties, conventions or agreements which may conflict with the rules of the present Statute."

<sup>21</sup> Art. 19.

<sup>22</sup> Art. 20. See also Art. 21.

<sup>23</sup> Art. 22.

that to which such river belongs, with this exception, throughout its navigable course.<sup>24</sup> The Statute is not applicable to a navigable waterway of international concern which has only two riparian States, and which separates for a considerable distance a Contracting State from a non-Contracting State whose government is not recognized by the former at the time of the signing of the Statute, until an agreement has been concluded between them, establishing, for the waterway in question, an administrative and customs régime which affords suitable safeguards to the Contracting State.<sup>25</sup>

(f)

§ 181B. **The Additional Protocol to the Convention on the Régime of Navigable Waterways of International Concern.** Certain States signatories to the Convention on the Régime of Navigable Waterways of International Concern, of April 20, 1921, concluded an Additional Protocol of like date.<sup>1</sup> They declared therein that, in addition to the freedom of communications which they had conceded by virtue of the Convention on Navigable Waterways considered as of international concern, they further conceded, on grounds of reciprocity, without prejudice to their rights of sovereignty, and in time of peace:

(a) on all navigable waterways,

(b) on all naturally navigable waterways,

which are placed under their sovereignty or authority, and which, not being considered as of international concern, are accessible to ordinary commercial navigation to and from the sea, and also in all the ports situated on these waterways, perfect equality of treatment for the flags of any State signatory of this Protocol as regards the transport of imports and exports without transshipment.<sup>2</sup>

It was said to be understood that States which accepted paragraph (a) were not bound as regards those which accepted paragraph (b), except under the conditions resulting from the latter paragraph; and also that those States which possessed a large number of ports (situated on navigable waterways) which had previously remained closed to international commerce, might, at the time of the signing of the Protocol, exclude from its application one or more of the navigable waterways referred to above. It was also provided that the signatory States might declare that their acceptance of the Protocol did not include any or all of the colonies, overseas possessions or protectorates under their sovereignty or authority, and that they might subsequently adhere separately

<sup>24</sup> Art. 23.

<sup>25</sup> Art. 24. According to Article 25: "It is understood that this Statute must not be interpreted as regulating in any way rights and obligations *inter se* of territories forming part, or placed under the protection, of the same sovereign State, whether or not these territories are individually Members of the League of Nations."

§ 181B. <sup>1</sup> League of Nations, Treaty Series, VII, 65; *Am. J.*, XVIII, *Official Documents*, 165; Hudson, *Int. Legislation*, No. 42B.

<sup>2</sup> It was provided that, at the time of signing, the signatory States should declare whether they accepted the obligation to the full extent indicated under paragraph (a), above, or only to the more limited extent defined by paragraph (b).

on behalf of any colony, overseas possession or protectorate so excluded in their declaration.<sup>3</sup>

The Protocol was to come into force after the Secretary-General of the League of Nations received the ratifications of two States, provided that the Convention on the Régime of Navigable Waterways of International Concern had come into force at that time. The Protocol went into force on October 31, 1922.<sup>4</sup>

(g)

§ 182. **Certain General Conclusions.** The true basis of any right possessed by a State to navigate the waters of a river traversing foreign territory is believed to be the general interest of the family of nations that such a privilege be not withheld.<sup>1</sup> That interest must vary according to geographical considerations.<sup>2</sup> It is strongest where a riparian State upstream seeks access to the sea. The international community is truly solicitous that each State in attempting to realize its legitimate aspirations should utilize fully those natural channels of water communication which border or pass through its domain, and each may confidently invoke that solicitude in testing or proclaiming the reasonableness of its demands.<sup>3</sup>

The general interest of the family of nations acknowledges also the equities of the several riparian States with respect to the navigation of waters upstream or on the farther side of a boundary formed by the thalweg. It heeds also the claims of non-riparian and of oversea States, but its respect therefor is measured in part according to the navigability of the particular stream by vessels sailing from their ports. It may be doubted whether States as a whole are concerned with any claim not in fact capable of actual use by a claimant.

The general international interest has given rise to numerous agreements

<sup>3</sup> It was provided that they might also denounce the Protocol separately in accordance with its provisions in respect of any colony, overseas possession or protectorate under their sovereignty or authority.

<sup>4</sup> League of Nations, Treaty Series, XI, 407-409.

§ 182. <sup>1</sup> Compare the reasoning of Mr. Jefferson, Secy. of State, in 1792. See, *The Mississippi, supra*, § 161. Compare also theory of Mr. Adams, Secy. of State, in communication to Mr. Rush, Minister to Great Britain, June 23, 1823, Am. State Pap., For. Rel., VI, 757, 758.

Hall, Higgins' 8 ed., p. 167, note 1, commenting on the opinions of various writers of the nineteenth century.

<sup>2</sup> This circumstance, which has been a decisive factor in international practice, appears oftentimes to have been ignored by writers endeavoring to formulate plans for general adoption.

<sup>3</sup> This idea appears to have been reflected by Mr. Gallatin, American Minister to Great Britain, in his discussion with British plenipotentiaries touching the claim of the United States to navigate the St. Lawrence. He contended that "it was a right essential to the condition and wants of human society, and conformable to the voice of mankind in all ages and countries." He added that "the principle on which it rested challenged such universal assent that, wherever it had not been allowed, it might be imputed to the triumph of power or injustice over right." See communication to Mr. Adams, Secy. of State, Aug. 12, 1824, Am. State Pap., For. Rel., VI, 758, 760. Also memorandum on the American claim to the navigation of the St. Lawrence prepared by Mr. Rush, *id.*, 769.

It is not without significance that formal proposal in 1918, that free and secure access to the sea be assured the population of a newly erected Polish State was made by the Chief Executive of an American country, who thereby voiced the actual concern of the family of nations that each new member thereof should enjoy the full benefit of its natural water communications with the ocean. See President Wilson, address to the Congress, Jan. 8, 1918, H. Doc. 765, 65 Cong., 2 Sess.

among the States most deeply concerned. These compacts have developed what may be called a fluvial conventional law, measuring and portraying the extent to which States have in practice responded to the requirements of the international society. It is to be observed that treaties have generally not purported to provide for more than the requirements of the contracting parties with respect to the particular river concerned.<sup>4</sup> Acts such as those of the Congress of Vienna or of the Berlin Conference must be regarded as having been designed primarily to apply the principles enunciated to the problems peculiar to special groups of rivers within specified areas.<sup>5</sup> Inasmuch as fluvial conditions in Europe, in North America, in South America and in Africa are not the same, and differ sharply according to geographical and other conditions distinctive of each continent, the attempt still remains futile to lay down rules applicable alike to all international waterways. Riparian States have not sought to do so.<sup>6</sup>

The treaty of Versailles with Germany of June 28, 1919, gave heed to every possible claim of non-riparian States of every continent to enjoy privileges of navigation in the particular rivers recognized as having an international character. It was not, however, deemed necessary to enunciate in that document a principle of law, and still less, to intimate to what extent it should be applied to streams outside of Europe. The acquisition by certain non-riparian European Powers of a right to participate in the administrative control of rivers named in the treaty was merely an incident in the attempt of the Principal Allied and Associated Powers in terminating the war, to establish a new order of things of their own devising with respect to navigation in streams passing through or bounding the territories of their enemies. The contemplated submission to the League of Nations for approval of the fresh régime to be laid down in the General Convention as drawn up by those Powers, gave hope that no rules of navigation injurious to a stream as a whole, or to any riparian proprietor, would be promulgated.<sup>7</sup>

The documents which have been examined reveal not only the strength of the considerations that have molded the policy of a conventional fluvial law applicable to rivers traversing particular areas, but also the difficulty in establishing that there are rules universally applicable to what may be called the international navigable rivers of every continent, and which are to be deemed to be incorporated in the law of nations and hence obligatory upon all concerned. Perhaps it may be true today that, as among riparian States variously situated, in a geographical sense, with reference to an international stream, privileges of navigation are within the common reach of all.

The concern of a non-riparian State in the use of an international navigable

<sup>4</sup> This has been conspicuously true in the case of treaties regulating the navigation of rivers traversing or bounding the United States.

<sup>5</sup> It is not intimated that these Acts did not give expression to a broader design. It is merely suggested that the object of chief concern to the negotiators was the regulation of navigation within particular groups of rivers.

<sup>6</sup> See statement of Dr. Alvarez at the Barcelona Conference, 1921, quoted *supra*, § 167.

<sup>7</sup> Notwithstanding the provisions of Article 338 of the treaty of Versailles with Germany of June 28, 1919, contemplating the approval by the League of Nations of the General Convention that was to establish the régime designed to supersede that set out in Articles 332-337 of the former, it does not appear that such approval was ever sought.

river is confined chiefly to the exercise of the privilege of access through it to the point furthest upstream with which commercial intercourse by boat is permitted.<sup>8</sup> There are two aspects of that concern, one pertaining to the right of an interested riparian State to fix the furthest point upstream with which such commerce may be so had; the other pertaining to methods of transportation and the consequences thereof when that point is beyond, and perhaps remote from, another downstream which marks the limit of navigability for vessels from non-riparian and oversea States. It may be contended, as has the United States, that the right of the riparian State to fix the furthest point with which commercial access may be had by boat is not unlimited, and that conversely, the non-riparian or oversea State may today fairly claim the privilege of navigation by its vessels to that point on an international navigable river which they are in fact capable of reaching. Yet it may be doubted whether in the absence of convention the law of nations has yet imposed such a restraint upon the riparian State, or conferred upon the non-riparian State such a benefit. If the riparian States see fit to fix the furthest point of permitted commercial intercourse by boat beyond that which vessels of non-riparian or oversea States are able to reach, there is established a section of the particular river through which transit is permitted, and yet within which navigability by such vessels is an impossibility. Thus in a strict sense the concern of oversea or non-riparian States with respect to such section of a river is not one pertaining to navigation, but rather to the transit of passengers and cargoes through it. Hence their chief interest is that such objects of transportation emanating from their territories be not discriminated against, in the employment of any local agencies of transportation. There is obviously no necessary discrimination when the riparian State or States assert a monopoly in the service of transportation through such sections of a river by vessels of their own; nor does that assertion necessarily mark an impediment in access to the ultimate point of permitted commercial

<sup>8</sup> "The problem of freedom of navigation to all flags of international rivers may be divided into two clearly marked parts, freedom for seagoing ships to sail up to the river ports where they transfer to and from river boats, and strictly fluvial navigation. So far as the first is concerned, the river should, for this purpose, be treated as an arm of the sea, for the second, the fluvial community should have full power of disposition. The distinction between rivers and the open sea should be kept in view. The open sea is a roadway between practically all countries, which all are interested in keeping open because their trade passes over it. A river is a pathway of trade only to the states bordering it and can be of interest only to them and the countries with which they traffic. Navigation, in and for itself, is worth while only to a few yachtsmen; it is because they can carry cargoes and passengers that ships are sailed. The right, therefore, to navigate a river is of value only if the riparian state or states permit ships to trade at their ports so that freedom of navigation of a river implies freedom to take part in commerce at the river ports. . . . If this be true in respect to national rivers, why should not a corresponding limitation hold good as to international rivers? If the Rhine states, for example, choose to retain for themselves or their subjects the monopoly of river transportation, no interest of the world at large is at stake, unless it be that a fair and free opportunity be assured to the upper riparians of access to the world sea. In the case of the Danube in 1856, a sort of international guardianship for the infant state of Roumania, was established, and the means of transporting goods was supplied by the countries interested in developing Roumanian commerce. This interest once established, remained in force, but in no case has a non-riparian country acquired any position in navigation on a river running through countries having the capital necessary to supply their own boats and the experience required to operate them." (J. P. Chamberlain, *The Régime of the International Rivers: Danube and Rhine*, 281-283.)

intercourse. Still, if discriminatory charges are exacted for services of transport as distinct from the privilege of transit, it may be doubted whether, in the absence of convention, any rule of international law is necessarily violated.

Absence of a sense of obligation to accept the establishment of régimes of international administration of international navigable rivers where the fewness of riparian proprietors or the conditions of the stream and the uses thereof appear to minimize the value of recourse to such agencies, must be acknowledged as existing in certain continents.

From the foregoing facts which accentuate the variety and complicated aspects of considerations pertaining to the best uses of navigable waterways in various areas, the conclusion is reached that international arrangements, multipartite or otherwise, attain their greatest usefulness when confined to the solution of the problems of navigation and commercial intercourse that are peculiar to particular river systems sought to be dealt with. From arrangements of such a character there is not necessarily to be deduced the best régime that is applicable to others where differing conditions prevail. In general, to the riparian proprietors must be left the final decision touching the character of the régime that should prevail within waters traversing their territories.

## (5)

### DIVERSION OF WATERS

#### (a)

§ 183. **The Principles Involved.** The diversion of the waters of an international stream for any purposes, such as those of sanitation, navigation, power or irrigation, tends to interfere with the fullest use of the river by all riparian proprietors. There may be said to be an essential conflict between the interest of the stream as a whole, and that of the particular State diverting its waters. Where a river traverses, or serves as the boundary of, the territories of several States, the existence of the river interest, as such, becomes the more apparent, because of the common concern of all in its welfare.

The upstream proprietor of the territory on both sides of a river which is not navigable as it flows through the same on its passage to or within the territory of another State may in fact claim the right to divert at will and without restraint such waters as the former may require, and that regardless of the effect produced upon the proprietor downstream. The claim may, moreover, be made in a case where the river becomes the boundary between the domain of the downstream proprietor and that of the upstream diverter, and finally, while so serving, becomes also a navigable waterway on its course to the sea. Such a claim as made by the United States with respect to the waters of the Rio Grande was regarded by Attorney-General Harmon, in 1895, as unopposed by any accepted rule of international law.<sup>1</sup> He maintained that such conduct was inci-

<sup>1</sup> § 183, <sup>1</sup>21 Ops. Attys.-Gen., 274, where the opinion was expressed that Art. VII of the Treaty of Guadalupe-Hidalgo of Feb. 2, 1848, did not purport to restrict the taking of water for purposes of irrigation from the Rio Grande where the river lay wholly within the United States. See, also, Moore, Dig., I, 653-654.

dental to the exercise of rights of sovereignty by a State within its own domain, and hence unrestricted by any limitation not self-imposed.<sup>2</sup>

It may be that in the particular case, the equities of the upstream State resorting to diversion within its own domain are, apart from those derived from the theory of unrestricted sovereignty, as solid as the claims of a proprietor downstream, and notably when the use of the water taken for purposes of irrigation, changes the form without lessening the extent of the benefit of the river to the latter, in spite of the diminished flow of water through the customary channel.<sup>3</sup> In such case there is merely a measuring of the value of conflicting claims of opposing States according to the effect upon each of the act of diversion. The situation, may, however, be otherwise, and point to no actual advantage derived from diversion which is comparable in degree to the damage inflicted upon another riparian State. Whether in such case the continued taking of water, regardless of the obvious result of so doing, amounts to an abuse of power, may still be in fact regarded as a mooted question. The solution of it must depend upon the view which is entertained as to the nature and extent of the freedom from external control which a State retains with respect to occurrences within its own domain. The United States appears to be reluctant to admit that the territorial sovereign is legally subject to restraint which it has not itself undertaken by treaty to observe.<sup>4</sup>

<sup>2</sup> In the course of his opinion Mr. Harmon said: "It is not suggested that the injuries complained of are or have been in any measure due to wantonness or wastefulness in the use of water or to any design or intention to injure. The water is simply insufficient to supply the needs of the great stretch of arid country through which the river, never large in the dry season, flows, giving much and receiving little." 21 Ops. Attys.-Gen., 283.

<sup>3</sup> In 1901, the State of Kansas brought an original suit in the Supreme Court of the United States to restrain the State of Colorado and certain corporations of the latter State from diverting the waters of the Arkansas River for irrigation purposes in Colorado. *Kansas v. Colorado*, 206 U. S. 46. The complainant recognized the right of Colorado to use the waters for its domestic purposes. It was contended, however, that the diversion not only diminished the flow, but also was inequitable in that it threatened the devastation of a portion of Kansas. Thus, the precise inquiry before the court was whether or not the diversion served to injure the substantial interests of the complainant. In this connection the court said: "But we are justified in looking at the question not narrowly and solely as to the amount of the flow in the channel of the Arkansas River, inquiring merely whether any portion thereof is appropriated by Colorado, but we may properly consider what, in case a portion of that flow is appropriated by Colorado, are the effects of such appropriation upon Kansas territory. For instance, if there be many thousands of acres in Colorado destitute of vegetation, which by the taking of water from the Arkansas River and in no other way can be made valuable as arable lands producing an abundance of vegetable growth, and this transformation of desert land has the effect, through percolation of water in the soil, or in any other way, of giving to Kansas territory, although not in the Arkansas Valley, a benefit from water as great as that which would enure by keeping the flow of the Arkansas in its channel undiminished, then we may rightfully regard the usefulness to Colorado as justifying its action, although the locality of the benefit of the flow of the Arkansas through Kansas has territorially changed." *Id.*, 100-101. The court concluded that as the great body of the Arkansas Valley in Kansas had suffered no perceptible injury, the complainant was not entitled to the relief sought.

<sup>4</sup> Elliott, J., in the course of the opinion of the court, in the case of *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 230, where the learned judge quoted a despatch of Mr. Root, Secy. of State, of Dec. 19, 1905.

In the resolutions adopted by the Institute of International Law at Madrid, in 1911, respecting the International Regulation of the Use of International Streams, it was declared that "International law having already considered the right of navigation on international rivers, the utilization of the water for manufacturing, agriculture, etc., has failed to contemplate all that this right entails." *Annuaire*, XXIV, 365, 366, J. B. Scott, Resolutions, 168, 169. In the rules adopted, the Institute, while giving heed to obligations to respect rights of naviga-

Generally speaking, a State may divert for its own purposes waters of a river within or passing through its territory. Thus, it may do so, when, from a source therein they flow through its domain and across a frontier into the territory of a neighboring State; or when having a like source, they are tributary to and flow into waters that constitute an international boundary.<sup>5</sup> Such has long been the view of the United States which has found expression in correspondence with Great Britain (or Canada) and Mexico.<sup>6</sup> A more delicate question is whether a State may likewise divert for its own purposes waters within its domain which, as those of a river, form the boundary between its territory and that of a neighboring State. If the river be not a navigable stream, it is not apparent why a different rule should prevail, even though the effect of diversion may prove to be more serious to the opposite riparian proprietor than that felt by a downstream proprietor when its neighbor up-stream proceeds to divert waters flowing through its territory. The record of the United States reveals some reluctance, however, to press for the privilege of diversion under such conditions.<sup>7</sup> Where

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tion, did not see fit to lay down any broad distinction between the obligations arising with respect to a navigable river, and those arising where a stream was not navigable.

See, also, McNair's 4 ed. of Oppenheim, I, § 178a, embracing note 5, page 381; H. A. Smith, *The Economic Uses of International Rivers*, London, 1931; F. A. Váli, *Servitudes of International Law*, London, 1933, Chapter VII.

<sup>5</sup> It is significant that the International Waterways Commission, embracing an equal number of Canadians and Americans, in the course of a joint report of November 15, 1906, on the application of the Minnesota Canal and Power Company, of Duluth, Minnesota, for permission to divert certain waters in the State of Minnesota from the boundary waters between the United States and Canada, found occasion to declare: "It can hardly be disputed that, in the absence of treaty stipulation, a country through which streams have their course or in which lakes exist can in the exercise of its sovereign powers, rightfully divert or otherwise appropriate the waters within its territory for purposes of irrigation, the improvement of navigation, or for any other purpose which the government may deem proper. This principle was lucidly stated by Mr. Harmon, Attorney General of the United States, on December 12, 1895, in a communication to the Secretary of State (Opinions of Attorneys General, Vol. 21, p. 274). . . . Great Britain also has insisted upon the same principle in the matter of the navigation of the lower St. Lawrence. The history of the positions taken by the United States and Great Britain need not be recited, but it will be noted that Great Britain did not recede from her position and simply conceded by treaty the right of navigation upon certain concessions being made by the United States. It would seem, therefore, to be settled international law, recognized by both countries, that the exercise of sovereign power over waters within the jurisdiction of a country, cannot be questioned, and that, notwithstanding such exercise may take a form that will be injurious to another country through which the waters of the same streams or lakes pass, it cannot be rightfully regarded as furnishing a cause of war. But where the citizens of a country are injured by such exercise of sovereignty, international law recognizes (unless there is urgent necessity for its exercise), that there is a breach of comity which entitles the country whose citizens or subjects are injured, to retaliate. . . . It would seem that comity would require that, in the absence of necessity, the sovereign power should not be exercised to the injury of a friendly nation or of its citizens or subjects, without the consent of that nation." (Compiled Reports of the International Waterways Commission, 1905-1913, Sessional Paper No. 19a, Canada, Sessional Papers, Vol. XLVII [1913], 363-365.)

See also J. Q. Dealey, Jr., *Am. J.*, XXIII, 307, 327.

<sup>6</sup> Abundant evidence of the American position is referred to by Dr. James Simsarian in his *Diversion of International Waters*, Washington, 1939, in which that author adverts to the records and letters of the late Honorable Chandler P. Anderson, to which the former had been given access. That author declares that "the protests by Great Britain, Canada and Mexico to the United States have not presented any instance of international practice to support their general contention that governing rules of international law limit the right of a State to divert waters" wholly within its territory although they are tributary to boundary waters, or later flow across an international boundary line (p. 106).

<sup>7</sup> Mr. Adey, Acting Secy. of State, did not hesitate to declare in the course of a note to



a river constituting an international boundary is a navigable stream, there is room for the assertion that neither riparian proprietor should make diversions productive of injury to navigability evidenced by acts serving to lower existing water levels, at least when those acts assume the form of diversions from the common stream. In such a situation it is probably the sense of obligation, within the limits mentioned, to preserve navigability, that has been creative of acknowledgment of restrictions upon the freedom of the riparian proprietor to utilize the boundary waters within its own domain in its own way.<sup>8</sup> It might be logical to contend that any acts on the part of a State, wheresoever committed, which are the proximate cause of impairment of the navigability of a boundary river should be restrained. The United States is, however, doubtless correct in maintaining that the law of nations has not as yet made the obligation so broad a one. Moreover, the American Government has not found it possible to interpret its conventional arrangements as being designed to enlarge that obligation, as by curtailing freedom to divert interior or tributary waters.<sup>9</sup> It has been far from admitting that the Convention Concerning the Boundary Waters between the United States and Canada concluded January 11, 1909, impaired the right

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the Mexican Ambassador at Washington, May 1, 1905: "A careful examination of the law of nations on the subject has failed to disclose any settled and recognized right created by the law of nations by which it could be held that the diversion of the waters of an international boundary stream for the purpose of irrigating lands on one side of the boundary and which would have the effect to deprive lands on the other side of the boundary of water for irrigation purposes would be a violation of any established principle of international law. Nevertheless, the Government of the United States is disposed to govern its action in the premises in accordance with the high principles of equity and with the friendly sentiments which should exist between good neighbors." (American and British Claims Arbitration, *The Rio Grande Claim*, Appendix to the Answer of the United States, Washington, 1923, p. 502.) See comment on this note by James Simsarian, *op. cit.*, 105.

*Cf.* Mr. Evarts, Secy. of State, to the Mexican Minister at Washington, June 15, 1880, *For. Rel.* 1880, 783.

<sup>8</sup> The treaties making reference to the navigable portions of rivers forming portions of the boundaries of the United States have at times during a long period, contained significant provision designed to protect navigability. Thus, Article III of the Webster-Ashburton Treaty of Aug. 9, 1842, provided that where the River St. John was to constitute the boundary, "the navigation of the said river shall be free and open to both parties, and shall in no way be obstructed by either." (Malloy's Treaties, I, 653.) *Cf.* Art. II of the same treaty, pertaining to the water communications and portages along the line from Lake Superior to the Lake of the Woods, and also Grand Portage, from the shore of Lake Superior to the Pigeon River, which "as now actually used," were to be "free and open to the use of the citizens and subjects of both countries." (See in this connection, *Pigeon River Co. v. Cox Co.*, 291 U. S. 138.) According to Art. VII of the Treaty of Guadalupe Hidalgo, concluded with Mexico Feb. 2, 1848, "the navigation of the Gila and of the Bravo (del Norte) below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation." (Malloy's Treaties, I, 1111.) See also Art. IV of the Gadsden Treaty, concluded with Mexico Dec. 30, 1853, Malloy's Treaties, I, 1123. See also, particularly, Art. III of Convention Concerning the Boundary Waters Between the United States and Canada, concluded Jan. 11, 1909, U. S. Treaty Vol. III, 2609. See in this connection statement of the Canadian Minister of Public Works before the Canadian House of Commons, in 1910, debates, 11th Parliament, 3d Sess. (1910-11), Vol. I, 893, quoted in Hackworth, *Dig.*, I, 617.

<sup>9</sup> See Mr. Hughes, Secy. of State, to Mr. Hoover, Secy. of Commerce, Aug. 17, 1922, in which reference was made to the opinion of the Attorney General, Dec. 12, 1895, 21 Ops. Attys. Gen. pp. 276-278, Report of the American Section of the International Water Commission United States and Mexico, Washington, 1930, 261.

to divert waters of Lake Michigan,<sup>10</sup> despite the opposing view of Great Britain and Canada.<sup>11</sup>

It has been perceived, however, in the United States and elsewhere that the common interest of riparian States in maintaining the level of waters of a navigable river that separates their territories may in fact be of greater concern to either than the preservation of the full right of diversion that both may possess. In such a situation that interest may be expected to beget a treaty which accentuates and sustains it, and conversely relaxes the grip of the contracting parties on their respective legal rights.<sup>12</sup>

In the course of domestic adjudications between States of the United States, the Supreme Court of the United States, finding itself possessed of adequate jurisdiction, has applied and laid down rules permitting diversions that under the circumstances of the particular case, were conceived to be equitable. In the course, however, of so doing, it has not hesitated to deny that an American commonwealth may rightfully divert and use, as she may choose, the waters flowing within her boundaries in an interstate stream regardless of any prejudice that such action may work to others having rights in the stream below her boundaries.<sup>13</sup> Through Mr. Justice Holmes the Court has declared:

A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished.

<sup>10</sup> See statement by Senator Elihu Root, Proceedings, Senate Committee on Foreign Relations, 57th-62nd Congresses, pp. 271-272, quoted and commented on by Hildegard Willmann in "The Chicago Diversion from Lake Michigan," *Canadian Bar Review*, X (1932), 575, 579-580; J. Q. Dealey, Jr., "The Chicago Drainage Canal and St. Lawrence Development," *Am. J.*, XXIII, 307; J. W. Garner, "The Chicago Sanitary District Case," *id.*, XXII, 837. Cf. H. A. Smith, "The Chicago Diversion," *Brit. Y.B.*, 1929, 144. See, also, C. J. Chacko, The International Joint Commission between the United States of America and the Dominion of Canada, New York, 1932, in relation to the Livingstone Channel Investigation, 272-279.

<sup>11</sup> In a communication from the British Ambassador at Washington to the Secretary of State, of March 17, 1913, it was declared that the Canadian Government "consider it desirable that Canada's protest as already put forward should be maintained, both on the ground that any diversion of water from Lake Michigan which prejudicially affects the navigation of the Great Lakes infringes the rights secured to Canada by the Ashburton-Webster Treaty of 1842 in the channels in the River St. Lawrence and in the River Detroit and in the other passages and channels referred to in Article 7 of that Treaty, as well as the rights of navigation in boundary waters and in Lake Michigan to which the Dominion is entitled under the Boundary Waters Treaty of 1909, and also on the ground that apart from these Treaties the authorities of the United States or the authorities of any State have not under the recognized principles of International Law any right to divert from Lake Michigan by any means, or for any purpose, such an amount of water as will prejudicially affect the navigation of boundary waters in which both Canada and the United States are deeply and vitally interested." (Sessional Paper No. 180, Canada, Sessional Papers, Vol. LX [1924], 126.)

<sup>12</sup> The plan set forth in the Great Lakes-St. Lawrence Deep Waterway Treaty of July 18, 1932, is illustrative. See *infra*, § 184A.

<sup>13</sup> *Wyoming v. Colorado*, 259 U. S. 419, 466.

See Charles Warren, "The Supreme Court and Disputes Between States," *Bulletin*, College of William and Mary, Vol. XXXIV, No. 5, Williamsburg, Virginia, June, 1940.

Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results, but the effort always is to secure an equitable apportionment without quibbling over formulas.<sup>14</sup>

In applying these principles the Court has held that as between two States (Wyoming and Colorado), both of which subscribed to the doctrine of appropriation as measured by what was reasonably required with a view to conserving the common supply of a stream, and whose laws recognized that priority of appropriation gave a superiority of right, relief should be granted to prevent a diversion that would serve to injure rights acquired through a prior appropriation.<sup>15</sup> Again, the Court has been insistent in demanding that, as a condition essential to relief, a complainant State establish conclusively that appropriations or other alleged acts of interference through diversion with an interstate stream produce in fact obvious injuries to itself.<sup>16</sup> It has accordingly been reluctant to interfere with diversions by an upstream proprietor that have not been found to be necessarily injurious to the ordinary uses of the waters by a proprietor downstream.<sup>17</sup> Moreover, in the course of adjudications before it, the Court has weighed carefully the character of the opposing equities of the States at variance, according to the nature of the uses which the particular diversions appeared to facilitate or thwart.<sup>18</sup>

As a tribunal possessed of sufficient jurisdiction to prevent or grant relief on account of diversions of the waters of American interstate streams, the Supreme Court of the United States has not been obliged to seek light from the

<sup>14</sup> *New Jersey v. New York*, 283 U. S. 336, 342–343, citing *Missouri v. Illinois*, 200 U. S. 496, 520; *Kansas v. Colorado*, 206 U. S. 46, 98, 117; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 237; *Wyoming v. Colorado*, 259 U. S. 419, 465, 470; *Connecticut v. Massachusetts*, 282 U. S. 660, 670. See also *Washington v. Oregon*, 297 U. S. 517.

<sup>15</sup> *Wyoming v. Colorado*, 259 U. S. 419.

<sup>16</sup> *North Dakota v. Minnesota*, 263 U. S. 365; also, *Missouri v. Illinois*, 200 U. S. 496, 521.

<sup>17</sup> *Connecticut v. Massachusetts*, 282 U. S. 660, where the Court through Mr. Justice Butler observed (at p. 667): "Connecticut failed to establish that the taking of flood waters will be materially injurious to the shad run or that the diversion will perceptibly increase the pollution of the river."

See also *New Jersey v. New York*, 283 U. S. 336.

<sup>18</sup> Thus in *Connecticut v. Massachusetts*, 282 U. S. 660, at 673, the Court declared: "Drinking and other domestic purposes are the highest uses of water. An ample supply of wholesome water is essential. Massachusetts, after elaborate research, decided to take the waters of the Ware and Swift rather than to rely on the sources in the eastern part of the Commonwealth where all are or are liable to become polluted. We need not advert to other considerations, disclosed by the evidence and findings, to show that the proposed use of the waters of the Ware and Swift should not be enjoined."

See, also, *New Jersey v. New York*, 283 U. S. 336, 345–348.

See *Württemberg and Prussia v. Baden*, German Staatsgerichtshof, 1927, McNair and Lauterpacht, Annual Dig., 1927–1928, Case No. 86.

Declared the Permanent Court of International Justice in its judgment of June 28, 1937, in the case of the Diversion of Water from the Meuse: "In the course of the proceedings, both written and oral, occasional reference has been made to the application of the general rules of international law as regards rivers. In the opinion of the Court, the points submitted to it by the Parties in the present case do not entitle it to go outside the field covered by the Treaty of 1863. The points at issue must all be determined solely by the interpretation and application of that Treaty." (Publications Permanent Court of International Justice, Series A/B, No. 70, 16.)

law of nations in enunciating rules that should be applied.<sup>19</sup> Thus, it has not sought to explore the problem touching the freedom of a State under that law to divert the waters of a river flowing out of, or constituting the boundary of, its territory.<sup>20</sup> Nevertheless, the conclusions of the Court are believed to be of utmost value in pointing to the relative strength of opposing claims of riparian States and as indicating bases of sensible agreements between them. The solution of problems growing out of the appropriation of waters of international streams is not to be found in the exercise by a particular riparian proprietor of the full measure of the privilege which it may prove difficult to deny or convincingly to challenge, but rather in the disposition of interested States to agree to understandings as to regulated diversions, even though the consequence may be the ultimate relinquishment of the privilege of independent action that might once have been reasonably asserted. In a word, the exercise of a legal right by the individual State may, in respect to the matter of diversions of international waters, prove, as in kindred fields, disadvantageous even to the possessor of it. Whenever this is found to be the case, the basis of a modification of what the law may permit is apparent. It may be observed that the increasing tendency of interested States to acquiesce through appropriate agreements in schemes of regulated diversions through accepted agencies bears testimony to the character of the practice that is in process of development.<sup>21</sup>

(b)

§ 184. **Certain Contractual Arrangements of the United States.** The United States has in the present century concluded significant agreements with both Mexico,<sup>1</sup> and Great Britain, with respect to the uses of waters constituting a part of, or appertaining to, or flowing across, its frontiers.

<sup>19</sup> Declared Mr. Justice Holmes, in the course of the opinion of the Court in the case of *New Jersey v. New York*, 283 U. S. 336, at 342: "We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut v. Massachusetts*, 282 U. S. 660. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignities bound together in the Union."

<sup>20</sup> In prescribing the reduction of the diversion of the waters from Lake Michigan through the Chicago Drainage Canal by the State of Illinois and the Sanitary District of Chicago, the Supreme Court of the United States did not have occasion to consider whether any lowering of the level of the Great Lakes violated any international obligation of the United States. See *Sanitary District v. United States*, 266 U. S. 405, 426; *Wisconsin v. Illinois*, 278 U. S. 367; *Wisconsin v. Illinois*, 281 U. S. 179, embracing a decree of April 14, 1930, which did have the effect of preserving the level of the waters throughout the Great Lakes-St. Lawrence System.

See in this connection, Hackworth, Dig., I, 618, and documents there cited.

<sup>21</sup> See *Certain Contractual Arrangements of the United States*, *infra*, § 184.

See declaration of the Seventh International Conference of American States of December 24, 1933, concerning Industrial and Agricultural Use of International Rivers, which the Delegation of the United States refrained from approving. *Am. J.*, XXVIII, *Official Documents*, 59.

Concerning the agreement in 1929 between the British and Egyptian Governments pertaining to the construction in the Sudan of works on the Nile and its branches, see discussion in James Simsarian, *Division of International Waters*, Washington, 1939, 97-102.

§ 184. <sup>1</sup> See convention providing for the equitable distribution of the waters of the Rio Grande for irrigation purposes, May 21, 1906, Malloy's *Treaties*, I, 1202. The convention made arrangement for the delivery to Mexico of a specified volume of water annually, in the

The arrangement, known as the Convention concerning Boundary Waters between the United States and Canada, was an achievement of great moment.<sup>2</sup> Each contracting party reserved to itself "the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters."<sup>3</sup> It was agreed, however, that any interference or diversion on either side of the boundary, resulting in injury on the other side thereof, should give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where the diversion or interference occurred.<sup>4</sup> No further uses or obstructions or diversions (in addition to those previously permitted or thereafter to be provided for by special agreement) affecting the natural level or flow of boundary

bed of the Rio Grande at the point where the head works of the Old Mexican Canal existed above the city of Juarez, Mexico. Art. I. According to Art. IV the delivery of water was not to be construed as a recognition by the United States of any claim on the part of Mexico to the waters specified; and in consideration of such delivery, Mexico waived any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the existing Mexican Canal and Fort Quitman, Texas, and declared to be fully settled and disposed of, and also thereby waived all claims previously asserted or existing, or that might thereafter arise or be asserted against the United States on account of any damages alleged to have been sustained by the owners of land in Mexico, by reason of the diversion by citizens of the United States of the waters of the Rio Grande. In Art. V it was declared that the United States, in entering upon the treaty, did not thereby concede, expressly or by implication, any legal basis for any claims previously asserted or which might thereafter be asserted by reason of any losses incurred by owners of land in Mexico due or alleged to be due to the diversion of the Rio Grande within the United States. It was also declared that the United States did not in any way concede the establishment of any general principle or precedent by the concluding of the treaty. The understanding of both parties was said to limit the arrangement contemplated by the treaty to the portion of the Rio Grande forming the international boundary from the head of the Mexican Canal down to Fort Quitman, Texas.

Concerning negotiations between the United States and Mexico since the conclusion of the convention of 1906, as well as the proposals of commissioners touching the basis of equitable diversions, see documents in Hackworth, *Dig.*, I, 585.

"By an act of Congress approved June 30, 1932 (47 Stat. 382, 417), the American section of the International Water Commission, United States and Mexico, was abolished, and its powers, duties, and functions were transferred to the American section of the International Boundary Commission, United States and Mexico, established under the boundary convention of March 1, 1889. 1 *Treaties*, etc. (Malloy, 1910) 1167.

"On August 19, 1935 Congress passed another act authorizing the President to appoint representatives to cooperate with representatives of Mexico in a study of the equitable use of the water of the lower Rio Grande, the lower Colorado River, and the Tia Juana River, for the purpose of obtaining information which might be used as a basis for the negotiation of a treaty (49 Stat. 660). The American Commissioner on the International Boundary Commission, United States and Mexico, was authorized to perform these functions. Negotiations looking to the conclusion of a treaty have been suspended until all available data have been assembled and compiled." (*Id.*, I, 588-589.)

See also documents in Hackworth, *Dig.*, I, § 107.

<sup>2</sup> U. S. Treaty Vol. III, 2607. In a preliminary Article it was declared: "For the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."

<sup>3</sup> Art. II.

<sup>4</sup> In this connection it was stated that "neither of the High Contracting Parties intends by the foregoing provision to surrender any right, which it may have, to object to any interference with or diversions of waters on the other side of the boundary the effect of which would be productive of material injury to the navigation interests on its own side of the boundary."

waters were to be made except by authority of the United States or Canada "within their respective jurisdictions" and with the approval of a joint commission known as the International Joint Commission established by the convention.<sup>5</sup> Save with the approval of the Commission the construction or maintenance of no remedial or protective works or any dams or obstructions were to be permitted by either contracting party on its own side, if the effect thereof would be to raise the natural level of waters on the other side of the boundary.<sup>6</sup> It was declared to be expedient to limit the diversion of waters from the Niagara River so that the level of Lake Erie and the flow of the stream should not be appreciably affected.<sup>7</sup> The amount to be diverted from that river within the State of New York above the Falls of Niagara "for power purposes" was expressly limited, and also the amount to be taken for like purposes above those falls within the Province of Ontario.<sup>8</sup>

To the International Joint Commission to be composed of six commissioners (three to be appointed in behalf of each party)<sup>9</sup> was given broad jurisdiction in cases involving the use or obstruction or diversion of waters. The following rules or principles were adopted for its guidance. Each party was to have on its own side of the boundary similar and equal rights in the boundary waters. The following order of precedence was to be observed among the various uses enumerated, and no use was to be permitted which might tend materially to conflict with or restrain any other use given preference over it in that order: (a) uses

<sup>5</sup> Art. III. It was declared in this connection that these provisions were not intended to limit or interfere with the existing rights of the United States, on the one side, and Canada, on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and others for the benefit of commerce and navigation, provided such works were wholly on its own side of the line and did not materially affect the level or flow of the boundary waters on the other. Nor were such provisions "intended to interfere with the ordinary use of such waters for domestic and sanitary purposes."

<sup>6</sup> Art. IV. An exception was made, however, with respect to cases provided for by special agreement between the contracting parties. This Article embraced the further agreement that the waters defined as boundary waters, as well as waters flowing across the boundary, should not be polluted on either side to the injury of health or property on the other.

<sup>7</sup> Art. V. It was said to be the desire of both parties to accomplish this object with the least possible injury to investments already made in the construction of power plants on both sides of the river.

<sup>8</sup> Art. VI. It should be noted that the provisions of this Article were not to apply to the diversion of water for sanitary or domestic purposes, or for the service of canals for purposes of navigation. In Art. VI arrangement was made for the equal apportionment between the two countries for purposes of irrigation and power, of the waters of the St. Mary and Milk rivers and their tributaries (in the State of Montana and the Provinces of Alberta and Saskatchewan).

It should be noted that by the resolution through which the Senate advised and consented to ratification of the convention, constitutional approval of the treaty was given with the understanding that nothing in it should be construed "as affecting, or changing, any existing territorial or riparian rights in the water, or rights of the owners of lands under water, on either side of the international boundary at the rapids of the St. Mary's River at Sault Ste. Marie, in the use of the waters flowing over such lands, subject to the requirements of navigation in boundary waters and of navigation canals, and without prejudice to the existing right of the United States and Canada, each to use the waters of the St. Mary's River, within its own territory, and further, that nothing in this treaty shall be construed to interfere with the drainage of wet swamp and overflowed lands into streams flowing into boundary waters, and that this interpretation will be mentioned in the ratification of this treaty as conveying the true meaning of the treaty, and will, in effect, form part of the treaty." U. S. Treaty Vol. III, 2607.

See *Pigeon River Improvement, Slide & Boom Co. v. Cox*, 291 U. S. 138.

<sup>9</sup> Art. VII.

for domestic and sanitary purposes; (b) uses for navigation, including the service of canals for the purposes of navigation; (c) uses for power and for irrigation purposes.<sup>10</sup> Discretion was given the Commission to make its approval in any case conditional upon the construction of appropriate remedial or protective works in compensation for a particular use or proposed diversion. A majority of the commissioners was to have power to render a decision.<sup>11</sup>

The International Joint Commission which was duly established, has exercised with success its functions with respect to problems of diversion referred to it. It "has decided numerous cases relating to power development affecting boundary waters between the two countries."<sup>12</sup>

The terms of the convention gave proof that both the United States and Canada perceived that the diversion of waters on either side of the boundary was a matter of common interest, requiring regulation through a common agency, and that in spite of reservations in favor of each territorial sovereign, there was a distinct mutual advantage derivable from a reciprocal arrangement in restraint of acts serving to impede navigation by lowering the natural level of the boundary waters.

<sup>10</sup> Art. VIII. It was declared that the foregoing provisions should not apply to or disturb any existing uses of boundary waters on either side of the boundary. It was agreed that in cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions, the Commission should require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which might be injured thereby.

<sup>11</sup> In the case of an equal division of opinion, separate reports were to be made by the commissioners on each side to their own Government. In such event the contracting parties were to endeavor to agree upon an adjustment.

It was agreed, in Art. IX, that any other questions or matters of difference arising between the contracting parties, and involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the common frontier between the United States and Canada, should be referred from time to time to the Commission for examination and report, whenever either the Government of the United States or that of the Dominion should so request. In the event of a reference, the Commission was, after making the requisite examination, to make its reports with conclusions and recommendations (subject to special restrictions imposed by the terms of reference). Such reports were not to be regarded as decisions or to possess the character of arbitral awards. The Commission was to make a joint report to both Governments in cases where a majority agreed. Provision for minority reports was made. In the event of an even division separate reports were to be made by the commissioners on each side to their own Government.

By Art. X it was agreed that "any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants," might be referred for decision to the Commission by the consent of those parties. Provision was made for the scope of the authority and functions of the Commission in cases so referred to it. The power of a majority to render a decision was acknowledged. In case of an equal division of opinion, or of inability of the Commission to render a decision or finding, the parties agreed to have recourse to arbitration.

See Joint Commissions, *infra*, § 584.

<sup>12</sup> Hackworth, Dig., I, 593, footnote, where there is given reference to numerous cases arising out of applications seeking the approval of the Commission for various projects.

See C. J. Chacko, *The International Joint Commission between the United States of America and the Dominion of Canada*, New York, 1932; R. A. MacKay, "The International Joint Commission between the United States and Canada," *Am. J.*, XXII, 292.

See Convention, Protocol and an Agreement between the United States and Great Britain in respect to Canada, to Regulate the Level of the Lake of the Woods, of February 24, 1925, U. S. Treaty Vol. IV, 3993. Also statement in Hackworth, Dig., I, 759, concerning problems for the solution of which the convention was concluded.

The treaties of peace with Germany, of June 28, 1919, with Austria, of September 10,

By a convention with Canada for the Emergency Regulation of the Level of Rainy Lake and Certain Other Boundary Waters, concluded on September 15, 1938, and proclaimed by the President, on October 18, 1940, the International Joint Commission was clothed with power to determine when emergency conditions exist in the Rainy Lake watershed, whether by reason of high or low water, and to adopt such measures of control as to it may seem proper with respect to existing dams at Kettle Falls and International Falls, as well as with respect to any existing or future dams or works in boundary waters of the Rainy Lake watershed, in the event the Commission shall determine that such emergency condition exists.<sup>13</sup>

(i)

§184A. **Proposed Great Lakes-St. Lawrence Deep Waterway.** Recognizing that the construction of a deep waterway, not less than twenty-seven feet in depth, for navigation from the interior of the continent of North America, through the Great Lakes and the St. Lawrence River to the sea, with the development of waterpower incidental thereto, would result in marked and enduring benefits to the agricultural, manufacturing and commercial interests of both countries; and recognizing also the desirability of effecting a permanent settlement of the questions raised by the diversion of waters from or into the Great Lakes System, the United States and Canada signed at Washington, July 18, 1932, the so-called Great Lakes-St. Lawrence Deep Waterway Treaty.<sup>1</sup> The plan, which contemplated regulated diversions, was one which, nevertheless, subordinated the appropriations of water to the maintenance of desired levels of the Great Lakes System. Not only was there elaborate provision for the construction of appropriate works by both contracting parties,<sup>2</sup> but there were also specific limitations imposed touching the amounts and the purposes of appropriations of water in specified sections of the area involved.<sup>3</sup> Thus there were arrangements for the utilization of water for the production of power

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1919, with Bulgaria, of November 27, 1919, and with Hungary, of June 4, 1920, as well as the Barcelona Statute on the Régime of Navigable Waterways of International Concern, of April 20, 1921, and the Convention Instituting the Definitive Statute of the Danube of July 23, 1921, are replete with provisions concerning the diversion of international streams.

See, also, Convention relating to the Development of Hydraulic Power Affecting More Than One State, and Protocol of Signature, signed at Geneva December 9, 1923, League of Nations, Treaty Series, XXXVI, 75.

See Analytical Digest of treaty provisions pertaining to various economic uses of international rivers embraced in H. A. Smith's *Economic Uses of International Rivers*, Appendix I.

<sup>13</sup> U. S. Treaty Series No. 961. See also statement in Dept. of State Bulletin, Oct. 19, 1940, 325.

§ 184A. <sup>1</sup> See Department of State Publication, No. 347, Washington, 1932, embracing the text of the treaty, statement of the President, statement of the Department of State, and a report of the Joint Board of Engineers (Reconvened) on Improvement of the International Section of the St. Lawrence River.

<sup>2</sup> See Articles I, II, and III; also, Schedule A.

<sup>3</sup> See Articles IV, VI and VIII.

See exchange of notes between Mr. Stimson, Secy. of State, and Mr. Herridge, Canadian Minister at Washington, January 13, 1933, in relation to the effect of the treaty upon the diversion of water for power purposes through the Massena Canal and Grass River, Department of State, Press Releases, January 21, 1933, Publication No. 422, 43-45,



on either side of the international boundary in what was described as the International Rapids Section.<sup>4</sup> Careful arrangement was made for the preservation of the levels of the Great Lakes System. Accordingly, it was provided that the diversion of water through the Chicago Drainage Canal should conform to the quantity provided under the decree of the Supreme Court of the United States of April 21, 1930;<sup>5</sup> and also that in the event that the American Government should propose, in order to meet an emergency, an increase in the permitted diversion, to which the Canadian Government took exception, the matter should be submitted for final decision to an arbitral tribunal, which should be empowered to authorize, for such time and to such extent as was necessary to meet the emergency, an increase in the diversion of water beyond the limits of the decree of the Supreme Court, and to stipulate such compensatory provisions as it might deem just and equitable.<sup>6</sup> It was also provided that no diversion of water, other than the foregoing, from the Great Lakes System, or from the International Section to another watershed should thereafter be made, except by authorization of the International Joint Commission established pursuant to the Boundary Waters Treaty of January 11, 1909 (on which the United States and Canada had equal representation).<sup>7</sup> It was agreed that the construction of works under the treaty should not confer upon either of the parties proprietary rights, or legislative, administrative or other jurisdiction in the territory of the other, and that the works constructed under the treaty should constitute a part of the territory of the country in which they were situated.<sup>8</sup> It was declared that ratifications should be exchanged "as soon as practicable," and that the treaty should come into force on the day of the exchange of ratifications.<sup>9</sup> No provision was made for the termination of the treaty.

On May 31, 1938, the Department of State made public a note to Canada, under date of May 28, 1938, transmitting the draft for a comprehensive treaty which provided for the planned use of the Great Lakes-St. Lawrence Basin. Such

<sup>4</sup> Art. IV. To a commission established under the provisions of Article III, known as the St. Lawrence International Rapids Section Commission, was confided broad powers in relation to the matter of works. See Schedule A.

<sup>5</sup> Art. VIII. That decree was set forth in the case of *Wisconsin v. Illinois*, 281 U. S. 179, 201.

<sup>6</sup> The arbitral tribunal was to consist of three members, one to be appointed by each of the Governments and the third, who should be the chairman, was to be selected by the two Governments jointly.

<sup>7</sup> Art. VIII. According to the same article it was agreed "(e) that compensation works in the Niagara and St. Clair Rivers, designed to restore and maintain the lake levels to their natural range, shall be undertaken at the cost of the United States as regards compensation for the diversion through the Chicago Drainage Canal, and at the cost of Canada as regards the diversion for power purposes, other than power used in the operation of the Welland Canals; the compensation works shall be subject to adjustment and alteration from time to time as may be necessary, and as may be mutually agreed upon by the Governments, to meet any changes effected in accordance with the provisions of this Article in the water supply of the Great Lakes System above the said works, and the cost of such adjustment and alteration shall be borne by the Party effecting such change in water supply."

<sup>8</sup> Art. V. Art. VI provided that the parties might, within their own respective territories, proceed at any time to construct alternative canal and channel facilities for navigation in the International Section of the St. Lawrence River or in waters connecting the Great Lakes, and that they should have the right to utilize for that purpose such water as might be necessary for the operation thereof.

<sup>9</sup> Art. X.

use would, it was declared, make possible development of navigation and of cheap power.<sup>10</sup>

Final accord between the United States and Canada has not as yet been reached.

(6)

§ 185. **Bays.** Over all bays within its territory a State may exercise exclusive control.<sup>1</sup> As such waters do not form channels of communication between open seas, foreign powers possess no rights of navigation therein save as incidental to the privilege of access to local ports, and except for purposes of refuge for vessels in distress.<sup>2</sup> Such access is, however, commonly accorded foreign vessels of commerce. The use of bays by foreign vessels of war is regarded as dependent upon the consent of the territorial sovereign.<sup>3</sup> That consent is doubtless to be presumed in seasons of peace, at least when such use is sought for the purpose of enabling such ships to enter a local port.<sup>4</sup> No rule of law serves to prevent the territorial sovereign from closing at will particular bays. Their use for its own distinctive military purposes may impel it to take such a step, likewise special considerations pertaining to the safety of the State, or the interest of the public health.

Within bays, as elsewhere within its waters, the fisheries are subject to the exclusive control of the territorial sovereign.

On May 3, 1923, Mr. Hughes, Secretary of State, announced to the chiefs of foreign diplomatic missions at Washington the text of a notice issued by the Secretary of the Treasury with reference to the decision of the Supreme Court of the United States of April 30, 1923, construing the National Prohibition Act, and holding that it was unlawful for any vessel, either foreign or domestic, to bring within the United States or within the territorial waters thereof any liquors whatever for beverage purposes, and stating that Treasury regulations were being prepared for carrying the decision into effect, and would be promul-

<sup>10</sup> Dept. of State Press Releases, June 4, 1938, 621-634.

See Executive Order No. 8568, of Oct. 16, 1940, establishing the St. Lawrence Advisory Committee and providing for a preliminary investigation of International Rapids Section, St. Lawrence River, Dept. of State Bulletin, Oct. 19, 1940, 317; also message by the President to the Congress in relation to the matter, Oct. 17, 1940, *id.*, 316.

See also exchanges of notes in October and November, 1940, concerning the diversion of waters into the Great Lakes system for power purposes, Dept. of State Bulletin, Nov. 16, 1940, 430-431.

§ 185. <sup>1</sup> A. H. Charteris, "Territorial Jurisdiction in Wide Bays," *Int. Law Association, Proceedings*, 23d Conference, Berlin, 1906, 103, 107.

<sup>2</sup> Art. I of the treaty between the United States and Great Britain of Oct. 20, 1818, prohibiting American fishermen from enjoying fishing privileges within certain British bays, provided, however, that such fishermen might enter such bays for the purpose of shelter and of repairing damages therein, of purchasing wood and of obtaining water, "and for no other purpose whatever." See Malloy's *Treaties*, I, 631-632.

<sup>3</sup> See reciprocal agreement relative to the stationing of coaling vessels in the waters of Mexico (Magdalena Bay) and the United States, as set forth in correspondence in *For. Rel.* 1907, II, 845-846. Also, *Rev. Gén.*, XV, 436-439.

See Preliminary Provisions of Regulations Concerning the Legal Status of Ships and Their Crews in Foreign Ports, adopted by the Institute of International Law in 1898, *Annuaire*, XVII, 273, J. B. Scott, Resolutions, 144.

<sup>4</sup> Access to Ports, *infra*, § 187; also Naval War College, *Int. Law Topics*, 1914, 35-67.

gated at an early date.<sup>5</sup> Numerous foreign States lodged immediate protest, declaring for the most part that the action proposed by the United States would constitute an abuse of jurisdiction.<sup>6</sup> Possibly the broad scope of the notice communicated to them justified objection in so far as it may have intimated possible interference with foreign vessels exercising the privilege of innocent passage on the marginal sea. That was not, however, the chief purpose of the United States. It sought, primarily, to keep out of its territorial waters, such as its bays and ports, foreign ships seeking entrance thereto if and when laden with the prohibited articles. The question thus was not whether it might lawfully assert jurisdiction over foreign vessels permitted to enter such waters, but rather whether it might lawfully forbid the entrance of such vessels thereto when so laden. It is believed that the United States possessed such a right.<sup>7</sup> The British Government appeared to acknowledge that it did.<sup>8</sup> Nevertheless, the hardship upon foreign shipping to be anticipated from the exercise of that right was a factor which contributed to the negotiation of a series of so-called liquor treaties of which the first was that concluded with Great Britain on January 23, 1924.<sup>9</sup>

<sup>5</sup> Department of State, Press Release, Feb. 16, 1927, 1.

The decision of the Supreme Court to which reference was made was that in the case of *Cunard Steamship Company v. Mellon*, 262 U. S. 100.

<sup>6</sup> Declared the Italian Ambassador, in a memorandum addressed to the Secretary of State, May 29, 1923: "The Italian Government emphasizes the general principle of international law and comity according to which the exercise of the jurisdictional power by a nation in its territorial waters finds an adequate limitation in the right of other countries to the freedom of commerce and navigation. In the opinion of His Majesty's Government such a limit is clearly indicated by the existing practice among nations, according to which a country does not exercise its jurisdictional power on foreign ships entering its territorial waters unless in matters involving questions of peace or dignity for the country or disturbing public order." (Department of State, Press Release, Feb. 16, 1927, 1.)

Declared the Swedish Minister, in a memorandum addressed to the Secretary of State, May 31, 1923: "In the opinion of the Swedish Government, the extent to which each country should compel observance of its laws on ships of another is of primary importance in regular intercourse between nations. To judge from existing comity and practice of nations, jurisdiction should not be exercised except to restrain acts calculated to disturb public order." (*Id.*, 9.)

Declared the Danish Minister, in a note addressed to the Secretary of State, June 1, 1923: "After careful consideration of the whole matter the Danish Minister of Foreign Affairs has directed me to state to you, that to prohibit Danish vessels from carrying alcoholic liquors (not intended for importation into the United States) inside American territorial waters would in their opinion be contrary to the international usage and practice, as heretofore acknowledged and followed, which not only have recognized any mere passage through territorial waters as inoffensive but also consecrated the non-exercise of jurisdiction within territorial waters over foreign merchant ships which call there, as long as these vessels do not disturb the peace and order inside the foreign territory." (*Id.*, 9.)

<sup>7</sup> See Mr. Hughes, Secy. of State, to the Italian Ambassador, June 9, 1923, *id.*, 2; same to the Danish Minister, June 16, 1923, *id.*, 11.

See also documents in Hackworth, Dig., I, § 99.

See P. C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, 219-220, 236.

<sup>8</sup> Declared Lord Curzon, British Foreign Secretary, in the House of Lords, June 28, 1923: "What is the legal position as interpreted by His Majesty's Government, acting upon the advice of their legal authorities? It is as follows. There are two recognized principles of International Law which prevent us from contending that the United States have committed any violation of International Law in forbidding foreign vessels to bring alcoholic liquor within their waters. The first is that foreigners and foreign ships trading with a country must comply with its laws. The second is that every sovereign independent State is supreme over all persons and property within its dominions, including ships within its territorial waters." (Hackworth, Dig., I, 677, quoting Parliamentary Debates, 54 H. L. Deb. 5s, col. 724.)

<sup>9</sup> U. S. Treaty Vol. IV, 4225. See *infra*, § 235B.

They served to permit the bringing into American waters of certain intoxicating liquors under seal, when not to be unladen within the domain of the United States.

## (7)

§ 186. **Lakes and Enclosed Seas.** A lake or land-locked sea which forms a part of the domain of a single State is subject to its exclusive control. Although, like Lake Michigan, it connects with and constitutes a part of a system of water communications forming an international boundary and emptying into the ocean, no right of navigation is possessed by any foreign State. It has been observed that by virtue of the Canadian boundary convention of January 11, 1909, rights of navigation in that lake were extended to the inhabitants and vessels of Canada.<sup>1</sup>

Where a lake forms a part of the territorial waters of two or more States, a common right of navigation is enjoyed by the several proprietors. Thus, Lakes Ontario, Erie, Huron and Superior, and their water communications, are treated as "international waters, being dedicated in perpetuity to the common navigation of all the inhabitants" of the countries on both sides of the boundary.<sup>2</sup> Such a right of navigation is not enjoyed by States other than those to which the waters may be said to belong. Moreover, the bordering States possess the exclusive right to control and utilize the fisheries within their respective territorial waters.<sup>3</sup> As has been observed elsewhere,<sup>4</sup> the proposed Great Lakes-St.

§ 186. <sup>1</sup>U. S. Treaty Vol. III, 2607; The Navigation of Rivers, The St. Lawrence, *supra*, § 162.

See provisions of Art. IV of treaty of June 5, 1854, Malloy's Treaties, I, 671; Art. XXVIII of the treaty of May 8, 1871 (which was subsequently terminated), *id.*, 711; also documents in Moore, Dig., I, 670-691.

<sup>2</sup>See statement in Moore, Dig., I, 675, where it is added: "It may be superfluous to remark that this common right of navigation does not embrace the respective coasting trade of the contracting parties, a limited participation in which was reciprocally conceded by Article XXX of the Treaty of Washington of May 8, 1871."

<sup>3</sup>Mr. Uhl, Acting Secy. of State, to Messrs. Laughlin, Ewell and Houpt, May 23, 1894, 197 MS. Dom. Let. 118, Moore, Dig., I, 672, 674; Mr. Gresham, Secy. of State, to Mr. Hooker, Jan. 2, 1895, 200 Dom. Let. 121, Moore, Dig., I, 675, note; Mr. Bayard, Secy. of State, to Mr. Chipman, M. C., Feb. 2, 1889, 17 MS. Report Book, 327, Moore, Dig., I, 675, note.

**LIMITATION OF NAVAL FORCE ON THE GREAT LAKES:** By an exchange of notes April 28 and 29, 1817, an agreement was concluded between the United States and Great Britain limiting the naval force of each Government on the Great Lakes to one vessel on Lake Ontario, to two on the upper Lakes, and to one on Lake Champlain, each vessel not to exceed in burden 100 tons, and in armament one 18-pound cannon. All other armed vessels were to be "forthwith dismantled" and no other vessels of war were to be "there built or armed." The arrangement was to be terminable on six months' notice. Am. State Pap., For. Rel., IV, 205-206, Moore, Dig., I, 692. Concerning the negotiation of this agreement and its subsequent interpretation by the high contracting parties, see statement in Moore, Dig., I, 692-698, and documents there cited, particularly the report of Mr. John W. Foster, Secy. of State, to the President, Dec. 7, 1892, Sen. Ex. Doc. No. 9, 52 Cong., 2 Sess. This report was published by the Carnegie Endowment for International Peace, Division of International Law, as *Pamphlet No. 2*, Washington, 1914.

See documents in For. Rel. 1923, I, 484-494, concerning negotiations for a new treaty between the United States and Canada to limit naval armament on the Great Lakes.

Developing understandings of the previous year, the American and Canadian Governments, late in 1940, appeared to be agreed as to a fresh "interpretation" of the Rush-Bagot Agreement of 1817, involving recognition that armament might be installed on naval vessels constructed on the Great Lakes, provided that the vessels were not intended for service on

Lawrence Deep Waterway Treaty of July 18, 1932, not only provided that the rights of navigation accorded under the provisions of existing treaties "between the United States of America and His Majesty" should be maintained, notwithstanding the provisions for termination contained in any of such treaties, but also declared that those treaties conferred upon the citizens or subjects, and upon the ships, vessels and boats of each contracting party rights of navigation in the St. Lawrence River and the Great Lakes System, including the canals then existing or which might thereafter be constructed.<sup>5</sup> Adverting to the fact that the treaty provided for the construction of a twenty-seven foot waterway from the sea to all Canadian and American points on the Great Lakes, President Hoover stated on July 18, 1932, that "such a depth will admit practically 90 per cent of ocean shipping of the world to our lake cities in the States of New York, Ohio, Michigan, Indiana, Illinois, Wisconsin, and Minnesota."<sup>6</sup> He did not, however, purport to intimate that ocean shipping under flags foreign to those of the contracting parties would enjoy a right of access to those cities or on what terms, if any, such a privilege would be extended to them.

Lake Ladoga, by virtue of the treaty of peace concluded by Finland and Russia at Dorpat, October 14, 1920, was made to constitute for a considerable distance<sup>7</sup> the boundary between those States, and found its outlet to the Gulf of Finland entirely through Russian territory by means of the River Neva.<sup>8</sup> Although Lake Ladoga became a part of the Soviet domain through Article 2 of the so-called Treaty of Peace between Finland and the Union of Soviet Socialist Republics, concluded March 12, 1940,<sup>9</sup> and although Finland and Russia have since become opposing belligerents, the provisions of the treaty of October 14, 1920 have not ceased to be of special interest, and may even have a bearing upon future arrangements should Lake Ladoga again constitute a part of the Russo-Finnish frontier.

Through that treaty, the contracting Powers undertook to refrain from maintaining military establishments which might be used for offensive purposes on Lake Ladoga or on rivers and canals flowing into it, as well as on the Neva so far as Ivanoffski Rapids (Ivanovskie Porogi).<sup>10</sup> Russia was, however, to have

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those lakes; that prior to commencement of construction each Government would furnish the other with full information concerning any vessel to be constructed at Great Lakes ports; that the armaments of the vessels would be placed in such condition as to be incapable of immediate use while the vessels remained in the Great Lakes; and that the vessels would be promptly removed from the Great Lakes upon completion. See Dept. of State Bulletin, March 29, 1941, 366-372.

<sup>5</sup> See Great Lakes-St. Lawrence Deep Waterway Treaty, *supra*, § 184A; also, Diversion of Waters, *supra*, § 183.

<sup>6</sup> Art. VII.

<sup>7</sup> Department of State, Publication No. 347, Washington, 1932, 10.

<sup>8</sup> According to information received from Mr. Boggs, Geographer of the Department of State, under date of February 16, 1934, that distance is approximately 70 statute miles or 112.5 kilometers.

<sup>9</sup> See Treaty of Peace between Finland and the Russian Soviet Republic, Helsingfors, Government Printing Office, 1921, Art. 2.

<sup>10</sup> *Am. J.*, XXXIV, *Official Documents*, 128.

<sup>11</sup> Art. 16. They were, however, to have a right to maintain war vessels of a displacement not exceeding one hundred tons, not being armed with larger than forty-seven millimetre calibre guns, and naval bases necessary for vessels of this size.

the right "to pass vessels of war to her inland waters through the canals on the south shore of Lake Ladoga, or, if hindrance to navigation occurs in the canals, then in such cases also through the southern portion of Lake Ladoga."<sup>11</sup> There does not appear to have been arrangement for Russian navigation in the Finnish waters of the lake.<sup>12</sup> To Finnish merchant and cargo vessels, Russia granted passage without hindrance on the Neva between the Gulf of Finland and Lake Ladoga, "on the same conditions as to Russian vessels," subject to the provision, however, that those vessels should not carry war materials or military supplies.<sup>13</sup> It was significantly declared that the water level of Lake Ladoga should not be changed without previous agreement between Finland and Russia.<sup>14</sup> In pursuance of the treaty, those States concluded at Moscow on June 5, 1923, a convention determining the conditions under which effect might be given to the provisions of the former in regard to navigation by Finnish merchant and cargo vessels.<sup>15</sup> It was agreed that "the decisions" (*les dispositions*) of the convention, which were a consequence of the special geographical position of Finland and of its immediate neighborhood to Russia, could not by virtue of the most-favored-nation principle, be extended to the vessels of a third State, "with the exception of the Soviet Republics, which are united to the Federal Socialist Republic of the Russian Soviets."<sup>16</sup>

## (8)

§ 187. **Access to Ports.** As no civilized State appears to be regarded as having the right to isolate itself wholly from the outside world or to remain aloof from all commercial or economic intercourse with it, there would seem to be a corresponding obligation imposed upon each maritime power not to deprive foreign vessels of commerce of access to all of its ports.<sup>1</sup> The territorial sovereign possesses, nevertheless, the broadest right to determine which of them shall be

<sup>11</sup> *Id.*, where it was also declared that in case the neutralization of the Gulf of Finland and the Baltic Sea should be realized, the contracting parties would agree to the neutralization of Lake Ladoga.

<sup>12</sup> See, however, convention between Finland and Russia of October 28, 1922, regarding the floating of timber in water courses flowing from Finland to Russia and vice versa, League of Nations, Treaty Series, XIX, 153; also convention between the same parties, of October 28, 1922, concerning the maintenance of river channels and the regulation of fishing on water courses forming part of the frontier between Finland and Russia, *id.*, XIX, 183.

<sup>13</sup> Art. 17.

<sup>14</sup> Art. 18.

<sup>15</sup> League of Nations, Treaty Series, XVIII, 203.

It should be observed that according to Article 5, Russia agreed not to take measures calculated to hinder or render difficult through navigation and communication of vessels on the Neva, reserving, however, the right to make exceptions: "(1) In case Russia or Finland should be at war with any third Power; (2) In case the Petrograd or North districts should be threatened by any military danger; (3) With regard to contraband of war; (4) For the protection of persons and animals against infectious disease, and (5) For the regulation of traffic in accordance with traffic requirements on the Neva."

<sup>16</sup> Art. 11.

§ 187. <sup>1</sup> "The government of the United States had, in 1852, the right to insist upon Japan entering upon such treaty relations as would protect travellers and sailors from the United States visiting or cast ashore on that island from spoliation or maltreatment, and also to procure entrance of United States vessels into Japanese ports." Moore, Dig., V, 740, *citing* Mr. Conrad, Asst. Secy. of State, to Mr. Kennedy, Nov. 5, 1852, MS. Notes, Special Missions III, 1. Concerning Commodore Perry's successful mission to Japan, *id.*, V, 736-740.

open to commerce, as well as to regulate access thereto.<sup>2</sup> Declared the United States Naval War College in 1930: "The closure of ports in the time of peace for various reasons is admitted as a legitimate act of a State. In time of war closure of ports by effective blockade has long been an unquestioned right. The closure of ports in time of insurrection by the declaration of an authority not having effective control is usually regarded as of no effect."<sup>3</sup> In the absence of special agreement, no foreign State is entitled to claim for its merchant vessels a right of entrance, with respect to a particular port, analogous to that which might reasonably be asserted in relation to navigation along the marginal seas, or through a strait.<sup>4</sup>

Numerous commercial treaties of the United States make provision for the entry of merchant vessels with their cargoes into the ports of the contracting States. Thus, that concluded with Germany on December 8, 1923, announces in its seventh article:

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The nationals of each of the High Contracting Parties equally with those of the most favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation. Nothing in this treaty shall be construed to restrict the right of either High Contracting Party to impose, on such terms as it may see fit, prohibitions or restrictions

<sup>2</sup> Mr. Monroe, Secy. of State, to the Chevalier de Onis, Spanish Minister, Jan. 19, 1816, *Am. State Pap., For. Rel.*, IV, 424, 426, Moore, Dig., II, 269; Mr. Conrad, Acting Secy. of State, to Mr. Barringer, Oct. 28, 1852, *MS. Inst. Spain*, XIV, 369; Moore, Dig., II, 269, Mr. Blaine, Secy. of State, to Mr. Douglass, Minister to Haiti, July 2, 1890, *For. Rel.* 1890, 530, Moore, Dig., II, 270.

<sup>3</sup> Naval War College, *Int. Law Situations*, 1930, 91.

According to Project No. 12 on "Jurisdiction" submitted to the International Commission of Jurists at Rio de Janeiro, April 1927, by the American Institute of International Law:

"Article 5. The entry of merchant vessels into the ports and bays of an American Republic shall be free in time of peace, except for reasons of security or of hygiene.

"In the event of refusal it should be communicated forthwith to the Pan American Union.

"Article 6. The entry of warships shall depend entirely upon the consent of the Republic, sovereign of the port. In time of peace such consent shall be presumed.

"Merchant vessels which enter and remain in the jurisdictional waters of a Republic shall be subject to its regulations.

"Ships of war shall not be subject to the jurisdiction of the Republic in which they are stationed, but the said Republic may, if it deems it convenient to the national interest, order or compel them to depart.

"In case of necessity every warship may enter any port whatsoever without being forthwith subject to the local laws and regulations. It shall not be subject to the said laws and regulations until the expiration of a reasonable time." (Appendix No. 4 to Harvard Draft Convention on Territorial Waters, *Am. J.*, XXIII, *Supplement*, 372.)

<sup>4</sup> See "Regulations Governing the Visits of Men-of-War to Foreign Ports," issued by Office of Naval Intelligence, Navy Department, September, 1913; corrected to June 10, 1916, *Am. J.*, X, *Supp.*, 121.

In 1931, it was declared by the Department of State that it understood that "no restriction is imposed upon the flag that a foreign merchant vessel may fly upon entering a port in the United States." (Mr. Kelley, Chief of the Division of Eastern European Affairs, to Mr. Roth, July 9, 1931, *Hackworth*, Dig., II, 207.)

In 1931, the Department of State announced that it would regard with disfavor the entry into an American port of a vessel flying a "Manchukuoan" flag and operating under "Manchukuoan" documents. See Mr. Moore, Assist. Secy. of State, to the Secy. of Commerce, July 3, 1934, *Hackworth*, Dig., II, 207.

of a sanitary character designed to protect human, animal or plant life, or regulations for the enforcement of police or revenue laws.<sup>5</sup>

These provisions, which are self-explanatory, are said to be typical of those contained in many of the commercial treaties of the United States.<sup>6</sup>

A State may not unlawfully close its ports, even in times of peace, to foreign vessels of war or other foreign public ships.<sup>7</sup> According to American opinion, it is generally understood, however, that in the absence of evidence of some prohibition, ports which are open to foreign vessels of commerce are not closed to those of war.<sup>8</sup> A State whose public vessels are about to visit the ports of a foreign Power, commonly, however, makes previous announcement of the fact to the Government of the latter, especially if several vessels are concerned, in order that steps suitable for their protection and reception may be duly taken.<sup>9</sup> The Naval War College has concluded that not more than three foreign vessels of war should at the same time sojourn in any naval district of the United States without specific authorization, and that the sojourn of foreign vessels of war in American waters should be limited to fifteen days unless a longer period is specifically authorized. Such vessels are regarded as subject to local regulations respecting anchorage, and also to others (except as to customs inspection) which American war vessels are obliged to respect. The former are deemed to be forbidden to take soundings (except as required for immediate safety of navi-

<sup>5</sup> U. S. Treaty Vol. IV, 4193.

<sup>6</sup> See statement in Hackworth, Dig., II, 206, footnote.

<sup>7</sup> Illustrative of the exercise of this right to withdraw or limit the license to foreign vessels of war to enter the ports of a State, Professor Moore calls attention to the Act of Congress of May 15, 1820, "by which foreign armed vessels were for a period of two years, beginning July 1, 1820, forbidden to enter any harbor in the United States except Portland, Boston, New London, New York, Philadelphia, Norfolk, Smithville (N. C.), Charleston, and Mobile, unless by reason of stress of weather or pursuit of an enemy they were unable to make one of those ports." Dig., II, 564; 3 Stat. 597. See, also, 2 Stat. 339, 342; also Rev. Stat., § 2791.

See correspondence between the United States and Venezuela in 1901, relative to objections by the latter to the presence of the U.S.S. *Scorpion* in the harbor of Santa Catalina, a port that was not open to commerce. In this connection Mr. Hay, Secy. of State, called the attention of the American Minister, Mr. Loomis, to a letter from Mr. Long, Secy. of the Navy, pointing out a distinction between the ordinary visit of a man-of-war, and a visit for "scientific purposes." Mr. Long declared that the Navy Department would not order a vessel to the port of a recognized government to conduct surveys or make topographical examinations without having obtained explicit permission therefor; that on the other hand, the Department would neither send notice nor request permission if the visit were not undertaken for such purpose, unless the waters "were expressly denied to passage of men-of-war by national decree, as in the case of the Amazon." For. Rel. 1901, 541-546, Moore, Dig., II, 565-570. Concerning the visit of the U.S.S. *Mayflower* to the Venezuelan island of Margarita, see For. Rel. 1901, 547-550.

<sup>8</sup> Declared Chief Justice Marshall in the course of his opinion in *The Schooner Exchange v. McFaddon*: "If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them, while allowed to remain, under the protection of the government of the place." 7 Cranch, 116, 141; see, also, Dana's *Wheaton*, 160, 162.

<sup>9</sup> See correspondence in 1895, between the United States and Turkey, relative to the proposed visit of an American squadron to certain Ottoman ports, For. Rel. 1895, II, 1250-1251; correspondence in 1905, relative to the proposed visits of the second British cruiser squadron under command of Prince Louis of Battenberg to certain ports of the United States, For. Rel. 1905, 476-478; correspondence in 1904, concerning the visit of an American fleet to Austrian ports, For. Rel. 1904, 44-47.

See Naval War College, *Int. Law Situations*, 1927, Appendices 106-126, embracing texts of laws of various countries (Belgium, Denmark, Italy, Norway, the Serb-Croat-Slovene State and Venezuela) for the admission of foreign warships to their ports and harbors.



gation), to use submarine or air craft, or to engage in target or similar practice therein, although it is said that such activities may be specifically authorized.<sup>10</sup>

While public foreign ships, for reasons later discussed, are not subject to the local jurisdiction, the territorial sovereign may not unlawfully, if in its judgment occasion so requires, demand their departure from its ports, and, if need be, employ reasonable means to accomplish that end.<sup>11</sup>

In time of war, according to the Naval War College, any foreign vessel, public or private, is regarded as entering American ports at its own risk. A desire to enter between sunrise and sunset should, it is said, be made known by flying the national flag with a signal for pilot, the vessel remaining outside until permission to enter is granted; and entrance during the night is prohibited. Vessels availing themselves of permission to enter should observe strictly the terms imposed. Vessels entering without permission are said to do so at their peril and to subject themselves to the use of such force as American authorities may deem necessary to direct against them.<sup>12</sup>

Shortly before the United States became a belligerent in April, 1917, the President, in accordance with statutory authority, established a series of "defensive sea areas" with respect to specified ports, harbors and roads, comprising the principal ones under American authority, and issued appropriate regulations therefor.<sup>13</sup> These prescribed the methods by which vessels might cross a de-

<sup>10</sup> Naval War College, *Int. Law Topics*, 1914, 35-67.

It may be noted that the War College did not purport to limit the operation of the regulations suggested further than that they should be applicable to the waters "under the jurisdiction of the United States." Thus no distinction was made between ports and bays or other territorial waters.

"On August 7, 1934 the Portuguese Legation inquired of the Department of State with respect to the facilities which the United States was prepared to extend to naval vessels of Portugal visiting the United States, on a reciprocal basis. It was stated in reply that foreign naval vessels are granted free naval wharfrage and tugboat facilities, if available, when requested through the Department of State, it being 'understood that the United States assumes no liability for damages incident to such use'; that naval officers arrange for a dock or anchorage, usually 'assigned without charge by the local port authorities,' and assist in other ways; that under section 309 of the Tariff Act of 1930 (46 Stat., pt. I, p. 690) supplies (not including equipment) may be withdrawn from bonded warehouses free of duty or internal-revenue tax for certain classes of vessels, including naval vessels, of any nation reciprocating such privileges toward naval vessels of the United States in its ports; that foreign naval vessels are given the same privileged quarantine treatment as are naval vessels of the United States, without charge, and that necessary American consular bills of health are furnished by American consular officers without charge; that no entry fees, lighthouse dues, tonnage taxes, or port charges are collected in such cases; that towing and wharfrage charges are not collected by the Government, but are made by private interests for services rendered on request of visiting war vessels; and that the Government of the United States was prepared to extend these facilities reciprocally to the Portuguese Government." (*Statement in Hackworth, Dig., II, 416.*)

<sup>11</sup> Act of June 15, 1917, c. 30, title V, § 10, 40 Stat. 223. See, also, Naval War College, *Int. Law Topics*, 1914, 35, where it was declared that foreign vessels of war might be fairly required to leave American waters within six hours, if so requested by the authorities, even though the limit of time of their sojourn had not expired. Also *id.*, 43, with respect to certain foreign regulations in regard to departure.

<sup>12</sup> Naval War College, *Int. Law Topics*, 1914, 436.

<sup>13</sup> Executive Order No. 2584, April 5, 1917, pursuant to an Act of March 4, 1909, Section 44, 35 Stat. 1097, as amended by an Act of March 4, 1917, 39 Stat. 1194. Later Executive Orders, Nos. 2597 and 2898 extended the scope of defensive sea areas to additional waters. Cf. Official Bulletin, May 11, 1917, p. 3; *id.*, July 2, 1918, p. 1.

See, also, Executive Order establishing defensive sea areas for Panama Canal Terminal Ports, Aug. 27, 1917, Official Bulletin, Sept. 5, 1917, p. 8.

fensive sea area, the entrance to which was prohibited save after authorization by the so-called Harbor Entrance Patrol. It was declared that no permission would be granted to other than a public vessel of the United States to cross such an area between sunset and sunrise, nor during the prevalence of weather conditions that rendered navigation difficult or dangerous. It was announced that a vessel arriving off such an area after sunset should anchor or lie-to at a distance of at least a mile outside its limits until the following sunrise, and that vessels discovered near the limits of such areas at night might be fired upon.<sup>14</sup>

## (9)

AIR SPACE OVER THE NATIONAL DOMAIN<sup>1</sup>

## (a)

§ 188. **In General.** The various opinions as to the nature and extent of the right of a State to control the air space above its territory were put to the test by World War I.<sup>2</sup> Events of that conflict served to make clear the significance

<sup>14</sup> § 806, Chap. 463, Act of Sept. 8, 1916, authorizing the President to withhold the clearance of vessels of a belligerent country refusing to accord to American ships or American citizens any of the facilities of commerce which such vessels or citizens of that belligerent country might enjoy in the United States or its possessions, or in case American ships or citizens were not accorded by such belligerent equal privileges or facilities of trade with vessels or citizens of any nationality other than that of such belligerent, until that belligerent should restore to such American vessels and American citizens reciprocal liberty of commerce and equal facilities of trade.

The same Act gave to the President the alternative power to direct that similar privileges and facilities, if any, enjoyed by vessels or citizens of such belligerent in the United States or its possessions be refused to vessels or citizens of such belligerent.

See, also, Title II of the so-called Espionage Act of June 15, 1917, 40 Stat. Part I, 220.

§ 188.<sup>1</sup> The author acknowledges his great indebtedness in the preparation of §§ 188-191C to Mr. Stephen Latchford, Chief, Aviation Section, Division of International Communications, Dept. of State, whose constructive suggestions embodied in extensive memoranda have been freely utilized on account of their distinctive value. To Miss Alberta Colclaser of the Department of State, who has assisted Mr. Latchford in the matter, and has offered her own suggestions, the author also acknowledges his indebtedness.

<sup>2</sup> See documents in Hackworth, Dig., IV, §§ 365-369.

For bibliographies of the extensive literature on this subject see Fauchille, 8 ed., § 531-(2), note (1); Harold D. Hazeltine, *Law of the Air*, London, 1911; A. S. Hershey, revised ed., 345; Rudolf Hirschberg, "Bibliography of the Law of Aviation," *Southern California Law Review*, II (1928-1929), 455; J. F. Lycklama à Nijeholt, *Air Sovereignty*, Appendices, The Hague, 1910; Lauterpacht's 5 ed. of Oppenheim, I, 406.

Cf., also, Enrico Catellani, *Le Droit Aérien* (translated from the Italian by Maurice Bouteloup), Paris, 1912; A. E. Denton, "Law Governing Air Space and Aviation," MS. Thesis for Master's Degree, Northwestern University, 1916; Paul Fauchille, *Le domaine aérien et le régime juridique des aérostats*, Paris, 1901; Grünwald, *Das Luftschiff in völkerrechtlicher und strafrechtlicher Beziehung*, Hanover, 1908; Léon Lalande, *La réglementation de la circulation aérienne internationale en temps de paix*, Toulouse, 1913; Sir H. Erle Richards, *Sovereignty Over the Air*, Oxford, 1912.

See, also, Simeon E. Baldwin, "Law of the Airship," *Am. J.*, IV, 95; Blewett Lee, "Sovereignty of the Air," *id.*, VII, 470; A. K. Kuhn, "The Beginnings of an Aërial Law," *id.*, IV, 109; "Aërial Navigation in its Relation to International Law," *Am. Pol. Sc. Assn., Proceedings*, 1908, 83; G. G. Wilson, "Aërial Jurisdiction," *Am. Pol. Sc. Rev.*, V, 171; J. E. G. de Montmorency, "Air-Space Above Territorial Waters," *Jour. Comp. Leg.*, N. S., XVII, Part 3, p. 172; G. D. Valentine, "The Air — A Realm of Law," *Jurid. Rev.*, XXII, 16 and 85; H. D. Hazeltine, "Law of Civil Aërial Transport," *Jour. Comp. Leg.*, 3 ser., I, Part I, 76; A. Mérignhac, "Le domaine aérien privé et public, et les droits de l'aviation en temps de paix et de guerre," *Rev. Gén.*, XXI, 205.

Cf. Proceedings of Institute of International Law in *Annuaire*, XIX, 19-26 (concerning legal status of aircraft); J. B. Scott, Resolutions, 170-171; *Annuaire*, XXI, 76-87 (Report

of the following factors to be reckoned with in applying theory to the formulation of rules for general guidance: first, the effect of the operation of the law of gravity upon all bodies heavier than air passing over the subjacent land; secondly, the indispensability of the air itself to the inhabitants of the earth, and thirdly, the practical importance of transportation and communication through air space over foreign territory.

It has been perceived that the relationship which the air space bears to the territory beneath it is unlike that existing between the sea and the land adjacent to it; and statesmen have not been blind to the difference.

Developments in the art and science of aeronautics have within recent years served to inspire fresh and widespread demands for uses of the air between and over the territories of States. What may be called an international sense of need of opportunities for flight over areas belonging to States in proximity to, and

of Paul Fauchille on wireless telegraphy); *Annuaire*, XXIV, 23-104 (Report of Paul Fauchille); *id.*, 105-155, embracing Paul Fauchille's Project of a Convention Respecting Aërial Law, the text of which is contained also in J. B. Scott, Resolutions, 243-256; and L. von Bar's proposed code on aircraft in war, *id.*, 256, *Annuaire*, XXIV, 127-133.

See Int. Law Assn., *Proceedings*, 27th Conference, Paris, 213-281; *Proceedings*, 28th Conference, Madrid, 222-245 (embracing Report of Committee upon Aviation); Hague Papers, 1914, embracing Report of the Aërial Law Committee, E. S. M. Perowne, convener; *Proceedings*, Premier Congrès du Comité Juridique International de L'Aviation, Paris, 1911; *Proceedings*, Deuxième Congrès, Geneva, 1912.

See *Proceedings of the First International Juridical Congress for the Regulation of Aërial Locomotion at Verona*, 1910; also *Rev. Gén.*, XVII, 410; "An Act to Regulate Commerce by Airship," embraced in Report of Committee on Jurisprudence and Law Reform of American Bar Association, 1911, *Reports of American Bar Association*, XXXVI, 379, 381.

See Fourth International Conference on Private Air Law, Brussels, September, 1938, Report of the American Delegation to the Secretary of State, Dept. of State Publication 1401, Conference Series 42, 1939.

See, also, J. W. Garner, Recent Developments in International Law, University of Calcutta, 1925, 141-188; D. Goedhuis, National Airlegislations and the Warsaw Convention, The Hague, 1937; same author, Air Law in the Making, The Hague, 1938; André Henry-Couannier, *Éléments Créateurs du Droit Aérien*, Paris, 1929; Joseph Kroell, *Traité de Droit International Public Aérien* with preface by A. de G. de La Pradelle, Paris, 1934; League of Nations, Organisation for Communications and Transit, Enquiries into the Economic, Administrative and Legal Situation of International Air Navigation (by M. H. Bouché, Brigadier-General P. R. C. Groves, Dr. Hans Oppikofer, and M. Salvatore Cacopardo), C.339.M.139. 1930.VIII.6.; Arnold D. McNair, The Law of the Air, London, 1932; L. H. Slotemaker, Freedom of Passage for International Air Services, Leiden, 1932; J. M. Spaight, Aircraft in Peace and the Law, London, 1919; same author, Air Power and War Rights, London, 1924; Laurence C. Tombs, International Organization in European Air Transport, New York, 1936; Charles de Visscher, *Le droit international des communications*, Gand, 1924, 135-151; Carl Zollmann, Law of the Air, Milwaukee, 1927.

See, generally, *Revue Aéronautique Internationale*, Paris, 1931-; *Revue Juridique Internationale de la Locomotion Aérienne*, Paris, 1910- Since 1929, beginning with Vol. XIII, entitled *Droit Aérien*; *Air Law Review*, New York University, 1930-; *The Journal of Air Law* (edited by the Law Schools of Northwestern University, University of Southern California, and Washington University, St. Louis, in conjunction with the Air Law Institute), Northwestern University, 1930, and since 1939 entitled *The Journal of Air Law and Commerce*.

See, C. L. Bouvé, "The Development of International Rules of Conduct in Air Navigation," *Air Law Review*, I, 1; Kenneth Colegrove, "A Survey of International Aviation," *Journal of Air Law*, II, 1; same author, "The International Aviation Policy of the United States," *id.*, 447; F. D. Fagg, Jr., "The International Air Navigation Conventions and the Commercial Air Navigation Treaties," *Southern California Law Review*, II, 430; Manley O. Hudson, "Aviation and International Law" (with added appendix of List of International Agreements concerning Aviation), *Am. J.*, XXIV, 228; same article, *Air Law Review*, I, 183; Albert Roper, "Recent Developments in International Aeronautical Law," *Journal of Air Law*, I, 395; Fernand de Visscher, "*Le droit international de la navigation aérienne en temps de paix*," *Rev. Droit. Int.*, 3 sér., VIII, 182.

even remote from, each other, has become increasingly evident. This is doubtless a fact with which a reckoning must be had; and the influence of it may ultimately be seen in fashioning the character and growth of the applicable law.<sup>3</sup> At the present time, however, it is found that practical necessity has produced general governmental acquiescence in the theory that a State is to be deemed the sovereign of the air space over its territory.<sup>4</sup> The consequences of this conclusion are indeed vast. They may inspire the government of a State to resent the suggestion that it is acting arbitrarily whenever it stands on its legal rights and declines to agree to permit the establishment of foreign air services for operation over its territory save on such terms as are regarded as distinctly beneficial to its interests.<sup>5</sup> Notwithstanding what faithful examination of the

<sup>3</sup> See Some Conclusions, *infra*, § 191C.

<sup>4</sup> See Section 1107 (i) (3) of Civil Aeronautics Act of 1938, 52 Stat. 973.

<sup>5</sup> "Rejecting in its first sentence the theory of the freedom of the air, the Convention [International Air Navigation Convention of 1919] sets down as a prefatory principle the recognition of the sovereignty of the States over their air space. This brutal suppression of the freedom of the sky, so dear to eminent jurists in the early years of the century, has not been criticized by any government; some governments have shown themselves more liberal than others in the exercise of their right of sovereignty, but not one has thought of renouncing it. All of them, contracting or non-contracting, have embodied it in their internal legislation, no doubt because the world crisis has intensified everywhere the national spirit, but more especially because the governments, measuring from the point of view of national defense in the light of the terrible lessons of the war, the importance of the danger from the air, are conscious of their responsibility. The freedom of the sea outside the range of the most powerful guns presents only a relative danger, but the free movement in the atmosphere of aircraft, assimilative to guns of almost unlimited range, has not been accepted since 1919 by any government." (Albert Roper, "Recent Developments in International Aeronautical Law," *Journal of Air Law*, I, 395.)

The claim of a State to sovereignty within the air space over its territory to whatsoever distance it is penetrated by a human agency finds support in certain practical considerations that unceasingly project themselves, and which have, therefore, proved to be influential in causing respect for that claim. At whatever altitude an aircraft establishes its capacity for flight, its presence over the territory of the subjacent State is of actual concern to the latter because of the relentless influence of the law of gravity. Through act of God, or neglect, or by design, the aircraft may be productive of injury to that territory. Its presence above it is a constant source of danger even though the pilot be a messenger of peace or bent on an errand of mercy. Again, if such aircraft has attained an unusual altitude, it is probable that public aircraft of the subjacent State may ultimately acquire equal capacity, and so enable that State to exercise from or within the air itself a measure of control over foreign craft at whatever altitude may be mastered through the development of the art of aeronautics. In a word, it must be increasingly obvious that the power to prevent abuses chargeable to foreign aircraft in the course of flights at high altitudes is not to remain dependent upon the potentialities of devices fixed upon the earth.

"Accordingly, any exposition of the present régime of international air traffic must proceed from the conception of the full and exclusive sovereignty of the State over the air space above its territory and territorial waters, as something which, even if a serious obstacle to traffic, is nevertheless an incontestable fact." (Hans Oppikofer, "International Commercial Aviation and National Administration," *Enquiries into the Economic, Administrative and Legal Situation of International Air Navigation*, League of Nations, Doc. C.339.M.139.1930. VIII., 93, 113.)

<sup>6</sup> Such was the view of Mr. Stephen Latchford, Chief, Aviation Section, Division of International Communications, Dept. of State, expressed in a memorandum accompanying a note to the author, March 29, 1940. He said in part: "There are a number of considerations, including economic factors, that might influence a country to limit the number of foreign air carriers permitted to operate over its territory. There may be a number of instances where it would be economically feasible for one carrier to operate over such territory but not, say, for two or three in addition. In this connection it is to be observed that air transport operations are almost invariably conducted under some form of government subsidy. There may also be considerations of a military nature that would cause a government to hesitate to permit the entry of certain foreign aircraft. Foreign aircraft are not permitted to enter the territory of any country except by special permission of the country to be flown over,

condition of the law as it is today may reveal and of what a realistic portrayal of it must entail, it is none the less scientific to point out that the evolution of that law which is still in its infancy is inexorable, and that a community of economic interests of particular groups of States whose territories are in relative proximity to each other may be expected increasingly to let down barriers of interference, at least in seasons of peace, by such a network of appropriate agreements that with respect to numerous matters the right of a territorial sovereign to exclude the operation of foreign aircraft within its territory will lose much of its significance and be overshadowed by a legal system that accentuates what is permitted rather than what is excluded.

The geographical position as well as the extent of the area of the domain of a particular State, may minimize the desire of others to seek transit by air over its territory. Accordingly, if that territory does not happen to be in the path of desired flights between the territories of other States, they may suffer little or no detriment from the rigidity of prohibitions laid down in the local statutory law. This condition may result in the giving of meager concessions by such a State. Nevertheless, a country whose domain is subjacent to an area of the air not greatly needed for international flights may seek for itself broad privileges of access to, or transit through, the air space over the territories of other States. Consequently it subjects itself to the danger of retaliatory discrimination that may be injurious to its own interests if its laws serve unduly to restrict privileges of flight such as it deems to be highly desirable to acquire for itself through foreign territorial air space.

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which is in many instances granted by means of international agreements. Admitting, therefore, that a country is free to enter into such international agreements in view of the fact that it has complete sovereignty over its air space, it would not appear that it could necessarily be said that it was acting arbitrarily if in the national interest it should find it necessary to terminate any such international agreement. Another very important consideration is that countries in which aviation is well developed on an international basis are prone to grant the right of entry of foreign aircraft only on a reciprocal basis. See in this connection Section 6 of the Air Commerce Act of the United States of 1926 as amended by the Civil Aeronautics Act of 1938. Countries that may be disposed to permit the entry of foreign scheduled air transport services without demanding reciprocal operating rights frequently impose other conditions.

"Each country exercises strict supervision and control over the establishment and operation of its own air services, operating internally or on an international basis. It may permit or prohibit the establishment of such lines, basing its decision on economic necessity or perhaps on considerations of a police nature, and if it does this with respect to its own services, there is even more necessity for its exercise of control over the entry of foreign aircraft involving economic and perhaps national defense considerations and general questions of foreign policy.

"There is an important distinction between occasional flights by aircraft of one country over territory of the other and the operations of scheduled air transport services. . . . While practically all countries are very liberal in granting permission for the entry of foreign aircraft on occasional flight, they are far more conservative when it comes to the establishment of a scheduled line over their territory. An occasional flight may be allowed by special permission in the absence of an international agreement on the subject, or where there may be a blanket permission for such flights under the terms of a bilateral or multilateral international agreement. It is to be noted that the numerous international air navigation agreements, both bilateral and multilateral, generally contain a reservation to the effect that the operation of scheduled services shall be subject to the special consent of the country flown over. In addition to these general air navigation agreements, there have been frequently negotiated supplementary bilateral agreements dealing specifically with the operation of scheduled air transport services on a reciprocal basis."

At the present time the air space over the territory of the United States lacks much of the importance for purposes of international flight in transit between other countries that is apparent with respect to such space superjacent to the territories of numerous European or South American States. There are no extensive international air services which traverse the domain of the United States.<sup>6</sup> There are, however, international services with terminals in the United States. As yet there appears to be no widespread sense of great need of international transit flight over the interior of the United States. Again, the extent of its domain between the Atlantic and Pacific Oceans, as well as between the Canadian boundary and the Rio Grande, renders commonly imperative the landing thereon of aircraft in the course of transit through the air space superjacent to that wide area, and in this respect differentiates United States territory as such from that belonging to numerous smaller States whose territories are needed in much less degree for landing purposes when transit is merely sought across or through their air space in the course of international flights.<sup>7</sup> Nevertheless, the increasing interest of the United States in the exercise of privileges of flight through the air space superjacent to the territories of other States, together with the prospectively increasing, although perhaps moderate, interest of foreign States in privileges of flight through the air space superjacent to American territory, must unite in the long run to make clear to the United States as well as to other Powers of the western hemisphere the desirability of a uniform régime of widest applicability. Acknowledgment of this fact is believed to be of utmost importance. It points to the necessity of general agreement, and gives assurance that from the sense of need of common action and common sacrifice appropriate and reasonable adjustments are not beyond reach. From comparisons of the provisions of particular multi-partite and bi-partite conventions the several members of the international society, and among them the United States,<sup>8</sup> may be expected through experiment and observation to learn what are expedient bases of accord, and to employ that learning to best advantage. Thus far they have begun rather than completed their schooling.

(b)

§ 189. **The Control of Aircraft.** It is believed to be the right of a State generally to erect such prohibitions, restrictions and regulations as it may

<sup>6</sup> The service of Trans-Canada Air Lines across the domain of the State of Maine is an exception.

<sup>7</sup> Again, the fact should be borne in mind that the control or oversight of foreign aircraft in transit through the air space over United States territory in the course of prolonged flights embracing, for example, the area between Canada and Mexico, involves the solution of a problem of some difficulty, imposing a heavy burden upon the territorial sovereign.

<sup>8</sup> It may be observed that the United States has accepted the "Provisions Concerning the Transport of Postal Letters by Air," signed at London, June 28, 1929, which were to form an integral part of the Universal Postal Convention of that date. See Universal Postal Union: Convention of London, U. S. Post Office Department, Government Printing Office, 1930; Hudson, Int. Legislation, No. 222d. These "Provisions" were designed to facilitate the enjoyment of liberty of transit for mails guaranteed by the Universal Postal Union Convention by admitting "articles of correspondence" to aerial transportation, rather than to permit public aircraft of a particular category to fly over foreign territory.

think proper in regard to the passage of aircraft through the air space above its territories and territorial waters.<sup>1</sup> Such a view does not appear to be at variance with the existing practice, and accords with the position taken by the United States, which found recent exemplification in an executive order of September 12, 1939, concerning air navigation in the Canal Zone,<sup>2</sup> as amended by another of October 16, 1939.<sup>3</sup> The territorial sovereign is not impeded by any artificial horizontal frontier fixed at an arbitrary distance above the subjacent land; and it is not fettered as a belligerent in the enactment of prohibitions deemed necessary for the safety of its domain. The judgment of that sovereign as to the propriety and necessity of prohibitive enactments for the protection of its territory should be respected in every quarter.<sup>4</sup>

## (i)

**§ 189A. Aspects of the Legislation of the United States.** Through the Air Commerce Act of 1926,<sup>1</sup> and the Civil Aeronautics Authority Act of 1938 (in part amendatory of the former),<sup>2</sup> the Congress has announced that "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions

§ 189.<sup>1</sup> The language of the text is taken from the resolutions submitted by the Aviation Committee of the International Law Association, 28th Conference, Madrid, 1913, *Proceedings*, 533.

<sup>2</sup> No. 8251, Fed. Register, Sept. 14, 1939, p. 3899. See Act July 9, 1937, to amend the Canal Zone Code, 50 Stat. 486.

Provisions of the Air Commerce Act of 1926, as amended in 1938 by the Civil Aeronautics Act (52 Stat. 973) are also illustrative.

<sup>3</sup> No. 8271, Fed. Register, Oct. 18, 1939, p. 4277.

See also Regulations to Govern Air Navigation in the Canal Zone, Revised to June 23, 1934.

The following executive orders (brought to the attention of the author by Mr. Stephen Latchford of the Department of State) which pertain to the setting aside of prohibited areas in the United States and certain of its possessions may also be noted: No. 5211, Oct. 19, 1929; No. 5281, Feb. 17, 1930; No. 5710, Sept. 14, 1931; No. 6023, Feb. 11, 1933; No. 7138, Aug. 12, 1935; and No. 8378, March 18, 1940.

See the English Air Navigation Act of 1920, 10 and 11 Geo. 5, c. 80; the Carriage by Air Act of 1932, 22 and 23 Geo. 5, c. 36; the Air Navigation Act of 1936, 26 Geo. 5 and 1 Edw. 8, c. 44.

<sup>4</sup> The experience of the several belligerents participating in World War I is believed to have sufficed to convince each of the imperative necessity of controlling without interference the air space over its own domain.

Illustrative of the reasonable exercise by the United States of its belligerent right of control, see proclamation of President Wilson, Feb. 28, 1918, regulating the flying of civilian aircraft, appended to § 10212a, U. S. Comp. Stat., 1918 ed., embodying Title I, § 1, Chap. 30, of the Espionage Act of June 15, 1917.

It may be observed that the Convention for the Regulation of Aerial Navigation concluded at Paris, Oct. 13, 1919 (in Art. 38), and the Habana Convention on Commercial Aviation, concluded Feb. 20, 1928 (in Art. 29), announced that in time of war the provisions of the respective arrangements should not affect the freedom of the contracting States either as belligerents or as neutrals.

§ 189A.<sup>1</sup> 44 Stat. 568, Section 6, 49 U.S.C.A. § 176.

See F. P. Lee (Legislative Counsel, United States Senate), *Legislative History of the Air Commerce Act*, corrected to August 1, 1928, Washington, Government Printing Office, 1928.

Also, in this connection, Blewett Lee, "Freedom of the Air in the United States," *Am. J.*, XXV, 238.

<sup>2</sup> 52 Stat. 973, 49 U.S.C.A. §§ 401-682.

See Charles S. Rhyne, *Civil Aeronautics Act Annotated*, with the Congressional History Which Produced it and the Precedents Upon Which it is Based, Washington, D. C., 1939.

of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.”<sup>8</sup> The reference to international law as a test of the extent of areas over which the claim of sovereignty was assumed to be made is significant.

According to the Act of 1938, foreign aircraft and airmen serving in connection therewith may, except with respect to the observance by such airmen of the air traffic rules, “be exempted from the provisions of subsection (a) of this section,” to the extent, and upon such terms and conditions, as may be prescribed by the Authority (referring to the “Civil Aeronautics Authority” created and established by the Act in Section 201 thereof) as being in the interest of the public.<sup>4</sup> It is also provided that “no foreign aircraft shall engage in air commerce otherwise than between any State, Territory or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country.”<sup>5</sup> Upon the Civil Aeronautics Authority is conferred a certain jurisdiction to issue permits to foreign air carriers to operate on scheduled air services in the United States,<sup>6</sup> and also to issue certificates of public convenience and necessity to United States air carriers to conduct scheduled air services in American and foreign territory.<sup>7</sup>

It is interestingly provided that the term “navigable air space” “means air space above the minimum altitudes of flight prescribed by regulations issued under this act.”<sup>8</sup>

(ii)

**§ 189B. Provisions of Some Commercial Treaties of the United States.** Shortly before and after the enactment of the Air Commerce Act of 1926, a series of treaties of friendship, commerce and consular rights, to which the United States was a party, became operative. These instruments in like terms announced that the territories of the contracting parties, to which the provisions of the arrangements extended, should “be understood to comprise all areas of

<sup>3</sup> Section 1107 (i) (3). Section 1107 set forth in detail the character and extent of amendments to, and repeals of, previous enactments.

See definition of the words “Possessions of the United States,” as set forth in Section I (29) of the Act.

<sup>4</sup> Section 610 (b). Subsection (a) embodied a series of prohibitions.

<sup>5</sup> Section 1107 (5). This constituted a repeal of a corresponding portion of subsection (c) of section 6 of the Act of 1926. It should be noted that certain conditions of that section, including the basic principle on which entry of foreign aircraft was permitted, were kept in force by the Act of 1938.

See statement in Hackworth, Dig., IV, 387.

See Reorganization Plans No. III and No. IV transmitted by the President to the Congress in April, 1940, under the Reorganization Act of 1939. These plans became effective on June 30, 1940. Their effect was to abolish the Air Safety Board, theretofore functioning under the Civil Aeronautics Act of 1938, and to allocate duties under the Act to a Civil Aeronautics Board, and to the Administrator of Civil Aeronautics, who is under the jurisdiction of the Secretary of Commerce. See 54 Stat. 1231, 1233; also 54 Stat. 1234, 1235.

<sup>6</sup> Section 402.

<sup>7</sup> Section 401.

<sup>8</sup> Section I (24).

It may be observed that Section 10 of the Air Commerce Act of 1926 was amended by Section 1107 (i) (I) of the Act of 1938, by striking out the words “Secretary of Commerce” and inserting “Civil Aeronautics Authority,” and also by Section 1107 (i) (8), striking out the words “under section three.”



land, water, and air over which the Parties respectively claim and exercise dominion as sovereign thereof except the Panama Canal Zone.”<sup>1</sup> The nationals of the high contracting parties were to be permitted to enter, travel and reside within the territories of each other; and also to engage in commercial work of every kind, as well as to carry on every form of commercial activity that might not be forbidden by the local law, and generally to do anything incidental to, or necessary for the enjoyment of such privileges upon the same terms as nationals of the state of residence, or as nationals of the nation thereafter to be most favored by the contracting parties.<sup>2</sup>

While it has been contended that the foregoing provisions embraced, as a consequence of the definition of territories, the privilege of entrance into and travel by air through American territory,<sup>3</sup> it is not apparent that the United States or Germany intended to make commitments of such a character.<sup>4</sup> Accordingly, those States did not hesitate to agree in 1932, to a so-called “Air Navigation Arrangement,” in which it was declared that pending the conclusion of a convention between them on the subject of such navigation, the operation of civil aircraft of the one country in the other country should be governed by a series of specified provisions.<sup>5</sup> It may be noted that some recent commercial treaties of the United States have contained no specific reference to the air space superjacent to the areas to which the provisions of the particular agreement were to be applicable.<sup>6</sup>

(iii)

§ 189C. **Air Navigation Arrangements.** Through the instrumentality of a type of executive agreement described as an Air Navigation Arrangement, the United States has found it feasible to enter into a series of bi-partite agreements terminable upon sixty days’ written notice, which in somewhat varying terms make appropriate provision relative to the operation within the domain

§189B.<sup>1</sup> See, for example, Art. XXIX, Treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191.

See, also, Art. XXIII of Treaty with Hungary of June 24, 1925, U. S. Treaty Vol. IV, 4318; Art. XXVIII of Treaty with Honduras of Dec. 7, 1927, U. S. Treaty Vol. IV, 4306; Art. XXIX of Treaty with Latvia of April 20, 1928, U. S. Treaty Vol. IV, 4400; Art. XXVII of Treaty with El Salvador of Feb. 22, 1926, U. S. Treaty Vol. IV, 4615; Art. XXII of Treaty with Austria of June 19, 1928, U. S. Treaty Vol. IV, 3930; and Art. XXVIII of Treaty with Norway of June 5, 1928, U. S. Treaty Vol. IV, 4527; and Art. XXVIII of Treaty with Poland of June 15, 1931, U. S. Treaty Vol. IV, 4572.

<sup>2</sup> Art. I, Treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191.

<sup>3</sup> Cf. Art. XVI.

<sup>4</sup> Hampton D. Ewing, “Untested Air Rights in Our Treaties of Friendship, Commerce and Consular Rights,” *Air Law Review*, IV, 48. It should be noted that the Department of State, in a communication to that writer, informed him that it did not consider that the treaties of friendship, commerce and consular rights granted the right to engage in air commerce.

<sup>5</sup> The author, who was associated with the drafting of Article XXIX of the treaty with Germany, does not recall that in the course of final negotiations with the German Ambassador at Washington, Dr. Wiedfeldt, there was any discussion of the question whether privileges of entrance into, or travel by air through, the territories of the respective parties were to be granted.

<sup>6</sup> U. S. Executive Agreement Series, No. 38.

<sup>7</sup> See, for example, Art. XXXI of treaty with Finland, concluded Feb. 13, 1934, U. S. Treaty Vol. IV, 4150; also, Art. 19 of treaty with Siam, concluded Nov. 13, 1937, U. S. Treaty Series, No. 940.

of either contracting party of civil aircraft duly registered within territory of the other. A recent instance is the "Air Navigation Arrangement" between the United States and Canada, effected by exchange of notes on July 28, 1938.<sup>1</sup> Like other similar bilateral arrangements relating to air navigation in general, the one of 1938 with Canada provides that the establishment and operation by an enterprise of either party of a regular air route or service over the territory of the other party shall be subject to the consent of such other party. An arrangement between the United States and Canada relating to air transport services was effected by exchange of notes on August 18, 1939.<sup>2</sup> This arrangement sets forth the general principles to be applied in the establishment and development of air transport services between the two countries, and provides that the details of the application of the principle of reciprocity contained in the agreement shall be the subject of amicable adjustment between the aeronautical authorities of the parties to the arrangement. The agreement has been supplemented by an arrangement giving effect to Article III thereof.<sup>3</sup>

Provisions of the "Air Navigation Arrangement" concluded with Germany on May 31, 1932 may be noted as illustrative of the general plan that has been followed.<sup>4</sup> It was declared that pending the conclusion of a convention between the contracting parties on the subject of air navigation, the operation of civil aircraft "of the one country in the other country," should be governed by

§ 189C.<sup>1</sup> U. S. Executive Agreement Series No. 129. The arrangement became effective on Aug. 1, 1938, as well as two other arrangements between the same parties, both also signed on July 28, 1938, one relating to certificates of competency or licenses for the piloting of civil aircraft (Executive Agreement Series, No. 130) and the other relating to certificates of airworthiness for export (Executive Agreement Series, No. 131). The three arrangements served to "supplant in its entirety the reciprocal arrangement between the United States of America and Canada for the admission of civil aircraft, the issuance of pilots' licenses, and the acceptance of certificates of airworthiness for aircraft imported as merchandise, entered into by an exchange of notes signed August 29 and October 22, 1929 (Executive Agreement Series, No. 2)."

Following the conclusion of the arrangement of 1929 with Canada and a similar arrangement of 1931 with Italy, the general plan has been for the United States to negotiate a series of three bilateral arrangements with each country, relating to (1) air navigation in general; (2) issuance by each country of certificates of competency or licenses to nationals of the other country for the piloting of civil aircraft; and (3) acceptance by each country of certificates of airworthiness for export, issued by the other country.

See also arrangement with Canada, concerning Use of Radio for Civil Aeronautical Services, effected by exchange of notes, Feb. 20, 1939, U. S. Executive Agreement Series, No. 143.

See also documents in Hackworth, Dig., IV, § 368.

<sup>2</sup> U. S. Executive Agreement Series, No. 159. Cf. form of arrangement concerning air transport services, concluded with France, July 15, 1939, U. S. Executive Agreement Series, No. 153.

Between 1929 and March 1, 1940, the United States concluded and perfected bi-partite aeronautical arrangements with the following countries: Belgium (U. S. Executive Agreement Series, No. 43); Canada (*id.*, Nos. 129, 130, 131, and 159); Colombia (Dept. of State Press Release, Feb. 23, 1929); Denmark (U. S. Executive Agreement Series, Nos. 58, 59, and 60); France (*id.*, Nos. 152 and 153); Germany (Nos. 38 and 39); Great Britain (*id.*, Nos. 69, 76, and 77); Ireland (*id.*, No. 110); Italy (*id.*, No. 24); Liberia (*id.*, No. 166); Netherlands (Dept. of State Press Release, May 24, 1933, concerning temporary arrangement effective May 6, 1933); Norway (U. S. Executive Agreement Series, Nos. 50, 51, and 52); Sweden (*id.*, Nos. 47, 48, and 49); Union of South Africa (*id.*, Nos. 28, 54, and 55); and New Zealand (*id.*, No. 167).

<sup>3</sup> See arrangement concerning Air Transport Services, effected by exchange of notes signed November 29, and December 2, 1940, U. S. Executive Agreement Series, No. 186.

See agreement between the United States and Mexico concerning Transit of Military Aircraft, signed April 1, 1941, U. S. Treaty Series, No. 971.

<sup>4</sup> U. S. Executive Agreement Series, No. 38.

certain provisions. Each of the parties undertook to grant liberty of passage above its territory in time of peace to the aircraft of the other party provided the conditions set forth in the arrangement were observed. It was agreed that the establishment and operation of regular air routes by an air transport company of one of the parties within the territory of the other party or across such territory, with or without intermediary landing, should be subject to the prior consent of the other party.<sup>5</sup> Arrangement was made for the subjection of aircraft of each party, together with their crews and passengers, while within the territory of the other, to the general legislation in force in that territory, as well as to the regulations there in force pertaining to air traffic in general, to the transport of passengers and goods, and to public safety in general, in so far as they might be applicable to all foreign aircraft, their crews and passengers.<sup>6</sup> Permission for the import and export of merchandise, as well as the carriage of passengers by aircraft into or from the respective territories of the contracting parties, was yielded,<sup>7</sup> each of the two parties being entitled to reserve to its own aircraft air commerce between any two points neither of which was in a foreign territory.<sup>8</sup>

Each party was to enjoy the right to prohibit air traffic over certain areas of its territory, provided that no distinction in such matter was made between its aircraft engaged in international commerce and the aircraft of the other party likewise engaged.<sup>9</sup>

The conduct of an aircraft finding itself over a prohibited area,<sup>10</sup> the carrying of clear and visible nationality and registration marks recognizable during flight, the matter of certificates of registration and airworthiness, together with other documentary requirements, the possession by members of the crew of specified documents and certificates and licenses, as well as the freedom not to recognize certificates of competency and licenses issued to nationals of

<sup>5</sup> Art. 4.

<sup>6</sup> Art. 5.

<sup>7</sup> Art. 5. In this connection it declared: "Each of the Parties to this arrangement shall permit the import or export of all merchandise which may be legally imported or exported and also the carriage of passengers, subject to any customs, immigration and quarantine restrictions, into or from their respective territories in the aircraft of the other Party, and such aircraft, their passengers and cargoes, shall enjoy the same privileges as and shall not be subjected to any other or higher duties or charges than those which the aircraft of the country imposing such duties or charges, engaged in international commerce, and their cargoes and passengers, or the aircraft of any foreign country likewise engaged, and their cargoes and passengers, enjoy or are subjected to."

<sup>8</sup> *Id.* Nevertheless, the aircraft of either party were to be entitled to proceed from any aerodrome in the territory of the other which they were permitted to use, to any other such aerodrome, either for the purpose of landing the whole or part of their cargoes or passengers or of taking on board the whole or part of their cargoes or passengers, provided that such cargoes were covered by through bills of lading, and that such passengers held through tickets, issued respectively for a journey of which the starting place and destination both were not points between which air commerce had been so duly reserved; and such aircraft while proceeding in such wise from one aerodrome to another aerodrome, were to enjoy all of the privileges of the arrangement.

<sup>9</sup> Art. 6. The areas above which air traffic was thus prohibited by either party were to be notified to the other party.

According to the same article: "Each of the Parties reserves the right under exceptional circumstances in time of peace and with immediate effect temporarily to limit or prohibit air traffic above its territory on condition that in this respect no distinction is made between the aircraft of the other Party and the aircraft of any foreign country."

<sup>10</sup> Art. 7.

one party by the other party for the operation of aircraft of such other party under the terms of the agreement,<sup>11</sup> and conditions for the carrying and use of wireless apparatus by aircraft of either party within the territory of the other,<sup>12</sup> were appropriately dealt with. There were also arrangements for the use of aerodromes open to public air traffic, and the assistance of the meteorological and kindred services.<sup>13</sup> The obligation was imposed that all aircraft entering or leaving the territory of either of the parties should land at or depart from an aerodrome open to public air traffic and classed as a customs aerodrome at which facilities existed for enforcement of immigration regulations and clearance of aircraft, and that no intermediary landing should be effected between the frontier and the aerodrome.<sup>14</sup> The matter of forced landings, observance of quarantine regulations, and the exchange of lists of aerodromes designated as ports of entry and departure were dealt with.<sup>15</sup> Each of the parties reserved the right to require that all aircraft crossing the frontiers of its territory should do so between certain points.<sup>16</sup>

"No arms of war, explosives of war, or munitions of war" were to be carried by aircraft of either party above the territory of the other party, or by the crew or passengers, except by permission of the competent authorities of the territory within whose air space the aircraft was navigating.<sup>17</sup> As ballast, only fine sand or water might be dropped from an aircraft.<sup>18</sup> Moreover, no article or substance, other than ballast, might be unloaded or otherwise discharged in the course of flight unless special permission for such purpose should have been given by the authorities of the territory in which such unloading or discharge took place.<sup>19</sup> It was agreed that whenever questions of nationality might arise in carrying out the arrangement, every aircraft should be deemed to possess the nationality of the party within whose territory it was duly registered.<sup>20</sup>

The arrangement was to be subject to termination by either party upon sixty days' notice given to the other party.<sup>21</sup>

(iv)

§ 190. **Convention for the Regulation of Aerial Navigation, 1919.** The Convention for the Regulation of Aerial Navigation concluded at Paris, October 13, 1919, was a direct response to the pressing need of a general con-

<sup>11</sup> Art. 8. Attention is called to the fact that the fifth paragraph of this article provided that certificates and licenses issued by the one party should be regarded as valid by the other party for the purpose of flight within its territory.

<sup>12</sup> Art. 9.

<sup>13</sup> Art. 12.

<sup>14</sup> Art. 13, where it was declared that in special cases the competent authorities might allow aircraft to land at or depart from other aerodromes, at which customs, immigration and clearance facilities had been arranged. The prohibition of any intermediary landing was to apply also in such cases.

<sup>15</sup> Art. 13.

<sup>16</sup> Art. 14. In this connection it was declared: "Subject to the notification of any such requirements by one Party to the other Party, and to the right to prohibit air traffic over certain areas as stipulated in Article 7, the frontiers of the territories of the Parties to this arrangement may be crossed at any point."

<sup>17</sup> Art. 10.

<sup>18</sup> Art. 15.

<sup>19</sup> Art. 16.

<sup>20</sup> Art. 17.

<sup>21</sup> Art. 19.

tractual arrangement.<sup>1</sup> While it was there recognized that "every Power has complete and exclusive sovereignty over the air space above its territory,"<sup>2</sup> each contracting State undertook in time of peace to accord freedom of innocent passage above its territory to the air craft of the other contracting States, provided that the conditions laid down in the convention were observed.<sup>3</sup> In according freedom of innocent passage, it was agreed that regulations made by a contracting State as to the admission over its territory of the air craft of the other contracting States should be applied without distinction of nationality.<sup>4</sup> It should be borne in mind that Article 15 of the Convention provided in part that the establishment of international airways would be subject to the consent or the State flown over. The provision was changed and clarified by the Protocol of June 15, 1929, and now declares that "Every contracting State may make conditional upon its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."

Each contracting State was said to be "entitled, for military reasons or in the interest of public safety, to prohibit the aircraft of the other contracting States, under the penalties provided by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory."<sup>5</sup> As

§ 190. <sup>1</sup>League of Nations, Treaty Series, XI, 173; British Treaty Series, 1922, No. 2 [Cmd. 1609]; Hudson, Int. Legislation, No. 9. For text embodying modifications by the Protocols of June 15 and December 11, 1929, which entered into force May 17, 1933, see *Revue Aéronautique Internationale*, Numéro 8, June 1933, 208.

See also documents in Hackworth, Dig., IV, § 366.

See H. P. de Bousac, *Le Statut International de L'Espace Aérien*, Paris, 1931; Kenneth W. Colegrove, *International Control of Aviation*, World Peace Foundation, Boston, 1930; Hermann Döring, "La Convention de Paris et les États," *Revue Juridique Internationale de la Locomotion Aérienne*, XII (1928), 385; James W. Garner, "Le Réglementation Internationale de la Navigation Aérienne," *Rev. Droit Int.*, 3 sér., IV, 356; Arthur K. Kuhn, "International Aerial Navigation and the Peace Conference," *Am. J.*, XIV, 369; Albert Roper, "L'origine de la Convention aérienne du 13 octobre 1919, son extension progressive de 1922 à 1928 et sa revision," *Droit Aérien*, XIII (1929), 557; same author, *La Convention Internationale du 13 Octobre 1919 portant réglementation de la navigation aérienne*, Paris, 1930; "The Organization and Program of The International Commission for Air Navigation," *Journal of Air Law*, III, 167; Alfred Wegerdt, "La Réglementation Internationale de la Navigation Aérienne," Numéro 7, March 1933, 47.

See also Official Bulletins of the International Commission for Air Navigation, published annually; also the weekly Bulletin of Information published by the same body.

<sup>2</sup> Art. 1.

It was declared that for the purpose of the convention, the territory of a State should be understood as including "the national territory, both that of the Mother Country and of the colonies, and the territorial waters adjacent thereto."

See also Art. 40, providing that the territories and nationals of protectorates or of the territories administered in the name of the League of Nations, shall, for the purposes of the Convention, be assimilated to the territory and nationals of the Protecting or Mandatory States.

<sup>3</sup> Art. 2.

<sup>4</sup> Art. 2.

According to Article 18, every aircraft passing through the territory of a contracting State, including landing and stoppages reasonably necessary for the purposes of such transit, was to be exempt from any seizure on the ground of infringement of patent, design or model, subject to the deposit of security, the amount of which, in default of amicable agreement, was to be fixed with the least possible delay by the competent authority of the place of seizure.

<sup>5</sup> Art. 3. It was provided also (in the convention as amended) that the position and extent of the prohibited areas should be previously published and should be notified, as well as the

subsequently amended, the convention permitted each contracting State "as an exceptional measure and in the interest of public safety," to authorize flight over such prohibited areas by its national aircraft.<sup>6</sup> Again, an amendment declared that each contracting State reserved also "the right, in exceptional circumstances in time of peace and with immediate effect" temporarily to restrict or prohibit flight over its territory or part thereof, on condition that such restriction or prohibition should be applicable without distinction of nationality to the aircraft of all the other States.<sup>7</sup> The matter of recognition by one State for flights over its territory of certificates and licenses issued by another constituted one of the fundamental provisions of the Convention, and was appropriately dealt with in Article 15 thereof.

Every aircraft of a contracting State was accorded the "right" to cross the air space of another State without landing; in which case it was to follow the route fixed by the State over which the flight took place. However, for reasons of general security, such aircraft would be obliged to land if ordered to do so by means of the signals provided in Annex D to the convention.<sup>8</sup> According to a subsequent amendment, no aircraft of a contracting State, capable of being flown without a pilot, could, except by special authorization, fly without a pilot over the territory of another contracting State.<sup>9</sup> Each contracting State was acknowledged to have the right to establish reservations and restrictions in favor of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory.<sup>10</sup> It was declared that in case of war, the provisions of the convention should not affect the freedom of action of the contracting States either as belligerents or neutrals.<sup>11</sup>

Careful provision was made for establishing the nationality of aircraft,<sup>12</sup> the issuance and validity of certificates of airworthiness and competency,<sup>13</sup>

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exceptional authorizations, to all of the other contracting States as well as to the International Commission for Air Navigation.

<sup>6</sup> Art. 3.

<sup>7</sup> *Id.*, where it was added that such decision should be published, notified to all of the contracting States and communicated to the International Commission for Air Navigation.

According to Article 4, every aircraft which found itself above a prohibited area should, as soon as aware of the fact, give the signal of distress provided in paragraph 17 of Annex D and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State unlawfully flown over.

<sup>8</sup> Art. 15. It was there also provided that every aircraft which passed from one State into another should, if the regulations of the latter required it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes was to be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.

See, in this connection, L. H. Slotemaker, *Freedom of Passage for International Air Services*, 24-31.

<sup>9</sup> Art. 15.

<sup>10</sup> Art. 16, where it was also provided that such reservations and restrictions should be immediately published, and should be communicated to the International Commission for Air Navigation, which should notify them to the other contracting States.

See, also, Art. 17.

<sup>11</sup> Art. 38.

<sup>12</sup> Arts. 6-10. According to Art. 7, as amended by the Protocol of June 15, 1929: "The registration of aircraft referred to in the last preceding article shall be in accordance with the laws and special provisions of each contracting State."

<sup>13</sup> Arts. 11-14.

rules to be observed on departure, when under way, and on landing,<sup>14</sup> and concerning prohibited transport.<sup>15</sup> Arrangement for the treatment of "State aircraft" as distinguished from private aircraft was agreed upon.<sup>16</sup> There was to be instituted, under the name of the International Commission for Air Navigation a permanent commission placed under the direction of the League of Nations. Careful arrangement was made in relation to its organization and functions.<sup>17</sup>

(aa)

§ 191. **The Same.** The privileges of the convention in the form which it assumed when concluded in 1919, were to be confined to the contracting States and to those to be permitted to adhere to it. Article 42 placed certain restrictions on adherence by States which took part in the War of 1914-1918 but were not signatories of the convention.<sup>1</sup> This limitation was removed by the Protocol of June 15, 1929, which entered into force on May 17, 1933; and Article 41 of the convention now provides that "any State shall be permitted to adhere to the present convention." Article 5 forbade any contracting State, except by a special and temporary authorization, to permit the flight above its territory of an aircraft which did not possess the nationality of a contracting State.<sup>2</sup> According to the amendment of June 15, 1929, each contracting State was declared to be entitled to conclude special conventions with non-contracting States. The stipulations of such special conventions were not to infringe "the rights of the contracting parties to the present convention." Moreover, such special conventions, in so far as might be consistent with their objects, were

<sup>14</sup> Arts. 19-25.

<sup>15</sup> Arts. 26-29.

<sup>16</sup> Arts. 30-33. State aircraft were said to embrace military aircraft, and aircraft exclusively employed in State service, such as posts, customs and police. Every other aircraft was deemed to be "private." Moreover, all State aircraft other than military, customs and police aircraft, were to be treated as private aircraft, and as such to be subject to all of the provisions of the convention. Art. 30.

Art. 31 declared that "every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft."

According to Art. 32, no military aircraft of a contracting State was to fly over the territory of another contracting State or land thereon without special authorization. In case of such authorization, the military aircraft was to enjoy, "in principle," in the absence of special stipulations, the privileges customarily accorded to foreign ships of war. Nevertheless, a military aircraft which was forced to land, or which was requested or summoned to land, was not by reason thereof to acquire any right to the foregoing privileges.

See also Art. 33.

See Exemptions from Territorial Jurisdiction, Foreign State Aircraft, *infra*, § 257A.

Among the final provisions (Arts. 35-43) there was arrangement in Article 37 for the adjustment of differences concerning the interpretation of the convention and of the technical regulations annexed to it.

<sup>17</sup> Art. 34.

It may be noted that the United States accepted, under reservation, the International Sanitary Convention of Aerial Navigation, concluded at The Hague on April 12, 1933, U. S. Treaty Vol. IV, 5489.

§ 191.<sup>1</sup> By way of criticism of these restrictions, see Blewett Lee, "The International Flying Convention," *Harv. Law Rev.*, XXXIII, 23, 34-35; also, the views of this author in § 191 of the earlier edition of this work.

<sup>2</sup> See, in this connection, protocol concerning an amendment to Article 5 of the convention of October 13, 1919, signed at London, October 27, 1922, in force, December 14, 1926, League of Nations, Treaty Series, LXXVIII, 438; Hudson, *Int. Legislation*, No. 9b.

not to be contradictory to the general principles of the 1919 convention; and they were to be communicated to the International Commission for Air Navigation, which was to notify them to the other contracting States.<sup>3</sup> Important modifications of Article 34 of the convention, in the form that it assumed when concluded in 1919, were wrought through protocols of amendment of June 30, 1923,<sup>4</sup> June 15, 1929,<sup>5</sup> and December 11, 1929.<sup>6</sup> Under Article 34 as adopted in 1919, the majority of the contracting States were permitted to have only one representative on the International Commission for Air Navigation; but under that Article as amended in 1929, each State could have not more than two representatives on the Commission. Moreover, the amended Article served also to place all the contracting States on an equal basis with respect to voting, it being stipulated that each State represented on the Commission should have one vote. Again, modification of the provisions of "any one of the annexes" to the 1919 convention by the International Commission for Air Navigation was seemingly made possible when such modification should have been "approved by three-fourths of the total votes of the States represented at the Session and two-thirds of the total possible votes which could be cast if all the States were represented."<sup>7</sup> That Commission was clothed with extensive powers of an executive, administrative and advisory character.<sup>8</sup> The Commission has proved itself to be a highly useful agency in the field within which it was designed to function.<sup>9</sup>

It may be observed that the United States signed, but did not ratify, the Paris Convention. Certain reservations were made in its behalf upon signature.<sup>10</sup> "Despite the non-ratification of the convention of 1919 the Government of the United States has coöperated with the parties thereto by supplying information to assist the International Commission for Air Navigation in carrying out the functions for which it was created."<sup>11</sup>

<sup>3</sup> Protocol concerning amendments to certain articles of the convention of 1919, concluded June 15, 1929, League of Nations, Treaty Series, CXXXVIII, 418; Hudson, *Int. Legislation*, No. 9d.

<sup>4</sup> League of Nations, Treaty Series, LXXVIII, 441, 442; Hudson, *Int. Legislation*, No. 9c.

<sup>5</sup> League of Nations, Treaty Series, CXXXVIII, 421; Hudson, *Int. Legislation*, No. 9d.

<sup>6</sup> League of Nations, Treaty Series, CXXXVIII, 427, 428; Hudson, *Int. Legislation*, No. 9e.

<sup>7</sup> The statement is, however, perhaps misleading. As Mr. Latchford of the Department of State has pointed out to the author, subdivision (c) of Art. 34 specifically states that the Commission shall have power to amend the provisions of Annexes A to G, inclusive. Annex H, dealing with a very important subject, namely, customs matters, can be amended only under the same procedure as is applied to amendments of the body of the convention, that is to say, by approval of the contracting States rather than by approval of the International Commission for Air Navigation.

<sup>8</sup> Art. 34 (c). The Annexes to the Convention dealt with (A) The Marking of Aircraft; (B) Certificates of Airworthiness; (C) Logbooks; (D) Rules as to Lights and Signals; Rules for Air Traffic; (E) Minimum Qualifications Necessary for obtaining Certificates as Pilots and Navigators; (F) International Aeronautical Maps and Ground Markings; (G) Collection and Dissemination of Meteorological Information; (H) Customs.

See S. Cacopardo, "Principles of Public International Law Applicable to Air Transports," *Enquiries into the Economic, Administrative and Legal Situation of International Air Navigation*, League of Nations, Doc. C.339.M.139.1930.VIII, 159, 174-176.

<sup>9</sup> Albert Roper, "The Organization and Program of the International Commission for Air Navigation (C.I.N.A.)," *Journal of Air Law*, III, 167.

<sup>10</sup> See U. S. Treaty Vol. III, 3768 and 3769.

<sup>11</sup> Statement in Hackworth, *Dig.*, IV, 363.

See also Mr. Hull, Secy. of State, to the American Delegates to the Inter-American Technical Aviation Conference, Sept. 2, 1937, Hackworth, *Dig.*, IV, 364.



## (v)

§ 191A. **The Habana Convention on Commercial Aviation, of 1928.** At the Sixth International Conference of American States at Habana, a convention on Commercial Aviation was adopted on February 20, 1928, which was accepted by the United States through appropriate deposit of the instrument of its ratification on July 17, 1931.<sup>1</sup> As in the Paris Convention of 1919,<sup>2</sup> the contracting States recognize in the Habana Convention (Article I) that each State has complete and exclusive sovereignty over the air space above its territory. Although the Habana Convention does not follow the plan of the 1919 Convention by providing for a permanent organization to perform the executive, administrative and advisory functions, as by including annexes with technical regulations, it, like the 1919 Convention, accords the right of innocent passage and contains a number of other basic principles found in the body of that convention. Unlike other agreements, both multi-partite and bi-partite, relating to air navigation in general, the Habana Convention contains no language stating specifically that the establishment and operation of regular air transport services shall be subject to the consent of the State whose domain is flown over. The contracting States do not, however, appear to consider that the convention prevents them from following the international practice in this respect to the effect that the establishment and operation of scheduled air transport services is subject to the consent of the government of the country in which permission to establish and operate such service is sought.<sup>3</sup>

Articles 12 and 13 of the Habana Convention contained certain novel provisions. While the former declared that every aircraft engaged in international air navigation between the contracting States should be provided with a certificate of airworthiness, which is in harmony with the general rule, it also laid down the requirement that the document should certify to the States in which the aircraft was to operate that, according to the opinion of the authority that issued it, such aircraft complied with the airworthiness requirements of each of the States named in the certificate.<sup>4</sup> Article 13, in harmony with the

§ 191A. <sup>1</sup> U. S. Treaty Vol. IV, 4729.

The Convention has been ratified by the United States, Mexico, Guatemala, Honduras, Nicaragua, Costa Rica, Panama, Haiti, Dominican Republic, Ecuador and Chile.

<sup>2</sup> See Convention for the Regulation of Aerial Navigation, 1919, *supra*, § 190.

<sup>3</sup> The Habana Convention is made applicable "exclusively to private aircraft," which as defined by the convention, includes all State aircraft other than military, naval, customs and police aircraft. Attention is called to provisions of Arts. 4 and 5 designed to prevent certain discriminations. See also Art. 30 with reference to conditions under which the contracting parties may enter into agreement with other States concerning international aerial navigation.

<sup>4</sup> Again, the same article provides that while the parties affirm the principle that the aircraft of each contracting State shall have the liberty of engaging in air commerce with the other contracting States without being subjected to the licensing system of any State with which such commerce is carried on: "Each and every contracting State mentioned in the certificate of airworthiness reserves the right to refuse to recognize as valid the certificate of airworthiness of any foreign aircraft where inspection by a duly authorized commission of such State shows that the aircraft is not, at the time of inspection, reasonably airworthy in accordance with the normal requirements of the laws and regulations of such State concerning the public safety." The Article further provides that "in such cases said State may refuse to permit further transit by the aircraft through its airspace until such time as it, with due regard to the public safety, is satisfied as to the airworthiness of the aircraft, and shall imme-

general rule, provided that members of the operating crew of aircraft should possess certificates of competency issued by the State whose nationality the aircraft possessed. In addition, however, the article contained the following unique provision:

Such certificate or certificates shall set forth that each pilot, in addition to having fulfilled the requirements of the State issuing the same, has passed a satisfactory examination with regard to the traffic rules existing in the other contracting States over which he desires to fly. The requirements of form of said documents shall be uniform throughout all the contracting States and shall be drafted in the language of all of them, and for this purpose the Pan American Union is charged with making the necessary arrangements amongst the contracting States.

It is believed that the authorities of the pilot's country undertake a heavy responsibility in assuming to have a sufficient knowledge of the existing traffic rules of other countries to warrant the giving of an examination in regard to them, and that such authorities are, moreover, confronted in so doing with administrative difficulties that must cause delays to the pilots concerned.

Notwithstanding the possible confusion confronting States that are parties to both the Paris and Habana Conventions, it is possible that only by practical experience will interested countries learn whether the two conventions can well subsist side by side.<sup>5</sup> Should the American countries decide to maintain a regional convention, Pan American conferences that are yet to convene will doubtless find it expedient to make improvements in the Habana Convention that may offer suggestions for amendment of the Paris Convention; and, conversely, provisions of the latter may be expected to be given due consideration in the adoption of changes in the Habana Convention. It must be constantly borne in mind that notwithstanding the scope of geographical differences that seemingly distinguish the problems of Pan American flights from those existing in other continents, and especially in Europe, the universality of the needs of aircraft engaging in international flight has become increasingly obvious in every quarter.<sup>6</sup> Thus far, the conventions emanating from Paris as well as Habana point to bases of experiment which taken together may ultimately enable the international society to achieve a régime of coöperation of greatest common advantage to its several members.

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diately notify the State whose nationality the aircraft possesses and the Pan American Union of the action taken."

<sup>5</sup> For an excellent and helpful comparison of the two conventions, see Edward P. Warner (formerly Assistant Secretary for Aeronautics, U. S. Department of the Navy), "The International Convention for Air Navigation: And the Pan American Convention for Air Navigation: A Comparative and Critical Analysis," *Air Law Rev.*, III, 221.

<sup>6</sup> See Albert Roper, "Recent Developments in International Aeronautical Law," *Journal of Air Law*, I, 395, 411. See, also, S. Cacopardo, "The Collective Aeronautical Conventions and the Possibility of Their Unification," *Air Law Rev.*, II, 207.

The Ibero-American Convention of Aerial Navigation, signed at Madrid, Nov. 1, 1926, Hudson, Int. Legislation, No. 170, is now only of historical significance.

With a view to the regulation of the sanitary control of aerial navigation, there was concluded at The Hague, on April 12, 1933, an International Sanitary Convention for Aerial Navigation, U. S. Treaty Vol. IV, 5489. It was accepted by the United States subject to two reservations. *Id.*, 5506-5507.

## (vi)

§ 191B. **Certain Conventions Concerning Matters of Private Law.** From international diplomatic conferences on matters of private air law there may emanate conventions which, when accepted by the signatory or adhering States, constitute international obligations calling for faithfulness of performance, and through which the contracting parties impose burdens upon the operators of aircraft, and at the same time yield to them, and also to the public generally, specified privileges.<sup>1</sup> Examples of such conferences are found in those called for the purpose of completing action on projects of conventions prepared in preliminary form by the *Comité International Technique d'Experts Juridiques Aériens*, commonly referred to as the CITEJA, an international committee of drafting experts on which the United States and many other countries are represented.<sup>2</sup>

Such international conferences have thus far resulted in the signing of one convention at Warsaw on October 12, 1929,<sup>3</sup> during the Second International Conference on Private Law; two at Rome on May 29, 1933, during the Third International Conference on Private Air Law,<sup>4</sup> and one at Brussels on September 29, 1938, during the Fourth International Conference on Private Air Law.<sup>5</sup> (A protocol on aviation insurance was also signed at the Brussels Conference.) The Warsaw Convention sets forth the form and legal effect of transportation documents (passenger tickets, baggage checks and airway bills used in international transportation) and contains in addition provisions relating to the liability of the air carrier for damage caused in the transportation of persons and property. The carrier is permitted under certain conditions to claim under the Warsaw Convention a limitation of liability, but he may not avail himself of the provisions of the convention which exclude or limit his liability if the damage is caused by his willful misconduct or by such default as may be equivalent to misconduct.<sup>6</sup>

The Rome Convention of 1933 for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft manifested recognition by the contracting parties of the advantage of adopting certain uniform rules on that

§ 191B.<sup>1</sup> See Stephen Latchford, "Developments in the Codification of Private International Air Law," *Journal of Air Law*, VII, 202; same writer, "Codification of Private International Air Law," *Federal Bar Association Journal*, II, 267 and 349.

<sup>2</sup> See John Jay Ide, "The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)," *Journal of Air Law*, III, 27; L. R. Fike, "The CITEJA," *Air Law Review*, IX, 169.

See also documents in Hackworth, Dig., IV, § 367.

<sup>3</sup> U. S. Treaty Vol. IV, 5250. The convention and an additional protocol were adhered to by the United States subject to the reservation that the first paragraph of Article 2 of the convention should not apply to international transportation that might be performed by the United States of America or any territory or possession under its jurisdiction. *Id.*, 5260.

<sup>4</sup> Dept. of State, Treaty Information Bulletin, No. 47, August, 1933, pp. 22 and 27.

<sup>5</sup> See Fourth International Conference on Private Air Law, Brussels, September, 1938, Report of the American Delegation to the Secretary of State, Dept. of State, Publication 1401, Conference Series 42, Washington, 1939.

<sup>6</sup> In relation to problems arising under the Warsaw Convention, see *Aslan v. Imperial Airways*, 49 T.L.R. 415; *Grein v. Imperial Airways*, 155 L.T.R. 380; *Phillipson v. Imperial Airways*, 157 L.T.R. 112; *Westminster Bank v. Imperial Airways*, 155 L.T.R. 86.

subject. These pertained to the privilege of attachment, substitution therefor, or release therefrom, through adequate bond, and the exemption from attachment of specified classes of aircraft. The Convention thus provided a means of safeguarding foreign aircraft from harsh and arbitrary proceedings instituted by attachment in the courts of a territorial sovereign, without, however, depriving the complainant of an adequate remedy.<sup>7</sup> The Rome Convention of 1933 for the Unification of Certain Rules Related to Damages Caused by Aircraft to Third Parties on the Surface made reference to the character of the damage caused by or from an aircraft in flight to persons or property on the surface, which should give to them a right of compensation; defined the category of persons to whom responsibility should attach; laid down limitations of pecuniary liability subject to conditions when they were not to be available; called for measures of compulsory insurance as a condition precedent to flights over foreign territory; and established bases of jurisdiction for tribunals whose judicial aid might be invoked. Mr. Latchford of the Department of State has recently made the following authoritative comment on the convention:

The convention marks an effort on the part of signatory States to safeguard persons and property on the surface by the application to international flights of the principle of absolute liability with compulsory insurance and by seeking to assure to a class of persons in no way responsible for the operation of the aircraft and who had entered into no contractual relations with the operator some degree of certainty in the matter of recovery for damages. However, as an offset to the compulsory liability features of the convention and as an encouragement to the development of international air traffic consistently with the equities of persons on the surface a limitation of liability was under certain conditions granted to the operator of the aircraft. Nevertheless, difficulties with respect to the convention arose as the result of objections having been made by aviation insurers to the granting of incontestable policies of insurance. The Rome Air Law Conference of 1933 entrusted to the CITEJA the duty of studying this problem. The CITEJA's recommendations were considered at the Fourth International Conference on Private Air Law in Brussels in September 1938 with the result that the Brussels conference adopted a protocol on aviation insurance to the Rome convention on damage to persons and property on the surface, which protocol grants to the aviation insurer a limited number of defenses against the payment of insurance claims.<sup>8</sup>

<sup>7</sup> The following aircraft were declared in Article 3 to be exempt from precautionary attachment: "(a) Aircraft assigned exclusively to a Government service, the postal service included, commerce excepted; (b) Aircraft actually put in service on a regular line of public transportation and indispensable reserve craft; (c) Any other aircraft assigned to transportation of persons or property for hire, when it is ready to depart for such transportation, except in a case involving a debt contracted for the trip which it is about to make or a claim arising in the course of the trip." It was also declared that the provisions of the existing Article (3) are not to apply "to a precautionary attachment made by the owner of an aircraft who has been dispossessed of the same by an unlawful act."

<sup>8</sup> Memorandum accompanying communication of Mr. Latchford to the author, April 11, 1940.

See discussions on aviation insurance in Report of the American delegation to the Brussels

The delegates to the Fourth International Conference on Private Air Law held at Brussels in September, 1938, adopted a Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea.<sup>9</sup> It places an obligation upon commanders of aircraft to go to the assistance of other aircraft or surface vessels in distress at sea where such assistance can be given without danger to the aircraft rendering assistance. A similar obligation is placed upon the commanders of vessels to assist aircraft in distress at sea. The convention reveals deference for some principles which found expression in the Maritime Salvage Convention concluded at Brussels, September 23, 1910, including provisions for remuneration to salvors for saving lives and property. The Brussels Convention of 1938, contained, however, an important innovation in the additional provision for payment of indemnity to the salvor for actual expenses, within certain limitations, incurred in rendering assistance.<sup>10</sup>

(vii)

§ 191C. **Some Conclusions.** It would betray confusion of thought to intimate that in the absence of agreement there is, in an international sense, no law of the air. The evidence is abundant that States have reached a degree of unanimity in their assertion of the right of control over the air space above their territories which suffices to warrant the conclusion that that right is to be regarded as exemplifying a principle of international law. Even when a State accords to another, by agreement, the privilege of use of superjacent air space, the former does not completely relinquish control over the same, but simply permits that use under specified and well-defined conditions. International agreements, both multi-partite and bi-partite, have been the instruments for facilitating international air navigation through the waiver by the territorial sovereign of its right to require special authorization for flights. The concession by that sovereign has, however, been accompanied by the manifestation of control over its air space, as shown by insistence in the demand or requirement that there be full compliance with its laws and regulations governing flight. Although it can not be maintained that States have arbitrarily refused to permit the use of their air space, it is obvious that they have been prone to accentuate and be guided by what they conceived to be their own national interests in the yielding or withholding of permission. International agreements of various types

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Conference of 1938, submitted to the Secy. of State Jan. 9, 1939, pp. 19-24, and to the Insurance Protocol as adopted by that Conference, *id.*, Annex K.

The matter of compulsory insurance in international air navigation raises an important problem for the solution of which it has proved to be difficult to obtain general agreement.

<sup>9</sup> See Fourth International Conference on Private Air Law, Brussels, September, 1938, Report of the American Delegation to the Secy. of State, 1939, 8-16, and Annexes C and D thereto.

See also Stephen Latchford, "Brussels Air Law Conference," *Journal of Air Law and Commerce*, X, 147; same writer, "Convention relating to Assistance and Salvage of Aircraft at Sea," *Federal Bar Association Journal*, Nov., 1940, IV, 83; Arnold W. Knauth, "The Aviation Salvage at Sea Convention of 1938," *Air Law Review*, IX, 146.

<sup>10</sup> Inasmuch as aircraft must, because of limited capacity, be expected to be employed more in the transportation of passengers than in the carriage of cargo, the provision for indemnity constitutes a special inducement to the salvor to endeavor to save human life.

concerning the use of air space, by registering deference for certain underlying principles, have served to produce as much uniformity of practice as is consistent with the variety of conditions prevailing in the several areas concerned.

By international agreement States have dealt both with the privileges of flight and with rights and obligations affecting the public as a result of the exercise of that privilege. In so doing States have been influenced (as they will doubtless continue to be) by political as well as economic considerations.

The task of developing the law regulating flight, or establishing principles decisive of rights and obligations flowing from the granting by States of the privilege of use of their air space, is far from complete, and is necessarily retarded by the slowness with which the several members of the international society find it possible to agree on what is to be deemed responsive to fresh and changing conditions that confront them. In so far as the right of flight is concerned, future development in the art of aeronautics and the experience of States in the use of their air space are likely to be given due consideration by the individual territorial sovereign in dealing with foreign aircraft and in determining the degree of its coöperation with other States. At the present time, however, the period of experiment and observation has not passed, and it is, therefore, too early to forecast whether the attitude of the States will be in the direction of liberalizing the law of flight, or of maintaining rigid control over air navigation.

(c)

CONTROL OF RADIO

(i)

§ 192. **In General.** The transmission by radio of writing, signs, signals, pictures, and sounds of various kinds by means of Hertzian waves may produce, and be designed to produce, recognizable effects within foreign territory, or within places that are to be regarded as foreign to the transmitter, such as ships under foreign flags on the high seas.<sup>1</sup> Those effects may be regarded as injurious to the welfare of the State within whose domain they are felt.<sup>2</sup> Various

§ 192.<sup>1</sup> See definition of "radio communication" in Article 1 of Radiotelegraph Convention, signed at Washington, Nov. 25, 1927, U. S. Treaty Vol. IV, 5031, 5032.

See documents in Hackworth, Dig., IV, §§ 353-358.

See, generally, S. S. Biro, "The International Aspects of Radio Control," *Journal of Radio Law*, II, 45; Keith Clark, *International Communications*, New York, 1931; T. A. M. Craven, "International Rights of a Radio Station," *Air Law Review*, I, 439; Manton Davis, "International Radiotelegraph Conventions and Traffic Arrangements," *Air Law Review*, I, 349; W. J. Davis, *Radio Law*, Los Angeles, 1929; W. J. Donovan, "Origin and Development of Radio Law," *Air Law Review*, II, 107; Fauchille, 8 ed., §§ 531<sup>22</sup>-531<sup>35</sup>; Harold D. Hazeltine, *Law of the Air*, 96; Howard S. LeRoy, "Treaty Regulation of International Radio and Short Wave Broadcasting," *Am. J.*, XXXII, 719; Frédéric List, "*La Réglementation Internationale de la Radiodiffusion*," *Revue Juridique Internationale de la Radioélectricité*, October-December, 1931, 303; René Stenuit, *La Radiophonie et le Droit International Public*, Paris, 1932; Irvin Stewart, "The International Radiotelegraph Conference of Washington," *Am. J.*, XXII, 28; R. Thurn, *Die Funkentelegrafie*, Berlin, 1913; Robert Kingsley, "Bibliography of Radio Law," *Journal of Radio Law*, I, 178.

See, also, Resolution concerning Radio-telegraphic Communication adopted by the Institute of International Law, 1927, *Annuaire*, XXXIII, Vol. III, 342.

<sup>2</sup> "To send harmful messages over a foreign State is just as clearly an invasion of its sov-

reasons may impel such a conclusion such, for example, as the sinister character of communications that are received,<sup>3</sup> or the interference through transmission with radio communications locally sought to be made.<sup>4</sup> This circumstance raises a problem touching the extent of the right of a State to safeguard itself by appropriate means against foreign radio communications which it seeks to thwart; and conversely, touching the obligation of a State to prevent the transmission by radio from stations within its control of communications fairly to be deemed injurious to a foreign State, and from which the latter seeks to be safeguarded. The question also presents itself whether it does not oftentimes in seasons of peace become inequitable for a State, under a variety of circumstances, to prevent the simple passage of wave lengths over its territory.<sup>5</sup>

The failure of a State to employ the means at its disposal to prevent uses of radio stations within its territory, or elsewhere within places under its control, from causing injury to a foreign State by radio communications taking effect within the territory of the latter, may be fairly deemed to mark the failure also to perform an international obligation, and, accordingly, to deprive the former State of ground of complaint on account of such defensive action on the part of the offended State as may render nugatory the offensive communications, even though that action serves to obliterate radio communications within the territory from which transmission is attempted.<sup>6</sup> The requisite defensive action may, however, serve to disturb legitimate services of other States, both domestic and international. It should be obvious that normally radio communications should be so organized as to disturb as little as possible services of other States.<sup>7</sup> Other considerations need also to be reckoned with. It is oftentimes of utmost desirability that transmission of certain forms of intelligence be facilitated rather than thwarted, regardless of national boundaries or intervening seas. This is apparent, for example, in the case of ships or individuals seeking aid in case of distress. It is apparent also when the inhabitants of a particular country desire to receive, for purposes of information or amusement, radio communications transmitted from abroad. This desire has become increasingly acute and is prevalent in every clime.

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ereignty as shooting a projectile across its territory." S. S. Biro, "The International Aspects of Radio Control," *Journal of Radio Law*, II, 45, 60.

<sup>3</sup> The transmission of hostile propaganda is an instance.

<sup>4</sup> See Irvin Stewart, "The International Technical Consulting Committee on Radio Communication," *Am. J.*, XXV, 684, 686.

<sup>5</sup> In paragraph III of the resolution of the Institute of International Law of 1927, it was declared that a State "does not, on the contrary, have any right to prevent the simple passage of wave lengths over its territory." (*Annuaire*, XXXIII, Vol. III, 342, 343.)

<sup>6</sup> See, in this connection, Paragraph V of Resolution adopted by the Institute of International Law, 1927, concerning Radio-telegraphic Communication: "If the radio-telegraphic emissions of a State cause grave trouble to the emissions of another State, this creates an international responsibility and exposes it to the penalties of ordinary sanctions, the responsibility depending upon the technical possibility in each case.

"The State is likewise responsible if it does not employ the means at its disposition to prevent radio-telegraphic emissions which, by their content, are of a nature to disturb the public order of another State, when similar emissions have already been called to its attention by the latter." (*Annuaire*, XXXIII, Vol. III, 342, 343; also, J. B. Scott, "The Institute of International Law," *Am. J.*, XXI, 716, 727-728.)

<sup>7</sup> Art. 35 § 1, International Telecommunication Convention concluded at Madrid, Dec. 9, 1932, U. S. Treaty Vol. IV, 5390.

It has long since become apparent that the equitable solution of problems arising out of complications attributable to the foregoing factors demands a development if not a modification of the law of nations through general agreement designed to prevent abuses, to minimize occasions for defensive action, and, by appropriate allocation of wave lengths or bands of frequencies, to facilitate the largest possible use of radio communication in every land, at least in seasons of peace. The terms of proposed arrangements have been devised by radio engineers fully cognizant of the common yet diversified commercial and other interests existing in every quarter. Suggestions for the modification of the applicable law have thus significantly sprung from such a source and so have had an economic rather than a political impetus. This fact, which became apparent in the negotiation of the more recent multi-partite arrangements, has given assurance that bases proposed for general acceptance rest upon practical as well as scientific foundations. From certain of their provisions they indicate also that the science of radio communication has not yet reached a stage of development that points unerringly to the character of a universal régime which the future may demand. The present time bears witness rather to a resolute and successful, if uncompleted, effort to mold a general contractual law that shall make flexible and just response to the needs of the international society. It will be seen that States such as the United States are endeavoring simultaneously by domestic legislation, to regulate radio communications within their respective territorial limits; and that in the process of so doing they are confronted at every step with the task of co-ordinating their legislative enactments with international obligations, contractual and otherwise. The thing, however, that is worthiest of observation today is the extent to which it is proposed by general agreement, for sake of the common weal, to restrict the freedom of the individual State, and the extent also to which such restriction is, according to American official opinion, regarded as desirable, if not imperative.<sup>8</sup>

In time of war, the right of a belligerent to control the passage of Hertzian waves over its territory must be acknowledged.<sup>9</sup> The United States has availed itself thereof.<sup>10</sup>

It will be found that neutral States are burdened with the obligation not to permit the establishment and operation within places under their control, of

<sup>8</sup> See Paragraph (1) of Arrangement effected by Exchange of Notes between the United States, Canada, Cuba and Newfoundland, Relative to the Assignment of High Frequencies to Radio Stations on the North American Continent, of Feb. 26 and 28, 1929, U. S. Treaty Vol. IV, 4787.

<sup>9</sup> See, in this connection, Rules for the International Regulation of Wireless Telegraphy, adopted by the Institute of International Law in 1906, *Annuaire*, XXI, 327, J. B. Scott, *Resolutions*, 164.

<sup>10</sup> Act of Aug. 13, 1912, to regulate radio communication, 37 Stat. 302; executive orders of President Wilson, No. 2585, April 6, 1917, and No. 2605-A, April 30, 1917. See also joint resolution approved July 16, 1918, 65 Cong., 2 Sess., Chap. 154, authorizing the President, in time of war, to supervise or take possession of, and assume control of any telegraph, telephone, marine cable, or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, and to provide just compensation therefor; proclamation of President Wilson, No. 1466, July 22, 1918. *Official Bulletin*, July 24, 1918, Vol. II, No. 368, p. 1; Effect of War on Normal Relations between Opposing Belligerents, Interference with Means of Communication, *infra*, §§ 606-607.

See, also, Section 6 of the Radio Act of Feb. 23, 1927, 44 Stat. 1162, 1165. *Cf.* § 606 of the Communications Act of 1934.



belligerent radio stations. The duty of a neutral State with respect to the passage of waves destined for a belligerent power, and conveying intelligence of military value is discussed elsewhere.<sup>11</sup>

(ii)

§ 192A. **Aspects of American Legislation.** By an Act for the Regulation of Radio Communications and for Other Purposes, approved February 23, 1927, and referred to and cited as the "Radio Act,"<sup>1</sup> the United States undertook to regulate all forms of foreign as well as interstate radio transmission and communications throughout its possessions. A system of licensing radio stations and of assigning bands of frequencies or wave lengths was established. The statutory law gave notable support to the treaty obligations of the United States by providing for the suspension of the license of any operator for a period not exceeding two years upon proof sufficient to satisfy the Secretary of Commerce that the licensee had violated any provision "of any Act or treaty binding on the United States which the Secretary of Commerce or the commission is authorized by this Act to administer or by any regulation made by the commission or the Secretary of Commerce under any such Act or treaty."<sup>2</sup> Again, any station license was to be revocable for violation of, or failure to observe any regulation of the licensing authority authorized by the Act or by a treaty ratified by the United States.<sup>3</sup> Still again, any person, firm, company or corporation failing or refusing to observe or violating any rule, regulation, restriction or condition imposed by the licensing authority under the authority of the Act or "of any international radio convention or treaty ratified or adhered to by the United States," was to be punished by a specified fine.<sup>4</sup>

It should be noted that according to an Act of June 30, 1932, the President was authorized to transfer, by executive order, the duty, powers and functions of the Radio Division of the Department of Commerce to the Federal Radio Commission.<sup>5</sup>

An act of Congress approved June 19, 1934, and entitled the "Communications Act of 1934," served to repeal the "Radio Act of 1927," as amended.<sup>6</sup>

<sup>11</sup> See *Neutrality, infra*, §§ 848 and 855; also *Naval War College, Int. Law Situations*, 1932, 44-49.

§ 192A. <sup>1</sup> 44 Stat. 1162. The Act of Feb. 23, 1927 has since been amended by enactments pertaining to the domestic polity of the United States. See Acts of March 28, 1928, 45 Stat. 373; March 4, 1929, 45 Stat. 1559; Dec. 18, 1929, 46 Stat. 50; July 1, 1930, 46 Stat. 844; and May 19, 1932, 47 Stat. 160.

See Joseph P. Chamberlain, "The Radio Act of 1927," *Am. Bar Assoc. Jour.*, XIII, 343 and 368.

<sup>2</sup> Sec. 5 (D) of Act of 1927.

According to Sec. 23, all radio stations on board foreign vessels, when within the territorial waters of the United States, were required to give absolute priority to radio communications or signals relating to ships in distress, and were obliged to take appropriate and specified steps to refrain from interfering with the hearing of a radio communication or signal of distress.

<sup>3</sup> Sec. 14.

<sup>4</sup> Sec. 32.

<sup>5</sup> 47 Stat. 417.

<sup>6</sup> 48 Stat. 1064, 1102. The later enactment was subjected to amendment by an Act approved May 20, 1937, 50 Stat. 189.

"For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication," there was created a commission to be known as the "Federal Communications Commission," which was to execute and enforce the provisions of the Act.<sup>7</sup> Special provisions relating to radio<sup>8</sup> laid down definite requirements pertaining to licenses for radio communication or transmission of energy.<sup>9</sup> Operation of apparatus for radio communication or transmission of energy without license was forbidden.<sup>10</sup> These licensing requirements were not, however, to apply to any person sending radio communications or signals on a foreign ship while the same was in the jurisdiction of the United States; but such communications or signals were to be transmitted only in accordance with such regulations designed to prevent interference, as might be promulgated under authority of the Act.<sup>11</sup> All radio stations including Government stations and stations on board foreign vessels when within the territorial waters of the United States, were to give absolute priority to radio communications or signals relating to ships in distress, and were to cease all sending on frequencies which would interfere with hearing a radio communication or signal of distress.<sup>12</sup> It may be observed that the Commission was given authority to suspend the license of any operator for a period not exceeding two years upon proof to satisfy the Commission that the licensee had (among other things) "violated any provision of any Act or treaty binding on the United States which the Commission is authorized by this Act to administer or any regulation made by the Commission under any such Act or treaty."<sup>13</sup> Broad emergency powers were conferred upon the President during the continuance of a war in which the United States might be engaged.<sup>14</sup>

(iii)

§ 193. **The Growth of a Conventional Régime.** In the effort to establish an international conventional régime, interested States proceeded with caution.<sup>1</sup>

<sup>7</sup> Sec. 1, 48 Stat. 1064.

<sup>8</sup> These were set forth in Title III.

<sup>9</sup> Sec. 301.

<sup>10</sup> *Id.*

<sup>11</sup> Sec. 306.

<sup>12</sup> Sec. 321. Moreover, except when engaged in answering or aiding the ship in distress, such stations were to refrain from sending any radio communications or signals until there was assurance that no interference would be caused with the radio communications or signals relating thereto, and were to assist the vessel in distress, so far as possible, by complying with its instructions.

<sup>13</sup> Sec. 303.

<sup>14</sup> Sec. 606.

§ 193. <sup>1</sup> See Howard S. LeRoy, "Treaty Regulation of International Radio and Short Wave Broadcasting," *Am. J.*, XXXII, 719.

The International conferences at Berlin in 1903<sup>2</sup> and 1906,<sup>3</sup> as well as that at London in 1912, were productive of agreements imposing slight restraint upon the contracting parties, and did not purport to indicate how far a State might normally interrupt the passage of foreign waves over its own domain.

Certain provisions of the International Wireless Telegraph Convention, signed at London, July 5, 1912, may be noted.<sup>4</sup> According to Article I, the contracting parties bound themselves to apply the provisions of the convention to all radio stations (both coastal stations and stations on shipboard) which were established or worked by the contracting parties and open to public service between the coasts and vessels at sea.<sup>5</sup> There was acknowledged in Article III a reciprocal obligation that coastal stations and stations on shipboard should exchange radiograms without distinction of the radio system adopted by such stations; and it was also provided that every station on shipboard should be bound to exchange radiograms with every other station on shipboard without such distinction.<sup>6</sup> It was declared in Article VIII that the working of radio stations should be organized as far as possible in such manner as not to disturb the service of other radio stations; and according to Article IX, radio stations were bound to give absolute priority to calls of distress from whatever source, to answer similarly such calls, and to take such action with regard thereto as might be required.<sup>7</sup> It was provided in Article XIV that any radiogram proceeding from a station on shipboard and received by a coastal station of a contracting country, or accepted in transit by the administration of a contracting country, should be forwarded.<sup>8</sup>

<sup>2</sup> *Nouv. Rec. Gén.*, 2 ser., XXXIII, 398-475. See declaration of Brig. Gen. A. W. Greely in behalf of the American delegation Aug. 5, 1903, *id.*, 409.

<sup>3</sup> For the text of the International Wireless Telegraph Convention, signed at Berlin, Nov. 3, 1906, and to which the United States became a party, see U. S. Treaty Vol. III, 2889; also supplementary agreement of same date, *id.*, 2896, and final protocol of same date, *id.*, 2898. For the provisions of specified Articles of the International Telegraph Convention, signed at St. Petersburg, July 10/22, 1875, made applicable to international wireless telegraphy by Art. XVII of the Convention of 1906, *id.*, 2917-2918.

<sup>4</sup> U. S. Treaty Vol. III, 3048. The treaty was proclaimed by the President July 8, 1913. Concerning the convention see *Documents de la Conférence Radiotélégraphique Internationale de Londres*, published by the *Bureau International de l'Union Télégraphique*, Berne, 1913; also "Radio Communication Laws of the United States and the International Radiotelegraphic Convention," Department of Commerce, Bureau of Navigation, Radio Service, Washington, July 27, 1914.

<sup>5</sup> It was also agreed in Art. I "to make the observance of these provisions obligatory upon private enterprises authorized either to establish or work coastal stations for radiotelegraphy open to public service between the coast and vessels at sea, or to establish or work radio stations, whether open to general public service or not, on board of vessels flying their flag."

<sup>6</sup> In the same Article it was declared that "in order not to impede scientific progress, the provisions of the present Article shall not prevent the eventual employment of a radio system incapable of communicating with other systems, provided that such incapacity shall be due to the specific nature of such system and that it shall not be the result of devices adopted for the sole purpose of preventing intercommunication."

<sup>7</sup> The resolution of the Senate advising and consenting to ratification of the convention, contained the proviso that "The Senate advise and consent to the ratification of the said convention with the understanding to be expressed as a part of the instrument of ratification that nothing in the Ninth Article of the Regulations affixed to the convention shall be deemed to exclude the United States from the execution of her inspection laws upon vessels entering in or clearing from her ports." (U. S. Treaty Vol. III, 3064.)

<sup>8</sup> Art. XIV also provided that each of the high contracting parties "reserves to itself the right of fixing the terms on which it will receive radiograms proceeding from or intended for

## (iv)

§ 193A. The International Radiotelegraph Convention of 1927. The International Radiotelegraph Convention, signed at Washington November 25, 1927, marked progress in the growth of a conventional régime.<sup>1</sup> The scope of the convention, as defined in Article 2, was broader than that of the London Convention of 1912, the Contracting Governments undertaking to apply the provisions of the later convention "to all radio communication stations established, or operated by the Contracting Governments, and open to the international service of public correspondence," and also to the special services covered by the regulations annexed to the convention. Moreover, they agreed to propose to their respective legislatures the necessary measures to impose the observance of the provisions of the convention and the regulations annexed to it "upon individuals and private enterprises authorized to establish and operate radio communication stations in the international service, whether or not open to public correspondence."<sup>2</sup>

Matters pertaining to intercommunication,<sup>3</sup> limited service,<sup>4</sup> secrecy of correspondence, together with false or deceptive signals,<sup>5</sup> investigation of violations,<sup>6</sup> connection with the general communication system,<sup>7</sup> exchange of information regarding radio stations and service,<sup>8</sup> special devices,<sup>9</sup> conditions to be observed by stations, including interference,<sup>10</sup> priority for distress calls,<sup>11</sup> charges,<sup>12</sup> general and supplementary regulations and conferences,<sup>13</sup> special arrangements on matters of service not interesting Governments generally,<sup>14</sup> suspension of service,<sup>15</sup> uses of the International Bureau of the Telegraph Union,<sup>16</sup> the establishment of an International Technical Consulting Committee on Radio Communications,<sup>17</sup> relations with stations of non-contracting countries,<sup>18</sup> adherences,<sup>19</sup> arbitration,<sup>20</sup> the exchange of laws and regulations,<sup>21</sup> naval and military installations,<sup>22</sup> the execution, durations and denunciations of the convention,<sup>23</sup> and the ratification of the convention<sup>24</sup> were dealt with.

It may be observed that in the General Regulations annexed to the convention, there were important provisions in Article 5 relating to the allocation and use of frequencies.<sup>25</sup>

any station, whether on shipboard or coastal, which is not subject to the provisions of the present convention."

According to the same Article: "Any radiogram intended for a vessel shall also be forwarded if the administration of the contracting country has accepted it originally or in transit from a non-contracting country, the coastal station reserving the right to refuse transmission to a station on shipboard subject to a non-contracting country."

§ 193A. <sup>1</sup> U. S. Treaty Vol. IV, 5031.

See Irvin Stewart, "The International Radiotelegraph Conference of Washington," *Am. J.*, XXII, 28; same author, "The International Technical Consulting Committee on Radio Communication," *Am. J.*, XXV, 684.

<sup>2</sup> Art. 2, where there was also recognized the right of two contracting Governments to organize radio communications between themselves, provided they conformed to all provisions of the convention and the regulations annexed thereto.

<sup>3</sup> Art. 3.

<sup>4</sup> Art. 4.

<sup>7</sup> Art. 7.

<sup>10</sup> Art. 10.

<sup>13</sup> Art. 13.

<sup>16</sup> Art. 16.

<sup>19</sup> Art. 19.

<sup>22</sup> Art. 22.

<sup>5</sup> Art. 5.

<sup>8</sup> Art. 8.

<sup>11</sup> Art. 11.

<sup>14</sup> Art. 14.

<sup>17</sup> Art. 17.

<sup>20</sup> Art. 20.

<sup>23</sup> Art. 23.

<sup>6</sup> Art. 6.

<sup>9</sup> Art. 9.

<sup>12</sup> Art. 12.

<sup>15</sup> Art. 15.

<sup>18</sup> Art. 18.

<sup>21</sup> Art. 21.

<sup>24</sup> Art. 24.

<sup>25</sup> "The principle of allocation of frequencies to services, not countries, was followed, and

## (v)

§ 193B. **The International Telecommunication Convention of 1932.** At the International Radiotelegraph Conference at Madrid, there was signed on December 9, 1932, an International Telecommunication Convention, containing merely statements of general principle, most of which were applicable alike to radio, telegraphy and telephony.<sup>1</sup> Those statements were supplemented by details incorporated in separate sets of regulations dealing with radio, telegraphy, and telephony, respectively. While for the most part the articles of the convention related to all three services alike, certain articles relating to radio were, because of its peculiar nature, incorporated in the convention at the instance of a number of delegations, including that of the United States. The Conference adopted the term "telecommunication" as the one best adapted to include all of the services covered by the convention and regulations. Four sets of regulations were provided—one for telegraphy, one for telephony, and two for radio (General Regulations and Supplementary Regulations). A government accepting the convention was obliged to accept at least one set of regulations under the condition that the Supplementary Radio Regulations might be accepted only in conjunction with the General Radio Regulations. Moreover, the regulations were to be accepted only by governments which accepted the convention. A government was bound by the provisions of the convention only with respect to the services, the regulations concerning which it had accepted. Inasmuch as the American delegation at Madrid signed only the convention and the General Radio Regulations, the Government of the United States expected to incur obligations only with respect to radio, and not with respect to telegraphy and telephony.<sup>2</sup>

The first chapter of the Convention related to the organization and functioning of the International Telecommunication Union.<sup>3</sup> Chapter II,<sup>4</sup> relating to conferences, contained the significant provision that each administrative conference might permit the participation, in an advisory capacity, "of private operating

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an elaborate table showing this allocation was incorporated into the article. . . . Another important decision incorporated into the Regulations was that for the eventual abolition of damped waves." (Irvin Stewart, in *Am. J.*, XXII, 28, 48.)

See, also, Arrangement effected by Exchange of Notes between the United States, Canada, Cuba and Newfoundland, Relative to the Assignment of High Frequencies to Radio Stations on the North American Continent, Feb. 26 and 28, 1929, U. S. Treaty Vol. IV, 4787; also Radio Broadcasting, Arrangement between the United States and the Dominion of Canada, May 5, 1932, U. S. Executive Agreement Series, No. 34.

§ 193B. <sup>1</sup> U. S. Treaty Vol. IV, 5379.

See, also, *Documents de la Conférence Radiotélégraphique Internationale de Madrid* (1932), published by the International Bureau of the Telegraph Union, Berne, 1933, 2 vols.

<sup>2</sup> See International Radio Telegraph Conference, Madrid, 1932, Report to the Secretary of State by the Chairman of the American Delegation, with appended documents, Dept. of State, Conference Series No. 15, 1934; also, Irvin Stewart, "The Madrid International Telecommunication Convention," *Air Law Review*, V, 236.

See documents in Hackworth, Dig., IV, 280-284.

See Robert Homburg, "The Next World Conference at Madrid and the International Regulation of Electric and Radio-electric Transmissions," *Journal of Radio Law*, I, 220; Otto Kucera, "Legal Problems of the Madrid International Radio Conference," *id.*, II, 473.

<sup>3</sup> Arts. 1 to 17 inclusive.

<sup>4</sup> Arts. 18 to 21 inclusive.

agencies recognized by the respective contracting governments.”<sup>5</sup> Chapter III consisted of provisions of a general order.<sup>6</sup> Chapter IV contained provisions relating particularly to radio, the contents thereof being practically identical with the corresponding articles of the International Radio Convention of 1927.<sup>7</sup> Chapter V contained a single article stipulating that the Convention should come into effect on January 1, 1934.<sup>8</sup>

The General Radio Regulations annexed to the International Radio Convention of Washington of 1927 had in general proved satisfactory to the United States, as well as to numerous other countries. The General Radio Regulations annexed to the Madrid Convention of 1932, in Article 7, dealt with the allocation and use of frequencies and types of emission. In the development of that article the principal effort of the Delegation of the United States at the Conference was to maintain, so far as possible, the same allocation and rules for use of frequencies as had been prescribed by the Washington Regulations. Around that allocation there had developed a large number of stations which represented a large investment of the radio-communication administrations and private operating companies of the world. The article maintained the “principle of the right of nations to make assignments of any frequency on the condition that no interference results.” If, however, frequencies to be used were capable of causing interference, there was agreement to assign frequencies to services in accordance with the table of allocations.<sup>9</sup> In order that all administrations might know when a State intended, “under the general provision of no interference to regularly authorized services of other nations,”<sup>10</sup> to assign a frequency to a service not authorized for that service, provision was made for the notification of all States of such fact prior to the entering into service of the station in question. Opportunity was thus afforded for protest and adjustment or arbitration before the station might be actually equipped for service and produce interference. The principle of regional agreements which had been used extensively in North America was more definitely recognized, in harmony with the provisions of Article 13 of the Convention.<sup>11</sup> The General Regulations of Washington of 1927 had provided that all stations should be operated in accordance with “good engineering practice.” The Madrid Conference made more definite the meaning of those words in their relation to

<sup>5</sup> Art. 18, § 4. This provision made possible the participation of American companies in international telegraph and telephone conferences which adopted rules of operating procedure and in which conferences the Government of the United States could not effectively participate because of its non-acceptance of the telegraph and telephone regulations. See Report of the American Delegation to the Secretary of State, p. 13.

<sup>6</sup> Arts. 22 to 33 inclusive.

<sup>7</sup> Arts. 34 to 39 inclusive.

<sup>8</sup> Art. 40.

<sup>9</sup> According to the report to the Secretary of State by the Chairman of the American Delegation “this language was made definite and the allocation table is no longer merely a guide.”

<sup>10</sup> *Id.*

<sup>11</sup> As a whole, the allocation table, as it affected North America was said to be satisfactory since it remained practically unchanged from that of the Washington allocation and did not disturb existing services. In order to give satisfaction to the smaller nations of Europe, the European States entered into a separate protocol providing for a European Broadcasting Conference, and setting up the procedure for its organization. The Conference convened in Switzerland in 1933. See *id.*

frequency tolerance and band width of emissions, through the insertion of a table of tolerances to be used as a guide by all States as to the limits to be observed. It may be noted that the aeronautical services were given more recognition by the insertion in several articles of general provisions concerning the operation of aeronautical and aircraft stations. The regulations concerning the International Consulting Committee on Radio (C.C.I.R.) were changed in form in order to make them similar to those set up for the International Consulting Committees on Telegraph and Telephone (C.C.I.T. and C.C.I.F.). Participation of international organizations in the work of the C.C.I.R. was recognized; and the Madrid Conference specified the international organizations which could participate in the meeting if they so desired and contributed to the expenses. Provision was also made for the participation of private companies as well as organizations of private companies.<sup>12</sup>

## (vi)

§ 193C. **The Cairo Revisions of 1938.** The general radio regulations annexed to the International Telecommunications Convention of Madrid were in general satisfactory to the United States. However, the ever-increasing demands for additional radio frequencies due to a never-ceasing expansion of the mobile, fixed, and broadcasting services necessitated a further tightening of existing rules in order to make the most economical use possible of facilities that were available, as well as a reconsideration of the existing allocation of frequencies in the light of experience gained after the Madrid conference.<sup>1</sup> Accordingly, there convened at Cairo in February, 1938, International Telecommunication Conferences — a Telegraph and Telephone Conference, and also a Radio Conference.<sup>2</sup> At the latter there were adopted General Radio Regulations (annexed to the International Telecommunication Convention of 1932),<sup>3</sup> as well as a Final Protocol to the General Radio Regulations (Cairo Revision, 1938)<sup>4</sup> and certain Additional Radio Regulations (Cairo Revision, 1938).<sup>5</sup>

<sup>12</sup> These provisions were said to give assurance that all the radio interests of the United States which had previously desired to participate in the work of the C.C.I.R. were fully recognized. *Id.*

§ 193C. <sup>1</sup> The statement in the text paraphrases that of the Report to the Secy. of State by the Chairman of the American delegation to the International Telecommunication Conferences, Cairo, 1938, Dept. of State Publication 1286, Conference Series 39, 1939, 17.

<sup>2</sup> See Francis Colt de Wolf, "The Cairo Telecommunication Conferences," *Am. J.*, XXXII, 562.

<sup>3</sup> U. S. Treaty Series, No. 948, English translation, p. 143.

<sup>4</sup> *Id.*, English translation, p. 275.

<sup>5</sup> *Id.*, English translation, p. 300. It should be noted that the United States did not accept the Additional Radio Regulations.

The American delegation to the Cairo Conferences did not participate in the telephone deliberations of the Telegraph and Telephone Conference. The Regulations dealt with the conduct and service of the telephone business in Europe. "Since the American companies are not affected by them, and the United States neither signed them nor contemplates adhering to them, it is deemed unnecessary to discuss them in detail." (Dept. of State Publication 1286, Conference Series 39, 1939, 17.)

"On September 18, 1939, the President issued his proclamation of the Revision of the General Radio Regulations annexed to the International Telecommunication Convention signed at Madrid on December 9, 1932, and the Final Protocol to the Revision of the General Radio Regulations, embracing reservations made by several Governments, which were signed at the International Radio Conference held at Cairo, Egypt, February 1-April 9, 1938." (Dept. of State Bulletin, Sept. 23, 1939, 294.)

According to the Report to the Secretary of State by the Chairman of the American Delegation (Senator Wallace H. White of Maine), the following were some of the more important decisions of the Cairo Radio Conference which were incorporated in the revised regulations there adopted:

1. Adoption of a plan for radio channels for the world's seven main inter-continental air routes, including calling and safety service channels.
2. Widening of the high-frequency broadcast bands to a total of 300 kilocycles and the adoption of special bands for tropical regions for regional use.
3. The limitation of the use of spark sets to three channels and the outlawing of spark sets except below 300-watt output.
4. Improved tolerance and band-width tables.
5. The extension of the allocation table to 200 megacycles for the European region. Other regions were given the right to effect their own arrangements above 30 megacycles.
6. Establishment of further restrictions on the use of 500-kilocycle frequency for traffic.
7. Bringing up to date of regulations relative to the maritime and aeronautical services.<sup>6</sup>

The American Delegation at the International Telecommunication Conferences expressed the opinion that the Regulations adopted at Cairo were a distinct improvement over the existing ones, and that "the interests of the United States have been safeguarded."<sup>7</sup>

(vii)

§ 193D. **Inter-American Radio Communications Arrangements, 1937.** "The first Inter-American Conference on Radiocommunications was held at Habana, Cuba, from November 1 to December 13, 1937. . . . The Conference resulted in the signing of a convention, two agreements, and the final acts, namely, the inter-American radiocommunications convention; final acts of the first Inter-American Radio Conference, including (a) resolutions, motions, and agreements, and (b) recommendations to the International Telecommunications Conferences to be held at Cairo, Egypt, February 1, 1938; inter-American arrangement concerning radiocommunication; North American regional broadcasting agreement."<sup>1</sup>

<sup>6</sup> Department of State Publication 1286, Conference Series 39, 17.

<sup>7</sup> *Id.*, 47.

§ 193D.<sup>1</sup> Dept. of State Treaty Information Bulletin No. 99, Dec. 31, 1937, 22-23. For the text of the Convention see U. S. Treaty Series No. 938. For the text of the Inter-American Arrangement concerning Radio-Communications, see U. S. Executive Agreement Series No. 200.

See Harvey B. Otterman, "Inter-American Radio Conferences, Habana, 1937," *Am. J.*, XXXII, 569.

See Radio Broadcasting Arrangement between the United States and Canada, effected by exchange of notes, Oct. 28, and Dec. 10, 1938, embracing three arrangements resulting from the Inter-American Radio Conference at Habana, in 1937, U. S. Executive Agreement Series, No. 136. See also agreement between the United States and Canada, concerning radio communications between Alaska and British Columbia, effected by exchanges of notes in 1938, U. S. Executive Agreement Series, No. 142.



The Inter-American Radio Communications Convention<sup>2</sup> undertook to establish, at least temporarily, in the city of Habana and under the auspices of the Government of Cuba, an Inter-American Radio Office (C.I.R.) which, in a consultative capacity, was "intended to provide for closer coöperation among the member States, and for a fuller and more rapid dissemination of technical, legal, and other data of interest in the field of communications, all for the purpose of an improvement of engineering practices and a better understanding of the legal problems in the field of communications in the participating countries."<sup>3</sup>

The North American Regional Broadcasting Agreement, signed on December 13, 1937,<sup>4</sup> established technical principles applicable throughout the North American region, and was designed to accord to all participating States adequate broadcasting facilities and to eliminate international radio interference. It undertook to establish within the standard broadcast band three principal classifications of channels, namely, clear, regional, and local, with a view to avoiding interferences which, in the region concerned, had caused great inconvenience to radio listeners.<sup>5</sup>

For the purpose of harmonizing the action of the radio administrations of the several parties concerned, so that the assignment of frequencies to broadcasting stations in the standard broadcasting band would be in conformity with the provisions of the North American Regional Broadcasting Agreement, there convened at Washington in January, 1941, the so-called North American Regional

<sup>2</sup> U. S. Treaty Series No. 938.

<sup>3</sup> Dept. of State Treaty Information Bulletin No. 99, Dec. 31, 1937, 22-23.

"Part 3 of the convention undertakes to apply throughout the American Continent numerous special provisions appearing in the South American regional convention on radio-communications and affirms the sovereign right of all nations to the use of every broadcasting channel, while recognizing at the same time the need for regional arrangements in view of the present state of the art. Accordingly, provision is made for the negotiation of bilateral agreements when need therefor arises.

"The inter-American arrangement concerning radiocommunications, a purely administrative agreement, seeks to effect a standardization throughout the Americas of technical matters involved in the art of radiocommunications, particularly with respect to allocations, tolerances, spurious emissions, and interference, use and nonuse of certain air calling and distress frequencies, amateurs and the receipt and transmission by them of third-party messages, an international police radio system, and radio aids to air navigation, all with respect to frequencies outside the standard broadcasting band." (*Id.*)

<sup>4</sup> The Agreement was accepted by the United States when on July 21, 1938, its ratification was deposited with the Cuban Foreign Office, and became valid as among five contracting countries on March 29, 1940, on which date certain of its provisions became effective, the others becoming effective on March 29, 1941. See Dept. of State Bulletin, Jan. 25, 1941, 119.

<sup>5</sup> *Id.*, where it is added: "The clear channels are designed to permit service over wide areas free from objectionable interference, and provision is made for the operation of so-called dominant and secondary stations which may use the same clear channel subject to restrictions of power, mileage separation, and consequent avoidance of interference with the use where necessary of directional antennæ. Regional channels are intended to permit a number of stations to operate with limited power and each within a restricted area. Local channels will permit the operation of a number of stations on each, with still less power and smaller service area. Specific assignment of frequencies is made by the agreement to each class of channels."

See Resolution XIV concerning Radio Broadcasting and Moral Disarmament, Resolution XV concerning Radio Broadcasting in the Service of Peace, and Resolution XXI concerning the Pan American Radio Broadcasting Hour, emanating from the Inter-American Conference for the Maintenance of Peace at Buenos Aires, December, 1936, Pan American Union, Congress and Conferences Series, Nos. 22, 54, 55 and 58, respectively. See in this connection Howard S. LeRoy, in *Am. J.*, XXXII, 729-730.

Radio-Engineering Meeting.<sup>6</sup> It proceeded to make recommendations pertaining to lists of frequency allocations for particular broadcasting stations.<sup>7</sup> These are understood to have been acceptable to the contracting States.<sup>8</sup>

(viii)

§ 193E. **The Regional Radio Convention of Central America, Panama, and the Canal Zone.** In November and December, 1938, there met at Guatemala City a Conference which adopted, on December 8, a Regional Radio Convention of Central America, Panama and the Canal Zone.<sup>1</sup> "The purpose of the Conference was to effect an allocation of broadcasting frequencies for the countries of Central America, Panama, and the Canal Zone within the frequency band of 2,300 to 2,400 kilocycles. Broadcasting frequencies for this region in the band indicated were desired because of static due to climatic conditions which affects broadcasts in the standard broadcasting band of 550 to 1,600 kilocycles."<sup>2</sup> It was said to be the desire of all the participating States "that there be accorded to each, including the Canal Zone, one primary frequency which might be used by each with sufficient power to reach all of Central America and Panama."<sup>3</sup> The Convention that was agreed upon registered an agreement in relation to allocation which is said to have met the requirements of all the countries represented at the Conference, and at the same time contained clauses designed to protect the radio facilities in the Canal Zone.<sup>4</sup>

(ix)

§ 193F. **A Few Conclusions.** The international arrangements referred to above are self-explanatory and warrant close scrutiny. They reveal the interest of a variety of States in every quarter in establishing restrictions for sake of a common cause. They point to the practical expediency of individual sacrifices for a common purpose. They take cognizance of the fact that the distance separating the territories of some countries differentiates problems of inter-continental telecommunication from those where the territories of contracting States are in relative proximity to each other. Above all, they are prophetic of the day when the law of nations, even in its customary form, will find its shape completely molded by the character of conventional arrangements that have reflected, and have been responsive to, a widespread consensus of opinion.

<sup>6</sup> See Dept. of State Bulletin, Jan. 18, 1941, 101; *id.*, March 1, 1941, 236.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.*, March 29, 1941, 413, where it was announced that the Department of State had been informed of the approval by the Government of Mexico of the list of frequency allocations to Mexican broadcasting stations which was drafted at the North American Regional Radio-Engineering Meeting held in Washington from January 14 to 30, 1941. Adverting to the satisfaction of the Department in relation to the matter, it was said: "Thus the lists of broadcasting stations resulting from that meeting for Canada, Cuba, Mexico and the United States have received the official approval of the respective Governments."

§ 193E. <sup>1</sup> See Dept. of State Treaty Information Bulletin No. 110, November, 1938, 365; also *id.*, No. 111, December, 1938, 386-387.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## (10)

## TRANSIT BY LAND

## (a)

§ 194. **In General.** It may be doubted whether as yet it is generally acknowledged that a State owes a legal duty to another to agree to yield to it on equitable terms privileges of transit by land across the national domain. It must be clear, however, that the principle which the international society invokes in its demand that the territory of each of its members be accessible to and from the sea is broad enough to affect the use of any appropriate channel of communication, and is not incapable of practical application to modes of transit by land as well as water.<sup>1</sup> It must be apparent that the strength of the claim to a privilege of transit across foreign territory depends upon the nature and importance of the channel of communication to the domain of a State, and that it varies according to the geographical position and relative isolation of the territory of the claimant. Thus the demands for privileges of transit to and from Switzerland over the territories of States adjacent to it could be pressed with greater force than demands for like privileges across American territory from the Atlantic to the Pacific. Again, the obvious and special needs of a State, such as Switzerland, of means of transit by convenient routes across foreign territory offering direct communication with the sea, should receive greater consideration than those of States not so circumstanced and yet strongly desirous of free access to foreign land-locked areas.

Claims of transit over foreign territory must always be regarded as subordinate to the requirements of the sovereign thereof. When it becomes a belligerent its special needs are accentuated; and even in seasons of peace the superiority of its position is not to be questioned.<sup>2</sup> There is no room for a conflict of equal equities. The fact remains, however, that under normal conditions certain commercial privileges of transit may be yielded without impairing rights of governmental administrative control or those involved in the exercise of jurisdiction, and without subjecting the grantor to economic injury. The position, therefore, of the State whose territory, notwithstanding its vital importance as a channel of commerce to special groups of other States or to international trade generally, offers in time of peace an obstacle rather than an aid to transit, is likely, as time goes on, to be increasingly regarded as inequitable.

A State may with reason fix the terms for the transmission within or through its domain of electric energy from abroad, or of natural gas or kindred products from foreign countries; and it may likewise control as it sees fit the exportation

§ 194. <sup>1</sup> "The new theory of servitudes on land differs from the old, which was based on expediency and advantage, in that the new depends on an assertion of right which arises from an asserted principle that a nation ought not to be barred from the sea, the common property and highway of mankind, and thus deprived of the opportunity to engage in ocean-borne commerce." Robert Lansing, "Some Legal Questions of the Peace Conference," *Am. Bar Assoc., Reports* (1919), XLIV, 238, 248.

<sup>2</sup> Thus the right of a State to forbid the passage across its territory of foreign military forces is not to be challenged. *Infra*, § 201.

of such assets from its own territory. The United States has availed itself of these privileges.<sup>3</sup>

(b)

§ 195. **Certain Conventional Arrangements, Concluded by the United States.** The United States has on occasion entered into conventions containing provision for transit by land. By means of Article XXXV of the treaty with New Granada (Colombia) of December 12, 1846, the former acquired a right of way or transit for commercial purposes across the Isthmus of Panama by any mode of interoceanic communication.<sup>1</sup> According to Article XXIX of the Treaty of Washington of May 8, 1871, it was agreed that for a term of years goods arriving at certain American ports and destined for British North American possessions might be "entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States," under such rules, regulations and conditions for the protection of its revenue as it might prescribe; it was declared that and under like rules, regulations and conditions, goods might be conveyed in transit, without payment of duties, from such British possessions through the territory of the United States for export from its ports.<sup>2</sup>

According to Article XVI of the treaty of friendship, commerce and consular rights concluded with Germany December 8, 1923, there was to be "complete freedom of transit through the territories including territorial waters of each High Contracting Party on the routes most convenient for international transit, by rail, navigable waterway, and canal, other than the Panama Canal and waterways and canals which constitute international boundaries of the United

<sup>3</sup> See section 202 of Public Utility Holding Company Act of Aug. 26, 1935, 49 Stat. 838, 848; section 3 of the National Gas Act of June 21, 1938, 52 Stat. 821, 822; also Executive Order 8202 of July 13, 1939, Hackworth, Dig., IV, 353. These documents reveal the authority to control and functions to be exercised by the Federal Power Commission.

§ 195.<sup>1</sup> Malloy's Treaties, I, 312. See, in this connection, documents in Moore, Dig., III, 5-19.

<sup>2</sup> Malloy's Treaties, I, 712. By the same Article goods arriving at British North American ports and destined for the United States were to be under like conditions conveyed in transit through British territory, and similarly, goods were to be conveyed in transit on like terms from the United States, through the British possessions to other places in the United States, or for export from British American ports.

Cf. President Harrison, message of Feb. 2, 1893, Richardson's Messages, IX, 335; House Misc. Doc. No. 210, 53 Cong., 2 Sess., 37, declaring that this Article of the treaty was not considered to be in effect. See *Grogan v. Walker & Sons*, 259 U. S. 80.

According to Rev. Stat., § 3005, as amended by the Act of May 21, 1900, Chap. 487, 31 Stat. 181: "All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom-house and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe." This Act was repealed by Sec. 642 of the Tariff Act of Sept. 21, 1922, 42 Stat. 989.

See, also, the minor provisions contained in Art. XXXII of the treaty with Mexico of April 5, 1831, Malloy's Treaties, I, 1095, and in Art. VI of the treaty with that State of Feb. 2, 1848, *id.*, 1111; also Art. VIII of the Gadsden Treaty with Mexico of Dec. 30, 1853, *id.*, 1121. See proposed treaty of transit and commerce between the United States and Mexico of Dec. 14, 1859 (which failed to be consummated), Senate Ex. Doc. No. 98 (confidential), 36 Cong., 1 sess.

Not infrequently the conventions of the United States have accorded the nationals of the contracting parties a reciprocal exemption from all transit duties. See, for example, Art. VI of the treaty with Japan of Feb. 21, 1911, U. S. Treaty Vol. III, 2712, 2714.

States, to persons and goods coming from or going through the territories of the other High Contracting Party, except such persons as may be forbidden admission into its territory or goods of which the importation may be prohibited by law.”<sup>3</sup> It was added that persons and goods in transit should not be subjected to any transit duty, or to any unnecessary delays or restrictions, and should be given national treatment as regards charges, facilities and all other matters.<sup>4</sup> It was also provided that goods in transit should be entered at the proper customhouse, but that they should be exempt from all customs or other similar duties. Moreover, all charges imposed on transport in transit were to be reasonable, having regard to the conditions of the traffic.<sup>5</sup>

(i)

§ 196. **The Same.** Conventions resulting from World War I made significant provisions for transit by land. Thus Germany, by the Treaty of Versailles of June 28, 1919, and Austria, by the Treaty of Saint-Germain-en-Laye, of September 10, 1919, were obliged to undertake to grant freedom of transit through their respective territories, by the routes most convenient for international transit, by rail as well as by water, to persons, goods and vehicles of transportation coming from or going to the territories of any of the Allied or Associated Powers, whether or not contiguous, and without the imposition of transit or customs duties, or undue delays or restrictions, or unreasonable charges for transportation, or adverse discriminatory treatment.<sup>1</sup> The obligation not to maintain control over transmigration traffic through those territories, save with respect to specified measures, was accepted. Arrangements in pursuance of these general requirements were amplified and given also particular application to in-

<sup>3</sup> U. S. Treaty Vol. IV, 4191, 4198. This article was reproduced in numerous subsequent commercial treaties of the United States. See, for example, Art. XIII of treaty with Hungary, of June 24, 1925, U. S. Treaty Vol. IV, 4318, 4324; Art. XV of treaty with Honduras of Dec. 7, 1927, *id.*, 4306, 4311; Art. XIV of treaty with El Salvador of Feb. 22, 1926, *id.*, 4615, 4620; Art. XII of treaty with Austria of June 19, 1928, *id.*, 3930, 3935; Art. XIV of treaty with Poland of June 15, 1931, *id.*, 4572, 4579.

<sup>4</sup> In Art. XVI of the treaty with Latvia of April 20, 1928, *id.*, 4400, 4405, it was declared that: “The measures of a general or particular character which either of the High Contracting Parties is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may in exceptional cases and for as short a period as possible involve a deviation from the provisions of this paragraph; it being understood that the principle of freedom of transit must be observed to the utmost possible extent.” See, also, Art. XV of treaty with Norway of June 5, 1928, *id.*, 4527, 4533.

<sup>5</sup> Art. XVI, U. S. Treaty Vol. IV, 4191, 4198.

See, also, Art. VII of the convention between the United States and Great Britain (in respect of Canada), to suppress smuggling, of June 6, 1924, U. S. Treaty Vol. IV, 3984, 3985, whereby provision was made for the transit of alcoholic liquors under seal and under guard by Canadian authorities through the territorial waters of the United States to Skagway, Alaska, and thence by the shortest route, via the White Pass and Yukon Railway, “upwards of twenty miles to Canadian territory.”

By its treaties establishing friendly relations with Austria, of Aug. 24, 1921, U. S. Treaty Vol. III, 2493, with Germany, of Aug. 25, 1921, *id.*, 2596, and with Hungary, of Aug. 29, 1921, *id.*, 2693, the United States secured the rights and advantages stipulated in the Treaties of Peace concluded by those States at St. Germain-en-Laye, Versailles, and Trianon, respectively, in several specified parts thereof, embracing Part XII, concerning Ports, Waterways, and Railways.

§ 196. <sup>1</sup> Arts 321–326 of the treaty with Germany, U. S. Treaty Vol. III, 3485–3486; also Arts. 284–289 of the treaty with Austria, *id.*, 3265–3266.

ternational transport by rail.<sup>2</sup> It was provided, however, that after periods of years, the continued right of an Allied or Associated Power to claim the benefits of the general stipulations respecting freedom of transit, and certain special ones respecting railways, should depend upon the concession of reciprocal privileges.<sup>3</sup>

It may be observed that Germany agreed that the Czecho-Slovak State might require within a specified period of time the construction at its expense of a railway line across German territory between the stations of Schlauney and Nachod,<sup>4</sup> and that Austria agreed that Italy might within a like period require the construction or improvement of the new trans-alpine lines of the Col de Reschen and the Pas de Predil.<sup>5</sup> "In view of the importance to the Czecho-Slovak State of free communication between that State and the Adriatic," Austria recognized the "right" of the Czecho-Slovak State to run its own trains over certain sections included within Austrian territory on specified lines.<sup>6</sup> Moreover, the so-called "running powers" were to embrace the right to establish running sheds with small shops for minor repairs to locomotives and rolling stock, and to appoint representatives where necessary to supervise the working of Czecho-Slovak trains.<sup>7</sup> To Austria was accorded "free access to the Adriatic." That State was with such object to be permitted to enjoy freedom of transit over the territories and in the ports severed from the former Austro-Hungarian Monarchy.<sup>8</sup>

<sup>2</sup> Arts. 365-370, and 372-374, of the treaty with Germany, U. S. Treaty Vol. III, 3498-3501; also Arts. 311-317, and 319-325, of the treaty with Austria, *id.*, 3272-3277.

<sup>3</sup> According to Art. 378 of the treaty with Germany, and Art. 330 of the treaty with Austria, such stipulations (which were specified) were to be subject to revision by the Council of the League of Nations at any time after the expiration of a fixed period of years (which was five in the German treaty and three in the Austrian) following the coming into force of the treaty. Failing such revision, or the prolongation by the Council of the period during which reciprocity could not be demanded, the principle of reciprocity was to become applicable.

It was declared in the treaty with Austria that the benefits of the stipulations could not be claimed by States to which territory of the former Austro-Hungarian Monarchy had been transferred, or which had arisen out of the dismemberment of that Monarchy, except upon the footing of giving, in the territory passing under their sovereignty in virtue of the same treaty, reciprocal treatment to Austria.

See, in this connection, communication of M. Clemenceau, President of the Peace Conference, June 16, 1919, to the President of the German Delegation, with respect to the requirements of the German treaty, Misc. No. 4 (1919), [Cmd. 258], p. 62; also David Hunter Miller, "The International Régime of Ports, Waterways and Railways," *Am. J.*, XIII, 669, 670-672, quoting the foregoing communication.

*Cf.*, also, reciprocal provisions for freedom of transit contained in Art. XVII of treaty of June 28, 1919, between the Principal Allied and Associated Powers and Poland, British Treaty Series No. 8 (1919), [Cmd. 223], p. 9; also those contained in Art. XV of the treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, of Sept. 10, 1919, British Treaty Series, 1919, [Cmd. 461].

<sup>4</sup> Art. 373 of the Treaty of Versailles of June 28, 1919.

<sup>5</sup> Art. 321 of the Treaty of Saint-Germain-en-Laye, of Sept. 10, 1919. Arrangement was here made for the ultimate adjustment of the cost.

<sup>6</sup> Art. 322 of the same treaty.

<sup>7</sup> Art. 323, and also 324. See, also, in this connection, convention relative to transit through Salonica, concluded between Greece and Serbia, May 10, 1914, *Am. J.*, XIII, Supp., 441.

<sup>8</sup> Art. 311 of Austrian treaty of peace of Sept. 10, 1919.

See, also, Articles 268-273, and 294-307 of the treaty of peace concluded by the Allied Powers with Hungary, at Trianon, June 4, 1920, U. S. Treaty Vol. III, 3664-3665, and 3671-3676; also, Articles 212-217 and 236-244 of the treaty of peace concluded by the Allied Powers with Bulgaria at Neuilly-sur-Seine, Nov. 27, 1919, British Treaty Series, No. 5 (1920) [Cmd. 522], 66-67 and 71-73.

The transformation, and in some cases the demolition, of certain European States and boundaries, during and after 1938, was ruinous to much of the conventional régime that had been sought to be established through the treaties of peace that marked the conclusion of the earlier World War. Demands for privileges of transit over foreign territory are of course to be anticipated by the victors in the present conflict, and acquiescence will doubtless be duly registered in the terms of the ultimate settlement.<sup>9</sup>

It may be greatly doubted whether the United States would acknowledge any legal obligation towards any other country to agree to a reciprocal arrangement conferring privileges of transit across American territory such as were yielded by Austria and Germany in the peace settlements of 1919.

(c)

§ 196A. **Aspects of Some Post-War Arrangements.** The members of the League of Nations agreed, under certain conditions, through Article XXIII(e) of the Covenant thereof, to "make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League."<sup>1</sup> Accordingly, the League built up its "Communications and Transit Organisation," a technical body with a written and semi-autonomous constitution. "The Organisation mainly acts through ordinary or extraordinary *General Conferences*, through the Advisory and Technical *Committee* for Communications and Transit which meets in the intervals between ordinary General Conferences and through the *permanent secretariat*."<sup>2</sup> The General Conferences are attended by representatives of all States members of the Organisation, and also of other States. The Advisory and Technical Committee on Communications and Transit is a smaller body, meeting about twice a year, and composed of members appointed by the States elected for this purpose by the ordinary General Conference, and of members appointed by States permanently represented on the Council.<sup>3</sup> At the first meeting of the General Conference, which convened at Barcelona, there was concluded on April 20, 1921, the Convention and Statute on Freedom of Transit.<sup>4</sup> The Statute embodied a conservative arrangement to facilitate "traffic in transit." Persons, baggage and goods, and also vessels, coaching and goods stock, and other means of transport, were said to be deemed to be in transit across territory under the sovereignty or authority of one of the Contracting States, when the passage

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Turkey, through Article 101 of the treaty of peace of Lausanne of July 24, 1923, undertook to adhere to the Convention and to the Statute respecting the Freedom of Transit adopted by the Conference of Barcelona on April 14, 1921. See, generally, Section I of Part IV, embracing Articles 101-113 of that treaty, League of Nations Treaty Series, XXVIII, 11, 89-95.

<sup>9</sup> Russia obliged Finland to do its bidding in this regard in 1940. See Arts. 6 and 7 of Treaty of Peace between Finland and the Union of Soviet Socialist Republics, of March 12, 1940, *Am. J.*, XXXIV, *Official Documents*, 129.

§ 196A. <sup>1</sup> U. S. Treaty Vol. III, 3344. See also documents in Hackworth, *Dig.*, IV, § 364.

<sup>2</sup> League of Nations, Ten Years of World Co-operation, Secretariat of the League of Nations, London, 1930, 207, 209.

<sup>3</sup> *Id.*, 210.

<sup>4</sup> League of Nations, Treaty Series, VII, 11; Hudson, *Int. Legislation*, No. 41 and No. 41a.

across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, was only a portion of a complete journey, beginning and terminating beyond the frontier of the State across whose territory the transit took place. Traffic of this nature was that referred to as "traffic in transit."<sup>5</sup>

The existence of an essentially international traffic by land, which has become highly developed as among States whose territories are not remote from each other despite intervening areas under the sovereignty of foreign countries, has begotten numerous arrangements, both bi-partite and multi-partite, designed to cope with the variety of problems that are involved, and in particular to facilitate a common interest in unmolested communications. These conventional arrangements may purport chiefly to facilitate conditions of traffic,<sup>6</sup> or to yield rights of transit over, or forms of control within, foreign territory.<sup>7</sup> Those within the last two classes have a special importance in so far as they illustrate the willingness of contracting States reciprocally to relinquish during the life of the convention, or perhaps for a longer period, the exercise of privileges which they might be expected otherwise to retain as normal perquisites or incidents of a right of sovereignty.

It suffices to observe in this connection that problems pertaining to transit

<sup>5</sup> Art. 2.

"It will be seen that the main principle laid down in the Statute is limited. It covers only 'traffic in transit,' and does not affect in any way the rights of contracting States as regards traffic originating in or destined for their territory." G. E. Toulmin, "The Barcelona Conference on Communications and Transit and the Danube Statute," *Brit. Y.B.*, 1922-1923, 167, 173.

See, in this connection, Ernst Holländer, "International Traffic Law: Its Forms and Requirements," *Am. J.*, XVII, 470. Also Lauterpacht's 5 ed. of Oppenheim, I, 262, footnote.

<sup>6</sup> See, for example, Convention and Statute on the International Régime of Railways, of Geneva, Dec. 9, 1923, League of Nations, Treaty Series, XLVII, 55, Hudson, *Int. Legislation*, Nos. 106 and 106a; International Convention concerning the Traffic of Goods by Rail with Annexes and Protocol, of Berne, Oct. 23, 1924, and Procès-verbal, of Berne, Oct. 18, 1927, League of Nations, Treaty Series, LXXVII, 367, Hudson, *Int. Legislation*, Nos. 129, 129a, 129b and 129c; International Convention concerning the Transport of Passengers and Baggage by Rail, with Annexes and Protocol, of Berne, Oct. 23, 1924, and Procès-verbal, of Berne, Oct. 18, 1927, League of Nations, Treaty Series, LXXVIII, 17, Hudson, *Int. Legislation*, Nos. 130 and 130a; International Convention relative to Motor Traffic, of Paris, April 24, 1926, League of Nations, Treaty Series, CVIII, 123, Hudson, *Int. Legislation*, No. 157; International Convention relating to Road Traffic, of Paris, April 24, 1926, League of Nations, Treaty Series, XCVII, 83, Hudson, *Int. Legislation*, No. 158.

<sup>7</sup> See Convention between the Kingdom of Italy and the Kingdom of the Serbs, Croats and Slovenes, concerning the use of Frontier Stations, Common Stations and Connecting Lines, Aug. 12, 1924, League of Nations, Treaty Series, LXXXII, 423; Convention between the Kingdom of Hungary and the Czechoslovak Republic concerning Common Frontier Railway Stations, March 8, 1923, League of Nations, Treaty Series, LVII, 87.

See Convention between Germany and Poland and the Free City of Danzig, Concerning Freedom of Transit between East Prussia and the Rest of Germany, April 21, 1921, League of Nations, Treaty Series XII, 61; German-Polish Agreement Regarding Privileged Transit Traffic between Polish Upper Silesia and the Remainder of Poland through German Upper Silesia, June 24, 1922, League of Nations, Treaty Series, XXVI, 271, 313; Convention between the Government of the Kingdom of Hungary and the Government of the Czechoslovak Republic Regulating the Running of Czechoslovak Trains over the Hungarian Section of the Cata-Lučenec Line, March 8, 1923, League of Nations, Treaty Series, XLVIII, 257; Convention between the Republic of Finland and the Russian Socialist Federal Soviet Republic concerning the Conditions on which the Russian State and its Nationals shall be entitled to Free Transit through the Territory of Petsamo (Petchenga), Oct. 28, 1922, League of Nations, Treaty Series, XIX, 199, 208. Concerning these arrangements, see F. A. Váň, *Servitudes of International Law*, 106-114.



by land are commonly attributable to the geographical or economic conditions arising in particular areas, and for that reason are not necessarily indicative of the character of rules that should call for general acquiescence in every quarter. In that regard they differ, therefore, from numerous problems growing out of transit by air or the control of Hertzian waves. Accordingly, the United States may experience no sense of need to accept a multi-partite convention pertaining to traffic by land that might be deemed highly advantageous to a State whose territorial domain was in central Europe.

Thus far there has been a notable absence of conventional arrangement between the United States and Canada in relation to the operation of railway services between their respective territories.<sup>8</sup> "The United States is a party to the convention on the Pan American Highway signed at Buenos Aires December 23, 1936, by which the parties agree to collaborate in the 'speedy completion' of a Pan American motor highway."<sup>9</sup> It is also a party to a convention with Panama signed at Washington, March 2, 1936, for the completion of a highway between the cities of Panamá and Colón through "territory under their respective jurisdictions," referred to as the "Trans-Isthmian Highway."<sup>10</sup>

(11)

THE PROTECTION OF AREAS BY NEUTRALIZATION AND OTHER PROCESSES.  
INTERNATIONAL WATERWAYS

(a)

§ 197. **In General.** A group of States may undertake to accord permanent protection from hostile operations to a particular area of land or water within or between the territories of any of their number.<sup>1</sup> The arrangement may provide that certain persons and things shall be immune from attack,<sup>2</sup> or that hostilities shall not be committed within the area, or that it shall not serve a belligerent purpose, such, for example, as a means of facilitating the transportation of military forces. The agreement may even mark the attempt to impose a condition of permanent neutrality upon the area.<sup>3</sup>

Two distinct aspects of such undertakings deserve consideration. The one concerns a matter of feasibility or expediency; the other involves a question of law; and both appear in a new light since occurrences of World War I.

<sup>8</sup> See the Acting Chief of Division of Western European Affairs, to Mr. E. D. Fite, March 14, 1930, Hackworth, Dig., IV, 346; also other documents, *id.*, 348-349.

[See, however, exchange of notes, in March, 1942, between the United States and Canada, concerning the construction of a military highway to Alaska, Dept. of State Bulletin, March 28, 1942, 237.]

<sup>9</sup> Statement in Hackworth, Dig., IV, 349, citing U. S. Treaty Vol. IV, 4837.

<sup>10</sup> U. S. Treaty Series, No. 946.

§ 197.<sup>1</sup> Such an attempt may be made even though the area constitutes a part of the territory of a State, which it is not sought otherwise to neutralize.

<sup>2</sup> See, for example, Arts. I and XXI of the public act of Nov. 1, 1865, ratified at the Conference of Paris of March 28, 1866, with respect to the works, establishment and administration of the Danube, Brit. and For. St. Pap., LV, 94, 99, quoted in Joseph P. Chamberlain, *The Danube*, Dept. of State, confidential document, 1918, 87.

<sup>3</sup> "Neutralization is the imposition by international agreement of a condition of permanent neutrality upon lands and waterways." Cyrus F. Wicker, *Neutralization*, I.

A number of States, such, for example, as those whose territories are traversed or separated by an international river, may profess concern as to conditions of navigation in time of conflict, and conclude an agreement designed to protect the stream and its establishments should war ensue. Upon its outbreak, if the contracting States are aligned as opposing belligerents, there is likely to be a sharp conflict of interest with respect to the proper uses of the river, and one so vital as to encourage disregard of the compact by that party which would suffer a relative strategic detriment should it observe the restraints imposed. The danger of contempt for the arrangement is shown to be proportional to the opportunity which it leaves open to any contracting belligerent party to utilize the stream for a military end. An agreement imposing a duty to protect merely the works and establishments pertaining to navigation, offers a frail bond of restraint. Nor are provisions devised to localize hostilities by forbidding their commission in a particular stream in close proximity to, or in the very path of belligerent operations likely to prove a real deterrent. So long as a waterway is permitted to remain a means of military communication and transportation serving one belligerent and barred against its foe, the latter must be expected to make extraordinary effort to obstruct passage and stop navigation.<sup>4</sup> Conventions which ignore such probabilities and purport merely to impose minor restraints upon the contracting parties fall far short of those designed to attach to an area a status of permanent neutralization. They reveal no collective design to isolate it from warlike operations, and still less a joint undertaking to guarantee the maintenance of such a condition.<sup>5</sup> An international arrangement may, however, give appropriate expression to such a purpose. If it provides for the impressment of permanent neutralization, forbidding all acts within the area or uses thereof which would be denied a belligerent with respect to neutral territory, and especially if it is buttressed by a common guaranty of interested powers, there is automatically established a check which, by reason of its very

<sup>4</sup> Declares an authoritative commentator with respect to the belligerent uses of the Danube during World War I: "The active naval operations on the river, with the mines which were their consequence, all clear breaches of the treaty of Berlin, illustrate the difficulty in the way of attempts by treaty to prevent strong States from using any force at their disposal to beat the enemy, and emphasize the impossibility of preventing naval activity on a river forming a military line unless military activity on each side of and across that river is also prevented. . . .

"Experience in two wars, 1877 and 1914, has conclusively shown that neutralization of the Danube is impracticable. If troops are allowed to cross the river, if shore batteries can bombard forts and towns on the hostile opposite bank, then reasonable means of defense on the water should not be prohibited. The existing treaty limitations (treaty of Berlin, Article LII) on fortifications and the use of warships on the river were never effectively enforced, and the result has been to limit the freedom of Roumania to protect her own territory." Joseph P. Chamberlain, *The Danube*, Dept. of State, confidential document, 1918, 76, 107-108.

<sup>5</sup> See, in this connection, Cyrus F. Wicker, *Neutralization*, 3-4, 7, 39. See *Neutralized States*, *supra*, § 29.

The Straits of Magellan were said to be "neutralized forever" and free navigation guaranteed to the flags of all nations, by the provisions of Art. V of the treaty between the Argentine Republic and Chile of July 23, 1881. Brit. and For. State Pap., LXXII, 1103. Prior to the negotiation of this treaty, Mr. Evarts, Secy. of State, in a communication to Mr. Osborn, Jan. 18, 1879, declared that the United States would not tolerate any exclusive claims of any foreign nation over the straits, and would hold responsible any government undertaking to lay any impost or check on American commerce passing through. MS. Inst. Chile, XVI, 238, Moore, Dig., I, 664, note. See, also, Jean Marie Aribat, *Le Détroit de Magellan au Point de Vue International*, Paris, 1902.

nature, minimizes the grounds and invalidates the excuses for a possible breach.

The States most concerned in the treatment to be applied to an international waterway or other area may not, however, be disposed to consent to an arrangement designed to produce neutralization. Such reluctance gives rise to the inquiry whether a legal duty rests upon a State to acquiesce in a plan contemplating permanent neutralization or in one of less magnitude. It must be recognized that normally no State is obliged to agree to abandon the right when a belligerent to commit hostile acts within a zone of land or water belonging to or controlled by its enemy, or to yield to foreign powers the right to attach an artificial condition such as a new status to a portion of its own domain. On the other hand, it must be acknowledged that a particular area, especially if it be an international waterway, may bear such a relationship to a special group of maritime States through its connection with their territories, and to others as a necessary channel of communication between oceans or a means of access to interior ports, as to establish a solid and equitable demand for neutralization. Thus the society of maritime States may be practically united in such a claim. The point to be emphasized is that this claim of the international society may in a particular case, as in that of the Dardanelles, be strong enough to justify a demand for acquiescence on the part of any individual State technically possessed of a preponderant territorial interest.<sup>6</sup> It is equally important to observe, however, that that society will not assert a paramount claim save when the requirements of justice are deemed to offer no alternative, and least of all when a territorial sovereign, by arrangement with any others, preserves itself the area from hostile operations in all seasons, for the benefit of all States fairly entitled to its use.

(b)

§ 198. **The Panama Canal.** The status of the Panama Canal is the result of a contractual relationship established between the United States and Great Britain by the terms of the Clayton-Bulwer Treaty of April 19, 1850,<sup>1</sup> and renewed and modified by the superseding provisions of the Hay-Pauncefote Treaty of No-

<sup>6</sup> See Convention Relating to the Régime of the Straits, *infra*, § 198A.

Concerning the Kiel Canal constructed by Germany in German territory, see Lauterpacht's 5 ed. of Oppenheim, I, § 183a and documents there cited; Hackworth, Dig., II, § 219 and documents there cited. It will be recalled that the Permanent Court of International Justice in the case of the S.S. Wimbledon (Publications, Permanent Court of International Justice, Series A, No. 1, Judgment No. 1), concluded that through Articles 380-386 of the Treaty of Versailles of June 28, 1919, "the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world," and that "under its new régime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany." (22) *Cf.* dissenting opinion by Judges Anzilotti and Huber, *id.*, 35. See The Interpretation of Treaties by the Permanent Court of International Justice, Defence for the Form of a Text, *infra*, § 533F. It may be observed that the clauses of the Treaty of Versailles relating to the Kiel Canal did not embody an attempt to neutralize the waterway. These clauses were denounced by Germany in November, 1936. In 1940, portions of the Kiel Canal were subjected to aerial bombardment.

§ 198. <sup>1</sup> Malloy's Treaties, I, 659. *Cf.*, in this connection, The Monroe Doctrine, *infra*, § 94.

vember 18, 1901,<sup>2</sup> in which the Republic of Panama at the very beginning of its life as a State acquiesced.<sup>3</sup>

The convention of 1850 contemplated the application of the principle of neutralization to any trans-isthmian ship canal or other means of interoceanic communication that might be constructed. To that end the contracting parties pledged themselves to appropriate guaranties, and each also undertook specifically to refrain from obtaining for itself exclusive control over any ship canal, and to abstain from occupying, colonizing or assuming dominion over any part of Central America, and from the acquisition of special advantages in trans-isthmian commerce or navigation that should not accrue to the nationals of both. The erection or maintenance of fortifications was definitely forbidden. Moreover, outside States were to be invited to enter into stipulations with the contracting parties similar to those of the treaty, with a view to permitting general participation in the "honor and advantage" of the work designed. The convention failed, however, to be the means of facilitating the construction of a trans-isthmian canal, an achievement that awaited the conclusion of fresh agreements of the twentieth century.<sup>4</sup>

The Hay-Pauncefote Treaty, which by its terms superseded the Clayton-

<sup>2</sup> Malloy's Treaties, I, 782.

<sup>3</sup> Convention of Nov. 18, 1903, Malloy's Treaties, II, 1349. See Panama, *supra*, § 20; The Panama Canal Doctrine, *supra*, § 97A.

<sup>4</sup> Declared Mr. Hay, Secy. of State, in a personal communication to Mr. Cullom, Chairman of the Senate Committee on Foreign Relations, Dec. 12, 1901: "The Clayton-Bulwer Treaty of 1850, which contemplated the construction of a canal under the joint auspices of the two Governments, to be controlled by them jointly, its neutrality and security to be guaranteed by both, was almost from the date of its ratification the subject of frequent discussion and occasional irritation between the two Governments. Nearly half a century elapsed without any step being taken by either toward carrying it into practical effect by the construction of a canal under its provisions. Instead of being, as was intended, an instrument for facilitating the construction of a canal it became a serious obstacle in the way of such construction. In the meantime the conditions which had existed at the time of its ratification had wholly changed. The commerce of the world had multiplied many fold. The growth of the United States in population, resources, and ability had been greater still. The occupation and development of its Pacific coast and its commercial necessities upon the Pacific Ocean created a state of things hardly dreamt of at the date of the treaty. At last the acquisition of the Hawaiian and the Philippine Islands rendered the construction of the canal a matter of imperative and absolute necessity to the Government and people of the United States, and a strong national feeling in favor of such construction arose, which grew with the progress of events into an irrevocable determination to accomplish that object at the earliest possible moment. . . .

"But the Clayton-Bulwer Treaty stood in the way. Great Britain did not manifest, and it is believed did not entertain, the remotest idea of joining or aiding in such a work. The United States was able to bear alone the entire cost of the canal, but was apparently prohibited by the existing treaty from undertaking the enterprise which, although carried out at its own expense, would redound to the benefit of the world's commerce quite as much as to its own advantage. The President, loyal to treaty obligations, was unwilling to countenance any demand, however widespread, for proceeding with the construction of the canal until he could obtain by friendly negotiation, on which he confidently relied, the consent of Great Britain to the abrogation of the Clayton-Bulwer Treaty, or such a modification of its terms as would enable the United States untrammelled to enter upon the great work whose successful accomplishment was vitally necessary to its own security, and would benefit the people of all other nations according to their respective interests in the commerce of the world.

"Such was the situation in which the negotiations for the supersession of the treaty were commenced and have been conducted, and we cannot but recognize the fair and friendly spirit in which the successive overtures of the United States toward that end have been met by Great Britain." Diplomatic History of the Panama Canal, Senate Doc., No. 474, 63 Cong., 2 Sess. 53, 54-55.

See, also, Antonio José Uribe, *Colombia y los Estados Unidos de America*, Bogotá, 1931.

Bulwer Treaty, "without impairing the 'general principle' of neutralization" established therein,<sup>5</sup> permitted the construction of an essentially American canal under American control. It was to be maintained and protected by the United States, which was not denied the right of fortification, or burdened with the duty of sharing the work of maintenance or protection with Great Britain or other powers of any continent.<sup>6</sup> On its part the United States agreed to adopt "as the basis of neutralization" certain rules, substantially as embodied in the Suez Canal Convention of Constantinople, of October 29, 1888.<sup>7</sup> These an-

<sup>5</sup> Art. I and preamble. Concerning the history of negotiations between the United States and Great Britain following the amendments upon which the Senate conditioned its approval of a convention signed Feb. 5, 1900, and which were unacceptable to the latter State, see *Diplomatic History of the Panama Canal*, Senate Doc. No. 474, 63 Cong., 2 Sess., Part I.

"The President was, however, not only willing, but desirous, that the 'general principle' of neutralization referred to in the preamble of this [the Clayton-Bulwer] Treaty should be applicable to this canal now intended to be built, notwithstanding any change of sovereignty or of international relations of the territory through which it should pass. This 'general principle' of neutralization had always in fact been insisted upon by the United States, and he recognized the entire justice of the request of Great Britain that if she should now surrender the material interest which had been secured to her by the first Article of the Clayton-Bulwer Treaty, which might result in the indefinite future should the territory traversed by the canal undergo a change of sovereignty, this 'general principle' should not be thereby affected or impaired." Dept. of State, memorandum, *Diplomatic Hist. of Panama Canal*, Senate Doc. No. 474, 63 Cong., 2 Sess., 66.

Art. IV contained the agreement that "no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization of or the obligation of the High Contracting Parties under the present treaty."

<sup>6</sup> See communication of Sir Edward Grey, British Foreign Secy., to Mr. Bryce, British Ambassador at Washington, Nov. 14, 1912, in relation to Panama Canal tolls, *For. Rel.*, 1912, 481, 482, 484. Compare memorandum of President Taft, Aug. 12, 1912, *id.*, 475, 476-477. See also address of President Wilson before the Congress, March 5, 1914, urging repeal of the provision of the Panama Canal Act of Aug. 24, 1912, exempting vessels in the coastwise trade of the United States from the payment of tolls, *For. Rel.* 1914, 317; Memorandum by Mr. Hackworth, the Legal Adviser of the Dept. of State, Jan. 17, 1938, Hackworth, *Dig.*, II, 772.

"The whole theory of the treaty is that the canal is to be an entirely American canal. The enormous cost of constructing it is to be borne by the United States alone. When constructed it is to be exclusively the property of the United States, and is to be managed, controlled, and defended by it. Under these circumstances, and considering that now by the new treaty Great Britain is relieved of all the responsibility and burden of maintaining its neutrality and security, it was thought entirely fair to omit the prohibition that 'no fortification shall be erected commanding the canal or the waters adjacent.'" Dept. of State memorandum, sent by Mr. Hay to Senate Committee on Foreign Relations, *Diplomatic Hist. of Panama Canal* above cited, 61, 64.

<sup>7</sup> For the text of the Suez Canal Convention, see *Brit. and For. State Pap.*, LXXIX, 18; *Am. J.*, III, Supp., 123.

With respect to the Suez Canal see Fauchille, 8 ed., § 512, and literature there cited; bibliography contained in Frank M. Anderson and Amos S. Hershey, *Handbook for the Diplomatic History of Europe, Asia, and Africa (1870-1914)*, National Board for Historical Service, Washington, 1918, 107-108; Library of Congress, *List of Books and Periodical Literature Relating to Inter-oceanic Canals and Railway Routes*, 1900, 95-131. See also Lauterpacht's 5 ed. of *Oppenheim*, I, § 183, and documents there cited in footnote 4, p. 376; also Hackworth, *Dig.*, II, § 218 and documents there cited, among which the following may be noted: R. L. Buell, *The Suez Canal and League Sanctions*, Geneva Special Studies, VI, No. 3, 1935, 826; E. A. Whittuck, *International Canals* (Handbook prepared under the direction of the historical section of the British Foreign Office, No. 150), London, 1920, 814-816; Art. 8 of the Anglo-Egyptian Treaty of Alliance of Aug. 26, 1936, *British Treaty Series*, No. 6 (1937), Cmd. 5360, 818; Annex 8 to the protocol of the Anglo-Italian accord of April 16, 1938, *British Treaty Series*, No. 31 (1938), Cmd. 5726, 818.

It is understood that reports of the Italian High Command stated that attacks on oil depots near Suez and Port Said had been made on August 29, September 6 and October 24 and 26, 1940.

nounced (a) that the canal should be free and open to the vessels of commerce and of war of all nations observing the rules,<sup>8</sup> on terms of entire equality, and without discrimination in respect of the conditions or charges of traffic, or otherwise, and that those conditions and charges should be just and equitable; (b) that the canal should never be blockaded, and that no right of war should be exercised or any hostility be committed within it, the United States, however, to be at liberty to maintain such military police along the canal as might be necessary to protect it against lawlessness and disorder; (c) that vessels of war of a belligerent should not revictual nor take any stores in the canal except so far as might be strictly necessary, the transit of such vessels to be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as might result from the necessities of the service, and prizes to be in all respects subject to the same rules as vessels of war of the belligerents; (d) that no belligerent should embark or disembark troops, munitions of war or warlike materials in the canal, except in case of accidental hindrance of transit, in which case the transit should be resumed with all possible despatch; (e) that the provisions of the Article (embracing the rules) should apply to waters adjacent to the canal, within three marine miles of either end, and that vessels of a belligerent should not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case depart as soon as possible, but that a vessel of war of one belligerent should not depart within twenty-four hours from the departure of the vessel of war of the other belligerent; (f) that the plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal should be deemed to be part thereof, for the purposes of the treaty, and in time of war as in time of peace, should enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the Canal.<sup>9</sup>

By the treaty with Panama of November 18, 1903, whereby the United States, as has been elsewhere noted,<sup>10</sup> became the lessee in perpetuity of a zone traversing the territory of the former State, it was agreed that the Canal when constructed should be "neutral in perpetuity," and should "be opened upon the terms provided for by Section I of Article three of, and in conformity with all the stipulations of," the Hay-Pauncefote Treaty.<sup>11</sup> It was declared that the Government of the Republic of Panama should have the right to transport over

<sup>8</sup> There was omission of the words "in time of war as in time of peace," contained in the proposed convention of Feb. 5, 1900, Senate Doc. No. 160, 56 Cong., 1 Sess. There was also omission of a rule forbidding the erection of fortifications, and which had been contained in that convention, and which was embraced in the Rules of the Suez Canal Convention of 1888.

Concerning the repeal of certain provisions of the Panama Canal Act of Aug. 24, 1912, exempting American vessels engaged in the coastwise trade of the United States from the payment of tolls, see *supra*, § 54.

<sup>9</sup> See Neutrality Proclamation of President Wilson with respect to the Panama Canal Zone, Nov. 13, 1914, For. Rel. 1914, Supp., 552. See also Protocol of an agreement relating to neutrality, signed by Secretary Lansing and Dr. Morales, Panaman Minister at Washington, Oct. 10, 1914, U. S. Treaty Vol. III, 2777.

<sup>10</sup> See Panama, *supra*, § 20. See Malloy's Treaties, II, 1349.

<sup>11</sup> Art. XVIII.

the Canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind.<sup>12</sup> To the United States was accorded the right to use its police and its land and naval forces, or to establish fortifications for the protection of the Canal or of vessels making use of it, or of the railways or auxiliary works thereof.<sup>13</sup>

In section 1 of Article I of the treaty between the United States and Colombia concluded April 6, 1914, and which became effective in 1922, it was provided that the Republic of Colombia should be at liberty at all times to transport through the interoceanic Canal its troops, materials of war and ships of war, without paying any charges to the United States.<sup>14</sup> In conformity with the Final Resolution of the Senate of the United States in giving its consent to the ratification of the treaty, there was incorporated in the "protocol of exchange" the statement that this stipulation should not be applicable in case of a state of war between the Republic of Colombia and any other country.<sup>15</sup>

The treaties with Great Britain and Panama did not apparently contemplate the impressment upon the Canal of a status of neutralization. There was an absence of any collective guaranty appropriate to such an end, and no design of uniting interested maritime States in such an undertaking. The work of maintenance and defense was left to a single power. No obligation was assumed by the United States not to bar the use of the waterway by an enemy, and not to protect it by force. No plan was devised to remove from an enemy (except possibly Great Britain or Panama, should either of those States unhappily wage war against the United States)<sup>16</sup> the right to attack the Canal with a view to

<sup>12</sup> Art. XIX. It was here also provided that the exemption was to be extended to the auxiliary railway for the transportation of persons in the service of the Republic of Panama, or of the police force charged with the preservation of public order outside of the zone, as well as to their baggage, munitions of war and supplies.

<sup>13</sup> Art. XXIII. See Norman J. Padelford, "American Rights in the Panama Canal," *Am. J.*, XXXIV, 416; "The Panama Canal in Time of Peace," *id.*, 601; "Neutrality, Belligerency, and the Panama Canal," *id.*, XXXV, 55.

<sup>14</sup> U. S. Treaty Vol. III, 2539.

<sup>15</sup> *Id.*, 2540, 2541. "This stipulation was interpreted to mean that the Republic of Colombia would be placed, when at war with another country, on the same footing as any other nation under similar conditions and that therefore Colombia would not by operation of the declaration of the United States Senate be placed under any disadvantage as compared with the other belligerent or belligerents with respect to the use of the Panama Canal in the event of a war between Colombia and any other country or countries." (Hackworth, *Dig.*, II, 779, footnote.)

See also Art. II of a proposed treaty between the United States and Colombia signed on Jan. 9, 1909, and which did not become effective, of which the text is contained in *For. Rel.* 1909, 227.

See correspondence between the United States and Great Britain in 1909, concerning the exemption of Colombian warships from payment of tolls on Panama Canal, *For. Rel.* 1909, 290-294.

<sup>16</sup> "In the event of the remote and well-nigh impossible contingency of a war between the United States and Great Britain, each party is remitted to its natural right of self-defense, but, even in that emergency, by force of the sixth clause of Article III—which is the only clause in the treaty by its terms expressly applying in time of war as in time of peace—the plant, establishment, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, and shall enjoy complete immunity from attack or injury by the enemy, and from acts calculated to impair their usefulness as part of the canal." Mr. Hay, Secy. of State, to Mr. Cullom, Chairman of Senate Committee on Foreign Relations, personal, Dec. 12, 1901, *Diplomatic Hist. of Panama Canal*, above cited, 53, 59.

its seizure for strategic or other purposes.<sup>17</sup> Nor was the United States prevented from permitting, when a neutral, such uses of the waterway by belligerent maritime States as it might lawfully accord them in its own ports.<sup>18</sup> It was Sir Edward Grey, British Foreign Secretary, who declared in November, 1912: "now that the United States has become the practical sovereign of the Canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection."<sup>19</sup>

On April 13, 1917, the Secretary of State declared to the Secretary of War that while the Panama Canal was still in process of construction and had not been officially opened to the world, and by virtue of the fact that the United States was solely responsible for the protection, operation, and control of the Canal, "the vessels of the enemies of the country exercising sovereign rights over the Canal should not be allowed to endanger the safety and usefulness of this great waterway."<sup>20</sup> In Rule 15 of President Wilson's proclamation of May 23,

<sup>17</sup> The question presents itself, however, whether the long-continued use of the canal by the public as well as private vessels of a foreign State, under the rules of the treaty of 1901, would not impose upon it a duty, when at war with the United States, such as would be imposed on Great Britain were it the enemy of the United States. It might be urged with force that the acceptance and use of privileges of transit, which the United States was not obliged itself indiscriminately to accord, created a corresponding duty not to commit acts which in time of war the rules expressly forbade.

<sup>18</sup> Chas. H. Stockton, *Outlines*, 144

See President Wilson's Neutrality Proclamation of Nov. 13, 1914, and rules and regulations governing the use of the Panama Canal and neutrality in the Canal Zone, *For. Rel.* 1914, Supp., 552; also documents, *id.*, 651-655; President Wilson's Proclamation No. 1371, of May 23, 1917, and rules and regulations for the regulation, management, and protection of the Panama Canal and the maintenance of its neutrality, *For. Rel.*, 1917, Supp. 2, Vol. II, 1265-1282.

Declared the Permanent Court of International Justice in the course of its first judgment in the Case of the S.S. *Wimbledon*: "It has never been alleged that the neutrality of the United States, before their entry into the war, was in any way compromised by the fact that the Panama Canal was used by belligerent men-of-war or by belligerent or neutral merchant vessels carrying contraband of war." (Publications, Permanent Court of International Justice, Series A, No. 1, 28.)

"The latter word [neutralisation] is frequently used in reference to the Suez Canal; but, strictly speaking, it is not correct, inasmuch as the passage of belligerent warships is permitted, whilst in neutralised territory the passage of belligerents' forces is prohibited. Lord Cromer, speaking of the term 'neutralisation' as applied to the Suez Canal, cited Lord Pauncefote as saying that it 'had reference only to the neutrality which attaches by international law to the territorial waters of a neutral State, in which a right of innocent passage for belligerent vessels exists, but no right to commit any act of hostility.'" Phillipson and Buxton, *Question of the Bosphorus and Dardanelles*, London, 1917, 239, *citing* Earl of Cromer, *Modern Egypt*, London, 1908, II, 384. It may be observed that Lord Cromer in the course of his statement referred to Lord Pauncefote as "an excellent authority on this subject." Dr. Hershey, in his *Essentials of International Law*, 1912, p. 211, Note 38, also adverted to Lord Cromer's statement.

Concerning the right of the United States to fortify the Canal, see especially Mr. Knox, Secy. of State, to Mr. L. James, Jan. 21, 1911, *Hackworth*, Dig., II, 791; the British Ambassador to Mr. Knox, Secy. of State, July 18, 1911, *Hackworth*, Dig., II, 791; Senator J. B. Foraker, to President Taft, Jan. 2, 1911, *Hackworth*, Dig., II, 791. See also George B. Davis, "Fortification at Panama," *Am. J.*, III, 885; Peter C. Hains, "Neutralization of the Panama Canal," *id.*, III, 354; H. S. Knapp, "The Real Status of the Panama Canal," *id.*, IV, 314; Crammond Kennedy, "The Canal Fortifications and the Treaty," *id.*, V, 620; Richard Olney, "Fortification of the Panama Canal," *id.*, V, 298; Eugene Wambaugh, "The Right to Fortify the Panama Canal," *id.*, V, 615.

<sup>19</sup> *For. Rel.* 1912, 485, 486.

<sup>20</sup> *Hackworth*, Dig., II, 785.

Concerning the absence of objection by the United States in November, 1917, to the



1917, it was announced that "in the interest of the protection of the Canal while the United States is a belligerent no vessel of war, auxiliary vessel, or private vessel of an enemy of the United States or an ally of such enemy, shall be allowed to use the Panama Canal nor the territorial waters of the Canal Zone for any purpose, save with the consent of the Canal authorities and subject to such rules and regulations as they may prescribe."<sup>21</sup>

Shortly after the outbreak of the European War, the President, on September 5, 1939, issued a proclamation announcing regulations concerning neutrality in the Canal Zone, which were designed to apply and somewhat modify provisions set forth in his neutrality proclamation of the same date in relation to the existing war, and also to announce certain additional provisions.<sup>22</sup> On that date the President, by executive order, prescribed regulations governing the passage and control of vessels through the Panama Canal "in any war in which the United States is a neutral."<sup>23</sup> These regulations made special reference to the requirements of the Hay-Pauncefote Treaty of November 18, 1901, and were designed in part to prevent damage or injury to vessels in transit, or to the Canal or its appurtenances, and to secure observance of the rules, regulations, rights, or obligations of the United States. To that end, broad powers of inspection, possession and control of belligerent and neutral ships (other than public vessels) during passage through the Canal, were to be exercised under specified conditions, by the Canal authorities.<sup>24</sup>

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granting by the Government of Panama of permission for British warships to remain at Taboga Island, for periods longer than the 24-hour limitation applicable in the Canal Zone waters, see Mr. Polk, Counselor of the Dept. of State, to Minister Price, Nov. 19, 1917, For. Rel. 1917, Supp. 2, Vol. II, 1274.

<sup>21</sup> For. Rel. 1917, Supp. 2, Vol. II, 1265, 1267.

In reference to the same proclamation the Department declared in a memorandum to the British Embassy of Aug. 15, 1917: "As the provisions of the proclamation in this respect and in others are based upon the treaties of the United States covering the status of the Isthmus and the diplomatic correspondence on the same subject with the countries concerned which, in a word, place upon the United States the duty and responsibility for maintaining the 'neutrality' or 'neutralization' of the Canal and its approaches, the Department of State regrets that, in its opinion, to allow the unlimited use of the dry dock and repair shops at Balboa by the British Pacific Squadron would be an infringement of the peculiar status of the Canal which the United States is under obligation to maintain. The Canal and its approaches, in the opinion of the Department, should not be made a rendezvous for belligerent ships or a base of naval equipment and repair." (For. Rel. 1917, Supp. 2, Vol. 2, 1270-1271.)

Concerning the willingness of the Department of State in October, 1920, to permit German ships to pass through the Panama Canal and use its terminal and other facilities, see Mr. Davis, Under Secy. of State, to Mr. Baker, Secy. of War, Oct. 5, 1920, Hackworth, Dig., II, 790.

<sup>22</sup> Proclamation No. 2350, Sept. 5, 1939, Dept. of State Bulletin, Sept. 9, 1939, 213.

See N. J. Padelford, "Neutrality, Belligerency, and the Panama Canal," *Am. J.*, XXXV, 55.

<sup>23</sup> *Id.*, 215.

The provisions of the proclamation (as well as of the neutrality proclamation of Sept. 5, 1939) and the regulations set forth in the executive order were declared to be "in addition to 'Rules and Regulations for the Operation and Navigation of the Panama Canal and Approaches Thereto, including all Waters under its jurisdiction' prescribed by Executive Order No. 4314, of September 25, 1925, as amended."

See also executive order No. 8251, of Sept. 12, 1939, embracing Regulations governing the Entrance of Foreign and Domestic Aircraft into the Canal Zone, and Navigation Therein, Dept. of State Bulletin, Oct. 14, 1939, 379; executive order No. 8271, of Oct. 16, 1939, amendatory of Section 6 of executive order No. 8251, Fed. Register, Oct. 18, 1939, 4277.

<sup>24</sup> There was contemplated the placing of armed guards on such vessels should the Governor of the Panama Canal deem such action necessary. See The Control of Aircraft, *supra*, § 189.

Through the treaty between the United States and Panama of March 2, 1936, which became operative on July 27, 1939,<sup>25</sup> the contracting parties recognized (subject to the provisions of articles I and X) "their joint obligation to insure the effective and continuous operation of the Canal and the preservation of its neutrality."<sup>26</sup> While it was said that the United States would continue the maintenance of the Canal for the encouragement and use of interoceanic commerce, the two Governments declared their willingness to coöperate, as far as it might be feasible for them to do so, for the purpose of insuring the full and perpetual enjoyment of the benefits of all kinds which the Canal would afford the two nations that made possible its construction, as well as all nations interested in world trade.<sup>27</sup> It was agreed, moreover, that in case of an international conflagration or the existence of any threat of aggression which would endanger the security of the Republic of Panama, or the neutrality or security of the Panama Canal, the Governments of the two Republics would take such measures of prevention and defense as they might consider necessary for the protection of their common interests; and also that any measures in safeguarding such interests, which it should appear essential to one government to take, and which might affect the territory under the jurisdiction of the other, would be the subject of consultation between the two Governments.<sup>28</sup> In these ways it was acknowledged that the voice of the Republic of Panama with respect to the Canal was to be heard.

The permanence of the isolation of the Canal from scenes of hostility, to the extent of the requirements of the Hay-Pauncefote Treaty, appears to depend technically upon the military and naval power of the United States. To this, however, must be added the influence of the moral (and possibly naval) support of Great Britain which, although unburdened by a legal obligation, must always be regarded as constituting in fact a co-guarantor. Moreover, with the consummation of the treaty of March 2, 1936, the Republic of Panama has given renewed and definite assurance of coöperation.

With the fresh alignment and uniting of the American Republics for defense as against non-American belligerents, and as revealed in the conferences at Lima in 1938, at Panama in 1939, and at Habana in 1940, there has come into being what may be described as a Pan American sense (which is believed to be shared by the Dominion of Canada) of the prime importance of safeguarding

<sup>25</sup> U. S. Treaty Series No. 945.

<sup>26</sup> Art. II, where it was added: "And consequently, if, in the event of some now unforeseen contingency, the utilization of lands or waters additional to those already employed should be in fact necessary for the maintenance, sanitation, or efficient operation of the Canal, or for its effective protection, the Governments of the United States of America and the Republic of Panama will agree upon such measures as it may be necessary to take in order to insure the maintenance, sanitation, efficient operation and effective protection of the Canal, in which the two countries are jointly and vitally interested."

<sup>27</sup> Art. I.

<sup>28</sup> Art. X.

It was acknowledged in Art. XI that "the provisions of this Treaty shall not affect the rights and obligations of either of the two High Contracting Parties under the treaties now in force between the two countries, nor be considered as a limitation, definition, restriction or restrictive interpretation of such rights and obligations, but without prejudice to the full force and effect of any provisions of this Treaty which constitute addition to, modification or abrogation of, or substitution for the provisions of previous treaties."

the Panama Canal from attack or destruction. Accordingly, the protective efforts of the United States would seem to be supported by the community of American nations, a circumstance that greatly enhances the likelihood of the success of those efforts.<sup>29</sup>

(c)

§ 198A. The Lausanne Convention Relating to the Régime of The Straits. In order to insure in The Straits freedom of transit and navigation between the Mediterranean Sea and the Black Sea "for all nations, in accordance with the principle laid down in Article 23 of the Treaty of Peace," signed on July 24, 1923, there was concluded on that date, and made a part of that treaty the Convention Relating to the Régime of The Straits.<sup>1</sup> Appropriate arrangement was made in a series of Rules in an Annex to Article 2 for freedom of navigation and passage. In time of peace, that privilege was to accrue to the benefit of various classes of both public and private vessels and aircraft, embracing those of military or naval character.<sup>2</sup> In time of war, when Turkey might be a neutral, provision was also made, under specified conditions, for the freedom of navigation and passage of all of the foregoing classes of vessels and aircraft. There was a restriction imposed upon Turkey not to interfere with navigation through The Straits, the waters of which, and the air above which, were to remain "entirely free in time of war, Turkey being neutral, just as in time of peace."<sup>3</sup> In time of war, Turkey being a belligerent, there was yielded to it the right to prevent enemy ships and aircraft, whether of public or private character, from using The Straits.<sup>4</sup> Nevertheless, such preventive measures were not to be of a nature such as to prevent the freedom of passage of neutral vessels, Turkey agreeing to provide such vessels with the necessary instruction or pilots for that purpose.<sup>5</sup>

The Convention provided for demilitarized zones on both shores of The

<sup>29</sup> See The Declaration of Lima, 1938, *supra*, § 94A; The Declaration of Panama, *infra*, § 888B; The Act of Habana and Convention of July 30, 1940, *supra*, § 94B.

§ 198A. <sup>1</sup> League of Nations, Treaty Series, No. XXVIII, 115, *Am. J.*, XVIII, Documents, 53, Hudson, Int. Legislation, No. 95.

See *Conférence de Lausanne, Documents diplomatiques*, Paris, published by the French Ministry of Foreign Affairs, 2 vols., 1923.

See, also, Fernand de Visscher, "*Le Régime Nouveau des Détroits*," *Rev. Droit Int.*, 3 sér. IV, 537 and V, 13.

<sup>2</sup> Paragraphs 1 (a) and 2 (a).

<sup>3</sup> Paragraphs 1 (b) and 2 (b).

<sup>4</sup> Paragraphs 1 (c) and 2 (c).

<sup>5</sup> *Id.*

It may be observed that freedom of navigation for private neutral vessels, embracing neutral non-military aircraft, was conditioned upon the fact that such vessels or aircraft should not assist the enemy, particularly by carrying contraband, troops or enemy nationals. It was added in this connection that: "Turkey will have the right to visit and search such vessels and aircraft, and for this purpose aircraft are to alight on the ground or on the sea in such areas as are specified and prepared for this purpose by Turkey. The rights of Turkey to apply to enemy vessels the measures allowed by international law are not affected." (*Id.*, 1 (c).)

The Rules embraced numerous appropriate supplementary provisions touching conditions of transit of various types of vessels and aircraft. See Paragraphs 3 to 6.

Straits of the Dardanelles and the Bosphorus, and with respect to specified islands in the Sea of Marmora and in the Ægean Sea.<sup>6</sup> Subject to certain provisions concerning Constantinople, it was declared that there should exist in the demilitarised zones and islands "no fortifications, no permanent artillery organisation, no submarine engines of war other than submarine vessels, no military aerial organisation, and no naval base."<sup>7</sup> No armed forces were to be stationed in those zones or islands except the police and gendarmerie forces necessary for the maintenance of order.<sup>8</sup> Moreover, in the territorial waters of those zones and islands there were to exist no submarine engines of war other than submarine vessels. Turkey, on the other hand, was to retain the right of transporting its armed forces through the demilitarised zones and islands of Turkish territory, as well as through their territorial waters, where a right of anchorage was allowed.<sup>9</sup> In the demilitarised zones and islands and in their territorial waters both Turkey and Greece were to be entitled to effect certain movements of limited personnel, and also to organize in the zones and islands in their respective territories specified systems of communication and observation. Greece was to be entitled to send her fleet into the territorial waters of the demilitarised Greek islands, but not to use those waters as a base of operations against Turkey or for any military or naval concentration for such purpose.<sup>10</sup> The installation of specified implements was forbidden in particular places.<sup>11</sup> A significant latitude was yielded to both Turkey and Greece in the declaration that if either, when a belligerent, should modify in any way the provisions of demilitarisation, it should be bound to reëstablish as soon as peace might be concluded the régime laid down in the Convention.<sup>12</sup> With the desire that the demilitarisation of The Straits and of the contiguous zones should "not constitute an unjustifiable danger to the military security of Turkey, and that no act of war should imperil the freedom of The Straits or the safety of the demilitarised zones," it was agreed that should either be imperiled by a violation of the provisions relating to freedom of passage, or by a surprise attack or some act of war or threat of war, the High Contracting Parties, "and in any case France, Great Britain, Italy, and Japan, acting in conjunction," would meet such violation, attack or other act of war or threat of war by all the means that the Council of the League of Nations might decide for that purpose.<sup>13</sup>

<sup>6</sup> Art. 4.

<sup>7</sup> Art. 6. Concerning the special provisions respecting Constantinople, see Art. 8.

<sup>8</sup> The armament of those forces was definitely limited and defined.

<sup>9</sup> Art. 6. Moreover, in so far as The Straits were concerned, the Turkish Government was to have the right to observe by means of aeroplanes or balloons both the surface and the bottom of the sea. Turkish aeroplanes were always to "be able to fly over the waters of The Straits and the demilitarized zones of Turkish territory, and will have full freedom to alight therein, either on land or on sea."

<sup>10</sup> Art. 6.

<sup>11</sup> Art. 7.

<sup>12</sup> Art. 9.

<sup>13</sup> Art. 18. It was declared that as soon as the circumstance which had necessitated such action should have ended, the régime of The Straits as laid down in the Convention should again be strictly applied.

In order to see that the provisions relating to the passage of warships and military aircraft should be properly carried out,<sup>14</sup> there was established an international commission called the "Straits Commission"<sup>15</sup> designed to exercise its functions under the auspices of the League of Nations.<sup>16</sup>

The contracting parties agreed to "use every possible endeavour to induce non-signatory Powers to accede to the present Convention."<sup>17</sup>

By the foregoing arrangement it was sought to reconcile the use of The Straits for military purposes in time of war, subject to a preponderant right of Turkey when itself a belligerent to bar transit to an enemy, with a régime designed to maintain freedom of navigation and safeguard the demilitarised zones. Even the provisions of demilitarisation were capable of modification by Turkey and also by Greece when at war. The Convention did not, therefore, seemingly exemplify a scheme of neutralization, but rather one for the protection of an international channel of water communications in the face of permitted belligerent uses that yielded a strategic advantage to a particular territorial sovereign. The arrangement was not illogical.

(d)

§ 198B. The Montreux Convention Regarding the Régime of the Straits. The Convention Regarding the Régime of the Straits signed at Montreux, July 20, 1936,<sup>1</sup> served to replace the Lausanne Convention of 1923.<sup>2</sup>

The arrangement did not register an attempt to neutralize the waters concerned. It gave expression to the desire of the contracting parties "to regulate transit and navigation in the Straits of the Dardanelles, the Sea of Marmora and the Bosphorus comprised under the general term 'Straits' in such manner as to safeguard, within the framework of Turkish security and of the security, in the Black Sea, of the riparian states, the principle enshrined in Article 23 of the Treaty of Peace signed at Lausanne on the 24th July, 1923."<sup>3</sup> There were no provisions for demilitarized zones. On the contrary, it was announced in

<sup>14</sup> Those provisions were laid down in paragraphs 2, 3, and 4 of the Annex to Article 2. See Art. 14.

<sup>15</sup> According to Article 12, the Commission was to be composed of a representative of Turkey, who should be president, and representatives of France, Great Britain, Italy, Japan, Bulgaria, Greece, Roumania, Russia, and the Serb-Croat-Slovene State, in so far as those Powers were signatories to the Convention, each of those Powers being entitled to representation as from its ratification of the Convention. The United States, in the event of acceding to the Convention, was also to be entitled to have one representative on the Commission. Under the same conditions any independent littoral States of the Black Sea not above mentioned were to possess the same right.

<sup>16</sup> Art. 15.

See Rapport de la Commission des Détroits à la Société des Nations, Année 1932, Istanbul, 1933.

<sup>17</sup> Art. 19.

§ 198B. <sup>1</sup> See *Actes de la Conférence de Montreux concernant le Régime des Détroits* (22 juin-20 juillet 1936), octobre, 1936.

See also Turkey No. 1 (1936), Cmd. 5249; *Am. J.*, XXXI, *Official Documents*, 1.

<sup>2</sup> See F. de Visscher, "*La nouvelle Régime des Détroits*," *Rev. Droit Int.*, 3 sér., XVII, 669; C. G. Fenwick, "The New Status of the Dardanelles," *Am. J.*, XXX, 701; Lauterpacht's 5 ed. of Oppenheim, I, 405-406; Georges D. Warsamy, *La Convention des Détroits* (Montreux 1936), Paris, 1937.

<sup>3</sup> Preamble.

a protocol signed on July 20, 1936, that Turkey might immediately remilitarize the zone of the Straits as defined in the preamble of the Convention.<sup>4</sup> The functions of the International Commission set up under the Convention of 1923, were, as has been noted elsewhere,<sup>5</sup> transferred to the Turkish Government.<sup>6</sup>

Recognizing and affirming "the principle of freedom of transit and navigation by sea in the Straits," and declaring that the exercise of such freedom should be regulated by the provisions of the convention,<sup>7</sup> the privileges of "merchant vessels" and "vessels of war" were in turn dealt with.<sup>8</sup>

Merchant vessels were accorded in time of peace complete freedom of transit and navigation, by day and by night, under any flag and with any kind of cargo, without any formalities, except as provided in article 3 (providing for the matter of sanitary control).<sup>9</sup> Such vessels were accorded in time of war, Turkey not being belligerent, substantially as broad privileges.<sup>10</sup> In time of war, Turkey being belligerent, merchant vessels not belonging to a country at war with Turkey were to enjoy freedom of transit and navigation on condition that they should not in any way assist the enemy. They were, however, to enter the Straits by day, and their transit was to be effected by the route which in each case should be indicated by the Turkish authorities.<sup>11</sup> Should Turkey consider itself to be threatened with imminent danger of war, the provisions of Article 2 were, nevertheless, to continue to be applied, except that vessels would be obliged to enter the Straits by day, and to have their transit effected by the route which should, in each case, be indicated by the Turkish authorities.<sup>12</sup>

<sup>4</sup> Annex IV.

<sup>5</sup> See Turkey, *supra*, § 28.

<sup>6</sup> Art. 24.

In this article it was also provided that the Turkish Government should address to the Secretary-General of the League of Nations and to the high contracting parties an annual report giving details regarding the movements of foreign vessels of war through the Straits and furnishing all information which might be of service to commerce and navigation, both by sea and by air, for which provision was made in the convention.

According to Art. 25, "Nothing in the present convention shall prejudice the rights and obligations of Turkey, or of any of the other high contracting parties members of the League of Nations, arising out of the Covenant of the League of Nations." With respect to this article, see C. G. Fenwick in *Am. J.*, XXX, 701, 704.

<sup>7</sup> Art. 1.

<sup>8</sup> See Art. 23 with reference to the undertaking of the Turkish Government to indicate air routes available for the passage of civil aircraft between the Mediterranean and the Black Sea, outside of such forbidden zones as might be established in the Straits. This article also significantly referred to the possible "remilitarization of the Straits."

<sup>9</sup> Art. 2. It was here also provided that no taxes or charges other than those authorized by Annex I to the convention should be levied by the Turkish authorities on such vessels when passing in transit without calling at a port in the Straits.

Art. 3 made careful provision for the exercise of sanitary control prescribed by Turkish law within the framework of international sanitary regulations.

<sup>10</sup> Art. 4. This article declared that such vessels, under any flag or with any kind of cargo, should enjoy freedom of transit and navigation in the Straits subject to the provisions of Articles 2 and 3. It was not stated in terms that such vessels were to enjoy the "complete" freedom that was to be the privilege of merchant vessels in time of peace, according to Art. 2. Nor was the privilege of transit "by day and by night" as set forth in Art. 2, duplicated in Art. 4.

Pilotage and towage were to "remain optional" for merchant vessels in the situations provided for in Arts. 2 and 4.

<sup>11</sup> Art. 5.

<sup>12</sup> Art. 6. Pilotage might in this case, be made obligatory, but no charge was to be levied.

According to Art. 7 the term "merchant vessels" was to apply to all vessels which were not covered by section II of the convention.

In time of peace certain categories of war vessels, whether belonging to Black Sea or non-Black Sea powers, and of whatsoever flag, were to enjoy freedom of transit, without any taxes or charges whatever, provided that transit were begun during daylight and subject to the conditions laid down in Article 13 "and the articles following thereafter." Vessels of war other than those within the categories specified were only to enjoy a right of transit under the special conditions set forth in Articles 11 and 12.<sup>13</sup> By virtue of Article 11 Black Sea powers were to enjoy the privilege of sending through the Straits capital ships of a tonnage greater than that laid down in the first paragraph of Article 14, on condition that such vessels should pass through the Straits singly, escorted by not more than two destroyers.<sup>14</sup>

The transit of vessels of war through the Straits was to be preceded by a notification given to the Turkish Government through the diplomatic channel.<sup>15</sup> The maximum aggregate tonnage of all foreign naval forces in course of transit through the Straits was not to exceed 15,000 tons except in the cases provided for in Article 11 and in Annex III to the convention.<sup>16</sup> Moreover, such naval forces were not to comprise more than nine vessels.<sup>17</sup> It was wisely provided that vessels of war in transit through the Straits should under no circumstances make use of any aircraft which they might be carrying,<sup>18</sup> and also that they should not, except in the event of damage or peril of the sea, remain therein longer than might be necessary for them to effect the passage.<sup>19</sup> The aggregate tonnage which non-Black Sea powers might have in that Sea in time of peace was not to exceed 30,000 tons, save under special conditions when the maximum might be 45,000 tons.<sup>20</sup> Moreover, the tonnage which any one non-Black Sea power might

<sup>13</sup> Art. 10.

For the purposes of the convention the definitions of vessels of war and of their specification, together with those relating to the calculation of tonnage were to be as set forth in Annex II to the convention. The wording of that Annex was taken from the London Naval Treaty of March 25, 1936.

<sup>14</sup> Art. 12 was as follows: "Black Sea Powers shall have the right to send through the Straits, for the purpose of rejoining their base, submarines constructed or purchased outside the Black Sea, provided that adequate notice of the laying down or purchase of such submarines shall have been given to Turkey.

"Submarines belonging to the said Powers shall also be entitled to pass through the Straits, to be repaired in dockyards outside the Black Sea on condition that detailed information on the matter is given to Turkey.

"In either case, the said submarines must travel by day and on the surface, and must pass through the Straits singly."

<sup>15</sup> Art. 13, which sets forth in detail the requirements as to notification.

<sup>16</sup> Art. 14.

<sup>17</sup> *Id.* The article also set forth circumstances when vessels of war should not be included in this tonnage.

<sup>18</sup> Art. 15.

<sup>19</sup> Art. 16.

According to Art. 17, nothing in the provisions of the preceding articles was to prevent a naval force of any tonnage or composition from paying a courtesy visit of limited duration to a port in the Straits, at the invitation of the Turkish Government. It was declared that any such force should leave the Straits by the same route as that by which it entered unless it fulfilled the conditions required for passage in transit as laid down by Articles 10, 14 and 18.

<sup>20</sup> Art. 18 which made elaborate provision in regard to the matter. In the same article it was declared that vessels of war belonging to non-Black Sea powers should not remain in the Black Sea more than twenty-one days, whatever might be the object of their presence there.

have in that Sea was to be limited to two-thirds of the aggregate tonnage provided for such powers.<sup>21</sup>

In time of war, Turkey not being belligerent, vessels of war were to enjoy complete freedom of transit and navigation under the same conditions as those laid down under Articles 10 to 18.<sup>22</sup> It was provided, however, that belligerent vessels of war should not pass through the Straits except in cases arising out of the application of Article 25 of the convention, and in cases of assistance rendered to a State victim of aggression in virtue of a treaty of mutual assistance binding Turkey, concluded within the framework of the Covenant of the League of Nations, and registered and published in accordance with the provisions of Article 18 of the Covenant.<sup>23</sup> Belligerent vessels of war were, moreover, forbidden to make any capture, to exercise the right of visit and search, or to carry out any hostile act in the Straits.<sup>24</sup>

In time of war, Turkey being a belligerent, the provisions of Articles 10 to 18 were not to be applicable; the passage of vessels of war was to be left entirely to the discretion of the Turkish Government.<sup>25</sup> A like privilege was conferred upon Turkey if it considered itself to be threatened with imminent danger of war, subject to the condition subsequent that if the Council of the League of Nations by a majority decision of two-thirds, together with a majority of the contracting parties signatories to the convention, should conclude that the measures taken by Turkey were not justified, they should be discontinued (as well as any measures which might have been taken under Article 6 of the convention).<sup>26</sup> Here was more than a technical check upon the freedom of the Turkish sovereign in case it regarded itself as threatened with imminent danger of war.<sup>27</sup>

The provisions of the Montreux Convention are self-explanatory, standing out in sharp contrast to those of the Lausanne Convention of 1923. They mark a vast concession to the Turkish Republic which, subject to, and notwithstanding deference for undertakings under the Covenant of the League of Nations, finds itself more than the administrative master of the Straits.

<sup>21</sup> *Id.*

<sup>22</sup> Art. 19.

<sup>23</sup> In the exceptional cases thus provided for, the limitations laid down in Articles 10 to 18 were not to be applicable. *Id.* In the same Article it was declared that notwithstanding the prohibition of passage laid down in paragraph 2 of the Article, vessels of war, belonging to belligerent powers whether they were Black Sea powers or not, which should become separated from their bases might return thereto.

See in this connection Lauterpacht's 5 ed. of Oppenheim, I, 405, footnote 3.

<sup>24</sup> Art. 19.

<sup>25</sup> Art. 20.

<sup>26</sup> Art. 21. The Article contained other provisions with reference to the exercise of the privilege referred to. It was declared, moreover, that should the Turkish Government make use of the powers conferred by the first paragraph of the Article, due notification should be addressed to the other contracting parties and to the Secretary-General of the League of Nations.

According to Art. 22 vessels of war were under certain conditions to make their passage through the Straits in quarantine, and to apply by the means on board such prophylactic measures as might be necessary in order to prevent any possibility of the Straits being infected.

<sup>27</sup> General and miscellaneous provisions were embraced in Section IV of the convention, comprising Articles 24-29.



## c

## The Supremacy of the Territorial Sovereign Over the National Domain

### (1)

§ 199. **In General.** States are agreed that within the national domain the will of the territorial sovereign is supreme. That will must, therefore, be exclusive, opposing the assertion of any other, and excluding the lawfulness of obedience to the commands of such other. There can be no conflict of right in the matter.<sup>1</sup>

In the application of this principle international differences frequently arise in cases where it is believed that the territorial sovereign has abused its rights as such, or where it is contended conversely, that within the national domain some public foreign agency has committed acts in derogation of the rights of that sovereign. Controversies also arise as to the extent to which a State has, for any reason, consented to relax its right of exclusive control in favor of a foreign power. It will be observed that in all of these situations the particular problem concerns the relation of the territorial sovereign to a foreign State or its nationals by reason of conduct or occurrences taking place within the domain of the former. This is true whether the acts complained of have been committed by that sovereign or by some foreign individual or agency in opposition to its will.<sup>2</sup>

Thus a State may eject at will alien bands of marauders or settlers who defy its boundaries and seek to establish themselves within its domain or commit

§ 199. <sup>1</sup>See Mr. Jefferson, Secy. of State, to M. Genêt, Minister of France, June 5, 1793, Am. St. Pap., For. Rel., I, 150. Also, *infra*, § 844.

Said Hall: "And it being a necessary result of independence that the will of the state shall be exclusive over its territory, it also asserts authority as a general rule over all persons and things, and decides what acts shall or shall not be done, within its dominion." Higgins' 8 ed., p. 56.

Declared Huber, Sole Arbitrator, in his award in the Island of Palmas Arbitration, April 4, 1928: "The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations. . . . Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State." (Am. J., XXII, 867, 875-876.)

"One of the foremost principles of international law is that the sovereign authority of the State is supreme over all persons and over all things within the limits of its jurisdiction." (Sir Cecil J. B. Hurst in *Brit. Y.B.*, 1929, 3.)

See Rights of Jurisdiction, In General, *infra*, § 218.

According to Art. 5 of the convention of friendship and economic coöperation between Japan and the Union of Soviet Socialist Republics of Jan. 20, 1925: "The high contracting parties solemnly affirm their desire and intention to live in peace and amity with each other, scrupulously to respect the undoubted right of a State to order its own life within its own jurisdiction in its own way, to refrain and restrain all persons in any governmental service for them, and all organisations in receipt of any financial assistance from them, from any act, overt or covert, liable in any way whatever to endanger the order and security in any part of the territories of Japan or the Union of Soviet Socialist Republics." (Brit. and For. St. Pap., CXXII, 896.)

<sup>2</sup>In seasons of war, it will be found that a State, whether or not a participant in the conflict, may find special occasion, in the course of the exercise of supremacy within its own domain, to exert control over foreign-owned property therein. See *infra*, §§ 618-624; 630-637A.

depredations therein.<sup>3</sup> Accordingly, it may fairly resent as a grave menace to its territorial integrity any effort on the part of the State to which such aliens belong, to oppose their ejection, or to support or utilize their presence in the invaded territory for the purpose of causing the revision of a treaty establishing the boundary which they have held in contempt. The Government of Colombia was on solid ground when in 1932 and 1933, it invoked the foregoing principle in opposition to that of Peru in the affair growing out of the incursion of Peruvian nationals at Leticia, on September 1, 1932.<sup>4</sup> Nor did the efforts made by Brazil, the United States, or the Council of the League of Nations, to avert armed conflict in the area concerned deny the correctness in this regard of the Colombian stand.<sup>5</sup>

## (2)

## ACTS IN DEROGATION OF THE SUPREMACY OF THE TERRITORIAL SOVEREIGN

## (a)

§ 200. **Generally Illustrative Instances.** Any act committed within the territory of a State in obedience to the command of a foreign power and contrary to the will of the territorial sovereign marks contempt for its supremacy therein.<sup>1</sup> Thus, the operations or movements of foreign military or naval forces

<sup>3</sup> That the treaty of commerce and navigation concluded by the United States and Japan, Nov. 22, 1894 (Malloy's Treaties, I, 1028), did not preclude forcible efforts of guards of the United States on the Pribilof Islands to eject armed Japanese persons while there taking or killing seals was the opinion of the Attorney General of the United States, April 15, 1908. See 26 Op. Att. Gen. 587. See also Hackworth, Dig., II, 4.

<sup>4</sup> See Memorandum by Dr. F. L. Torrijos, Colombian Minister to the United States, "relative to the various International Treaties on Boundaries that affect Colombia's definite position with respect to its boundary lines with Peru," of Oct. 1, 1932.

<sup>5</sup> Cf. Memorandum submitted by Dr. V. M. Maúrtua, in behalf of the Peruvian Government, to the "Permanent Committee of Washington" (Dr. D. J. Varela, Chairman), Nov. 9, 1932.

<sup>6</sup> Declared Mr. Stimson, Secy. of State, in the course of a communication to the Minister of Foreign Affairs of Peru, Jan. 25, 1933: "For if it were conceivable that Peru was seeking to obtain her desire to modify the treaty of 1922 not by pacific means but by a forcible and armed support of the illegal occupation of Leticia, would such a position not be entirely contrary to the provisions of the Kellogg-Briand Pact, which provides that no solution of a controversy shall be sought except by pacific means?" *New York Times*, Jan. 26, 1933, p. 8.

Cf. Dr. J. M. Manzanilla, Peruvian Minister of Foreign Relations, to Mr. Stimson, Secy. of State, Jan. 27, 1933, *New York Times*, Jan. 29, 1933, Part I, p. 5.

Declared the President of the Council of the League of Nations in the course of a telegram addressed to the Peruvian Government, Jan. 26, 1933: "The Council . . . feels bound to draw the attention of the Peruvian Government to the fact that it is the duty of Peru as a member of the League to refrain from any intervention by force on Colombian territory, and to insure that all necessary instructions be given to the Peruvian Commanders concerned to the effect that the military forces of Peru should take no action beyond the defense of Peruvian territory and not to hinder the Colombian authorities from the exercise of full sovereignty and jurisdiction in territory recognized by treaty to belong to Colombia." (*New York Times*, Jan. 27, 1933, p. 11.)

See also, Don Luis Anderson, *El Incidente entre Colombia y El Perú con motivo de los acontecimientos de Leticia*, San José, Costa Rica, 1933.

Concerning the final adjustment of the controversy, see Hackworth, Dig., I, 752-754, and documents there cited.

§ 200.<sup>1</sup> Mr. Jefferson, Secy. of State, to Mr. Ternant, French Minister, May 15, 1793, denouncing as contrary to the law of nations the condemnation by the French Consul at Charleston of a British vessel captured by a French frigate. Am. State Pap., For. Rel., I, 147-148. See, also, *The Apollon*, 9 Wheat. 362.

within the territory of a State, or directed against the occupants thereof from a position outside of the national domain, normally constitute a serious invasion of the rights of the territorial sovereign. The United States has always so regarded the acts of such foreign agencies when they have been heedless of the inviolability of American territory;<sup>2</sup> and it has on occasion deplored the commission by its own forces of acts manifesting like heedlessness of the inviolability of foreign territory.<sup>3</sup>

The arrest in March, 1920, by American officers of a citizen of the United States while on board of an American motorboat in British territorial waters off the Bahama Islands, and the forcible removal of him from the Bimini Islands were disavowed by the Department of State which made appropriate expression of regret.<sup>4</sup> Again, in 1927, the action of the commander of an American Coast Guard vessel in taking into and removing from British territorial waters two American liquor-laden vessels which had been seized on the high seas together with their cargoes, was productive of an expression of regret to the British Government and of other undertakings that were appropriate in the premises.<sup>5</sup>

Obviously, the pursuit and arrest of deserters within the national domain by foreign expeditions without the consent of the local authorities is necessarily looked upon with disapproval.<sup>6</sup>

<sup>2</sup> Mr. Clay, Secy. of State, to Mr. Vaughan, British Minister, Feb. 18, 1828, MS. Notes For. Leg., III, 430, Moore, Dig., II, 4; Mr. Buchanan, Secy. of State, to Mr. Wise, Minister to Brazil, Sept. 27, 1845, MS. Inst. Brazil, XV, 119, Moore, Dig., II, 4; Mr. Forsyth, Secy. of State, to Mr. La Branche, Chargé d'Affaires to Texas, Jan. 8, 1839, MS. Inst. Texas, I, 15, Moore, Dig., II, 363; Mr. Wilson, Acting Secy. of State, to the Mexican Ambassador, March 9, 1911, For. Rel. 1911, 419; Mr. Knox, Secy. of State, to the Mexican Chargé d'Affaires, April 10, 1911, *id.*, 453.

"Indeed, as you know, I have already declined, without Mexican consent, to order a troop of Cavalry to protect the breakwater we are constructing just across the border in Mexico at the mouth of the Colorado River to save the Imperial Valley, although the insurgents had scattered the Mexican troops and were taking our horses and supplies and frightening our workmen away." President Taft, Annual Message, Dec. 7, 1911, *id.*, XII. President Taft announced the purpose, however, to be in such a position that when danger to American lives and property in Mexico threatened, and the existing government was rendered helpless by the insurrection, he could "promptly execute congressional orders to protect them, with effect."

The American-Mexican frontier long proved to be the scene of activities that gave rise to controversy growing out of the applicability of the underlying principle. See documents in For. Rel. 1911, 419-525; For. Rel. 1912, 724-727; For. Rel. 1913, 692-755; For. Rel. 1914, 649-655; For. Rel. 1915, 786-821; For. Rel. 1918, 548-576; For. Rel. 1919, Vol. II, 555-565. See also Hackworth, Dig., II, 282.

See The Pursuit of Villa, 1916, *supra*, § 67.

<sup>3</sup> Mr. Monroe, Secy. of State, to the Chevalier de Onis, Spanish Minister, Feb. 7, 1816, MS. Notes to For. Leg., II, 128, Moore, Dig., II, 362; Mr. Seward, Secy. of State, to Mr. Welles, Secy. of the Navy, Aug. 4, 1862, 58 MS. Dom. Let. 15, Moore, Dig., II, 363.

Concerning certain general orders in 1864, of Major-General Dix, U. S. A., relative to the pursuit into Canada of a band of persons which had raided St. Albans, Vermont, see Moore, Dig., II, 367-368.

In cases of the accidental killing or injury by public vessels of the United States within the territorial waters of foreign States, of citizens of such States, ample indemnities have been paid and full apologies expressed. See President Jackson, special message to Congress, June 18, 1834, H. Ex. Doc. 492, 23 Cong., 1 Sess., Moore, Dig., II, 369. See, also, For. Rel. 1889, 547-549, relative to consequences of target practice in 1887, of the U.S.S. *Omaha*, while in Japanese water, Moore, Dig., II, 369.

<sup>4</sup> Mr. Colby, Secy. of State, to the British Ambassador at Washington, June 10, 1920, Hackworth, Dig., I, 624.

<sup>5</sup> See statement in Hackworth, Dig., I, 625, and documents there cited.

<sup>6</sup> Mr. Monroe, Secy. of State, to Mr. Baker, Dec. 6, 1815, MS. Notes For. Leg., II, 113,

Foreign civil officials are bound to respect the same principle. Thus they cannot lawfully, without the consent of the territorial sovereign, make an arrest within its domain,<sup>7</sup> or rescue any one from the custody of its officials,<sup>8</sup> or take to, or detain therein, any person however lawfully arrested within the territory of their own State.<sup>9</sup> Embraced within this obligation is the duty not to induce by false pretenses an individual to accompany an officer from foreign territory into that of the country of which the officer is an official with the intent of there arresting him; and if the arrest takes place as an incident of criminal prosecution, the series of acts marks an abuse of jurisdiction which engages the responsibility of the prosecuting State.<sup>10</sup> Nor does a State fare better when by any process or through any instrumentality, persons are kidnapped on foreign soil and brought within the national domain and effort is made there to retain custody of the victims.<sup>11</sup> It should be clear that private individuals cannot lawfully enter and remove from the territory of a foreign State, without its consent, the person of any individual found therein.<sup>12</sup>

The exercise of certain administrative functions by foreign civil agents is regarded as likewise inconsistent with the lodgment of supreme control in the territorial sovereign. The practice of Russian consuls in the United States of subjecting to certain invidious discriminations American citizens of Jewish faith, by refusing to *visé* their passports, was described by President Cleveland in 1895, as "an obnoxious invasion of our territorial jurisdiction."<sup>13</sup> It may be noted that Germany, in 1895, regarded with disapproval the authorization by

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Moore, Dig., II, 362; Mr. Seward, Secy. of State, to Mr. Stanton, Secy. of War, April 15, 1863, 60 MS. Dom. Let. 231, Moore, Dig., II, 370; Case of incursion in 1888, from Mexico into Texas of armed force to arrest Antanacio Luis, an alleged deserter, described in Moore, Dig., II, 371, and documents there cited.

<sup>7</sup> Mr. Bayard, Secy. of State, to Mr. Manning, Minister to Mexico, Feb. 26, 1887, MS. Inst. Mexico, XXI, 646, Moore, Dig., II, 373; Nogales Case, 1893, For. Rel. 1893, 457, 471, *id.*, 1896, 439-454, Moore, Dig., II, 380; Mr. Hay, Secy. of State, to Sir Julian Pauncefote, British Ambassador, Jan. 21, 1899, MS. Notes to British Legation, XXIV, 427, Moore, Dig., II, 381.

<sup>8</sup> Nogales Case, 1887, described in Moore, Dig., II, 376-379, and documents there cited from For. Rel. 1887 and 1888, Part II.

<sup>9</sup> Case of Peter Martin, For. Rel. 1877, 266, Brit. and For. State Pap., LXVIII, 1223, Moore, Dig., II, 371-373.

<sup>10</sup> See Case of Guillermo Colonje v. United States, American and Panamanian General Claims Arbitration under conventions of 1926 and 1932, Hunt's Report, 746.

<sup>11</sup> See instances set forth in Hackworth, Dig., II, 309, among them being the kidnapping of L. F. Converse and E. M. Blatt on American soil by Mexican citizens in February, 1911, and their conveyance across the Rio Grande to Mexican territory, "where, apparently awaiting the kidnappers' return, were Mexican soldiers whose commanding officer appeared to be directing the kidnappers' work." Also, For. Rel. 1911, 605-614.

See also For. Rel. 1914, 900-904, concerning the kidnapping of Samuel Cantú, a Mexican citizen, on American territory by Mexican officers.

See case of Ricardo Bermudez, "a Panamanian citizen," who "was arrested by Canal Zone police at Las Sabanas in the Republic of Panama and brought back to the Canal Zone charged with conspiracy to defraud the United States Government under section 37 of the United States Criminal Code," Hackworth, Dig., II, 311.

<sup>12</sup> Case of Madeline His, For. Rel. 1894, 646-675, Moore, Dig., II, 384-389, and documents there cited.

<sup>13</sup> President Cleveland, Annual Message, Dec. 2, 1895, For. Rel. 1895, I, xxxii, Moore, Dig., II, 10. See, also, correspondence between the United States and Russia, 1893, For. Rel. 1893, 547 and 548; and in 1895, For. Rel. 1895, II, 1056-1074, especially Mr. Adee, Acting Secy. of State, to Mr. Breckinridge, Minister to Russia, Aug. 22, 1895, For. Rel. 1895, II, 1067. The more important of the foregoing documents are contained in Moore, Dig., II, 8-13.

the United States of its own officials to inspect or order the disinfection in German ports of foreign vessels bound for the United States.<sup>14</sup> In 1906, Secretary Root declared it to be highly improper for the Consulate General of China to issue any proclamation at all in the territory of the United States without the express consent of the Government of the United States. He declared that the issuance of a particular proclamation "was an exercise of, or an attempt to exercise, official governmental authority, independently of our Government, over a body of people residing within our territory."<sup>15</sup>

Through an Act approved July 3, 1926, the Congress did not hesitate to impose upon an American consul in a foreign country the duty there to serve a subpoena upon a citizen of the United States or a person domiciled therein, who might be desired as a witness in a criminal case in the United States.<sup>16</sup> The Supreme Court of the United States declared by way of dictum in 1932, that "the mere giving of such a notice to the citizen in the foreign country of the requirement of his government that he shall return is in no sense an invasion of any right of the foreign government; and the citizen has no standing to invoke any such supposed right."<sup>17</sup>

The Department of State has on occasion instructed American consular officers to serve processes upon persons within their consular districts;<sup>18</sup> and, conversely, it has not regarded the efforts of foreign countries to take like action by similar means within the territorial domain of the United States as necessarily at variance with a legal duty towards the nation.<sup>19</sup>

<sup>14</sup> Declared Mr. Gresham, Secy. of State, to Baron Saurma, German Ambassador, Jan. 26, 1895: "This Government does not claim that under any treaty or the rules of international law it can authorize its officers to inspect foreign vessels or order their disinfection in German ports, or to administer oaths to officers of foreign ships within the jurisdiction of the German Empire" For. Rel. 1895, I, 513, 514; Moore, Dig., II, 13-14. Compare, however, Art. XXVI of treaty of friendship, commerce and consular rights with Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4201.

See, also, For. Rel. 1904, 519-521, concerning the unwillingness of the Netherlands to permit the United States to station officers at certain ports to conduct medical examinations under the Act of Congress of March 3, 1903. Concerning the attitude of Austria-Hungary, *id.*, 1904, 92-94.

"In 1936, the Colombian Government gave permission to the United States Post Office Department to assign a small force to distribute and make up air mails at Barranquilla, Colombia." (Hackworth, Dig., II, 313, citing Mr. Phillips, Acting Secy. of State, to the Legation in Colombia, telegram 26, June 24, 1936, and Mr. Hull, Secy. of State, to Postmaster General Farley, July 2, 1936.)

<sup>15</sup> He added: "The recognition of a consul carries with it no such authority, and a repetition of the attempt to exercise it can not be permitted." (Hackworth, Dig., II, 315, citing Mr. Root, Secy. of State, to the Chinese Minister, May 28, 1906.)

<sup>16</sup> 44 Stat. 835.

<sup>17</sup> *Blackmer v. United States*, 284 U. S. 421, 439.

See objections made by the German Government in 1908, to the exercise by an American commissioner of deeds of his functions in German territory, as set forth in communication from Mr. Tower, American Ambassador at Berlin, to Mr. Root, Secy. of State, March 5, 1908, Hackworth, Dig., II, 313.

<sup>18</sup> See Mr. Carr, Assist. Secy. of State, to Consul Leonard, Dec. 4, 1926, Hackworth, Dig., II, 121; Mr. Carr, Assist. Secy. of State, to Consul General Byington, Feb. 7, 1928, Hackworth, Dig., II, 122.

See also Mr. Hull, Secy. of State, to Senator Nye, Aug. 21, 1935, Hackworth, Dig., II, 123.

<sup>19</sup> See Mr. Adee, Second Assist. Secy. of State, to Mr. Ralph Pierson, March 21, 1908, Hackworth, Dig., II, 119.

"With respect to the service of documents on Soviet nationals in the United States in connection with cases pending in courts in the Soviet Union, my Government has informed

## (b)

§ 201. **The Passage of Foreign Forces.** When, in times of peace, a passage through the territory of a particular State is sought for reasons of convenience in behalf of a foreign military force, the permission of the territorial sovereign is requested and oftentimes granted.<sup>1</sup> The presence of such forces at international exhibitions or on social occasions within American territory has been a frequent occurrence.<sup>2</sup> Consent by the United States to the entering of a foreign force into the territory of any State of the Union is commonly conditioned upon that also of the particular Commonwealth concerned.<sup>3</sup>

In January, 1924, the Mexican Government requested the permission of that of the United States for the passage of a detachment of the Mexican Army with the animals and other material usually accompanying such a force, from Naco, Arizona, to some point in Texas where the detachment would reënter Mexican territory for service in regions in that country where American lives and interests were being threatened with danger by forces in insurrection. It was declared that these troops would not be armed, but that their arms and ammunition would accompany them as baggage. The Department of State transmitted the request to the Governors of Arizona, New Mexico and Texas,

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me that, while it cannot undertake to obligate courts or officials in the United States, no restrictions are known to exist upon the service of such documents without the application of coercion by Soviet diplomatic and consular officers in the United States." (Note of Mr. Bullitt, American Ambassador at Moscow, to the People's Commissar for Foreign Affairs, Nov. 22, 1935, forming part of an agreement concerning the Execution of Letters Rogatory, effected by an exchange of notes between the American and Soviet Governments on that date, U. S. Executive Agreement Series, No. 83.)

§ 201.<sup>1</sup> See, for example, Mr. Seward, Secy. of State, to Governor Washburne, of Maine, Jan. 17, 1862, 56 Dom. Let. 211, Moore, Dig., II, 390; Mr. Cadwalader, Acting Secy. of State, to Mr. Cameron, Secy. of War, Oct. 20, 1876, 115 MS. Dom. Let. 502, Moore, Dig., II, 392; Mr. Bayard, Secy. of State, to the Secy. of War, April 16, 1885, 155 MS. Dom. Let. 120, Moore, Dig., II, 393; correspondence in For. Rel. 1897, 325-326; *id.*, 1898, 358-363, relative to passage of Alaskan Relief Expedition through Canadian territory, Moore, Dig., II, 393-395.

See, in this connection, refusal of the United States while a neutral, to permit, in 1915, the passage of certain Canadian troops through the State of Maine. For. Rel. 1915, Supp., 774-776.

<sup>2</sup> Mr. Foster, Secy. of State, to Mr. Patenôtre, French Minister, Dec. 17, 1892, MS. Notes to France, X, 263, Moore, Dig., II, 395.

<sup>3</sup> Mr. Seward, Secy. of State, to Governor Washburne, of Maine, Jan. 17, 1862, 56 Dom. Let. 211, Moore, Dig., II, 390; Mr. Foster, Secy. of State, to the Governor of Illinois, July 5, 1892, 187 MS. Dom. Let. 142, Moore, Dig., II, 395; Mr. Hill, Asst. Secy. of State, to Mr. Buchanan, President of the Pan-American Exposition, Jan. 14, 1901, 250, MS. Dom. Let. 217, Moore, Dig., II, 396; Mr. Knox, Secy. of State, to the Mexican Ambassador, June 7, 1911, For. Rel. 1911, 503.

Concerning the jurisdiction of a State over foreign forces permitted to enter its territory, *infra*, § 247.

Concerning the transit of reservists from Canada across the territory of the United States in August, 1914, see Mr. Bryan, Secy. of State, to the American Consul General at Vancouver, Aug. 13, 1914, For. Rel. 1914, Supp., 564.

See Department of State Press Release, July 5, 1928, in relation to the permission granted by the Governors of North Carolina, Louisiana and Georgia, for a desired flight over the territories of their respective Commonwealths by a military airplane without armament, owned by the Colombian Government and piloted by Aviation Lieutenant Daza of the Colombian Army.

See arrangement between the United States and Canada, effected by exchange of notes on March 7, April 5 and June 22, 1939, concerning visits in uniform by individual members of defense forces, U. S. Executive Agreement Series, No. 157.

and received from each assurances of acquiescence. Accordingly, on January 19, 1924, the Mexican Embassy at Washington was informed that permission had been granted to the Mexican troops to proceed over American soil from Naco to El Paso or Laredo, Texas, under the conditions above stated.<sup>4</sup> On January 30, 1924, the Mexican Government requested permission to transport approximately two thousand additional Mexican soldiers from Naco to El Paso, for a purpose similar to that set forth in the earlier request. This request was likewise communicated to the Governors of Texas, New Mexico and Arizona. Upon receipt of assurances of their acquiescence, the desired permission was granted by the Government of the United States on February 1, 1924.

That no military aircraft of a State shall fly over the territory of another or land thereon without its authorization is a sound proposition that pays due deference to the supremacy of the territorial sovereign. It has been exemplified in the statutory law of the United States,<sup>5</sup> as well as elsewhere.<sup>6</sup>

When in the course of a domestic disturbance members of opposing forces seek refuge within the territory of a neighboring State, that State is normally free to determine the disposition to be made of such individuals as are permitted to enter its domain.<sup>7</sup> It should be observed that by Article I of the Convention in regard to the Duties and Rights of States in the Event of Civil Strife concluded at Habana, February 20, 1928, the contracting parties bound themselves to disarm and intern every rebel force crossing their boundaries, the expenses of internment to be borne by the State where public order might have been disturbed. It was also agreed that the arms found in the hands of the rebels might be seized and withdrawn by the country granting asylum, to be returned, however, at the termination of the conflict, to the State in civil strife.<sup>8</sup>

(c)

**§ 202. The Landing of Foreign Forces.** Respect for the inviolability of the territory of a State rests on the theory that it possesses the power and will to exercise control therein, and to a degree sufficient to assure the administration of justice, in a broad sense, throughout the national domain. Even countries not dealt with as full members of the family of nations, are held accountable for the possession of such power and disposition. When States are not found wanting in this regard, the United States is not disposed to sanction the use within their borders of its own public forces for the advancement or benefit of Ameri-

<sup>4</sup> See For. Rel. 1924, Vol. II, 431.

<sup>5</sup> See Section 6(a) of the Air Commerce Act of 1926, 44 Stat. 568, 572.

See also section 402(a) of the Civil Aeronautics Act of 1938, approved June 23, 1938, 52 Stat. 991, 49 U.S.C.A. § 482, in relation to permits to foreign air carriers from the Civil Aeronautics Authority.

See instances of foreign aeroplanes invading American or Mexican territory given in Hackworth, Dig., II, 304.

<sup>6</sup> See, for example, Art. 32 of Convention for the Regulation of Aerial Navigation, signed at Paris, Oct. 13, 1919, U. S. Treaty Vol. III, 3778.

<sup>7</sup> See terms of informal understanding reached by the Departments of State, Justice, Labor and War, in 1929, concerning the disposition to be made of Mexican Federal and rebel troops entering the United States, Hackworth, Dig., II, 304, citing Mr. Clark, Acting Secy of State to the Attorney General, May 4, 1929.

<sup>8</sup> U. S. Treaty Vol. IV, 4725, 4727.

can interests.<sup>1</sup> When, however, in any country, the safety of foreigners in their persons and property is jeopardized by the impotence or indisposition of the territorial sovereign to afford adequate protection, the landing or entrance of a foreign public force of the State to which such nationals belong, is to be anticipated.<sup>2</sup> Justification is to be found in the circumstance that such conduct is designed primarily to assure the performance of certain functions of government, the continued non-performance of which would produce an irreparable injury to persons entitled to demand protection from the local authorities.<sup>3</sup>

The United States has not hesitated to act upon this principle.<sup>4</sup> A notable instance occurred in China in 1900. That country was then at peace with the several foreign powers, including the United States. In the Northern Provinces of the Empire, in the course of the so-called "Boxer" movement, there occurred unprecedented disturbances against foreign life and property. As early as May 26, the American Minister had been authorized to arrange with the American Admiral for legation guards. On May 31, some 350 guards — American, English, Russian, French, Japanese and Italian — arrived at Peking. On June 11, Mr. Sugiyama, Chancellor of the Japanese Legation, was killed by regular Chinese troops. On June 20, Baron von Ketteler, the German Minister, was murdered by soldiers of the Imperial Chinese Army in pursuance of orders of their superiors. From that day until August 14, the several foreign legations were constantly attacked and besieged by forces comprising in part regular troops, under orders from the Imperial authority. In several provinces foreigners were murdered, tortured or attacked. In Peking the foreign cemeteries were desecrated, in some cases the graves being opened and the remains scattered abroad. An international expedition composed of troops of the several Powers was duly

§ 202. <sup>1</sup> Mr. Adee, Acting Secy. of State, to Mr. Sill, Minister to Korea, July 8, 1895, MS. Inst. Korea, I, 537, Moore, Dig., II, 401; Mr. Hay, Secy. of State, to the Chinese Minister, June 22, 1900, For. Rel. 1900, 274, Moore, Dig., V, 479, in reply to the memorandum of the Chinese Minister of June 22, 1900, For. Rel. 1900, 273.

<sup>2</sup> It has been observed that on grounds of self-defense, and with no political design foreign forces may, under certain circumstances, not unlawfully penetrate the territory of a State. See certain Non-Political Acts of Self-Defense, *supra*, §§ 65-68. The situations here considered are those which are not only non-political and not savoring of intervention, but which are also not illustrative of attempts to defend the safety of the territory of a State from foreign activities injurious to it. The instances described in the text are cases where the object of the foreign force entering the national domain is to safeguard persons or property found or established therein. Thus the forcible according of protection is to defend persons or things regarded as foreign to the territorial sovereign, but which have for the time being no immediate connection with the territory of the State whose force is employed to shield them. The activities which are observed illustrate the strength of the connection between a State and its nationals and their property in a foreign land, when abnormal conditions prevail therein.

<sup>3</sup> See memorandum on the Right to Protect Citizens in Foreign Countries by Landing Forces, by J. R. Clark, Jr., Solicitor of Department of State, of Oct. 5, 1912, Second Revised Edition, 1929; also Appendix giving chronological list of occasions on which the Government of the United States had taken action by force for the protection of American interests; including certain instances in which similar action had been taken by other governments in behalf of their nationals.

<sup>4</sup> Mr. Toucey, Secy. of Navy, to Captain Jarvis, U. S. S. *Savannah*, March 13, 1860, S. Ex. Doc. 29, 36 Cong., 1 Sess., Moore, Dig., II, 400; President McKinley, Annual Message, Dec. 5, 1899, For. Rel. 1899, XVIII, Moore, Dig., II, 401; Mr. Hill, Acting Secy. of State to the Secy. of the Navy, Sept. 11, 1900, 247 MS. Dom. Let. 597, Moore, Dig., II, 401. Compare Mr. Hay, Secy. of State, to Mr. Merry, Minister to Central America, March 3, 1899, For. Rel. 1899, 554.



sent to raise the siege of that city. This was accomplished after overcoming the constant resistance of the Chinese forces.<sup>5</sup>

For numerous other kindred purposes, American forces frequently have been landed on foreign territory. Such action has been taken in areas of which the territorial sovereign was or was not familiar with the full requirements of civilization as tested by the standards prevailing in the international society.<sup>6</sup> It has also been taken in order to protect American life and property within the territory of countries quite familiar with those requirements, and at times as a means of assuring fulfillment of treaty obligations.<sup>7</sup>

In January 1934, disturbances in Fukien Province in China led to the landing of American Marines in the disaffected area as a means of according a protection not otherwise available.<sup>8</sup> Moreover, there have been instances where the landing of American forces was accompanied by, or resulted in, the infliction of penalties upon individuals deemed to be responsible for injuries or loss of life sustained by American residents.<sup>9</sup>

<sup>5</sup> President McKinley, Annual Message, Dec. 3, 1900, For. Rel. 1900, XI-XVI; edicts and decrees of the Empress Dowager, *id.*, 1900, 85, 168, 169, 170, 172; communications of Mr. Conger, American Minister, to Mr. Hay, Secy. of State, *id.*, 1900, 144, 151, 159, 161-169, 190; joint note of the Allied Powers, Dec. 22, 1900, *id.*, 244; *id.*, 132. An abstract of the more important American documents relative to the disturbances in China during the "Boxer" movement is contained in Moore, Dig., V, 476-493.

The position of the United States in acting concurrently with the other Powers was set forth in a notable circular despatch of Mr. Hay, Secy. of State, July 3, 1900, in which he said in part: "The purpose of the President is, as it has been heretofore, to act concurrently with the other powers; first, in opening up communication with Peking and rescuing the American officials, missionaries, and other Americans who are in danger; secondly, in affording all possible protection everywhere in China to American life and property; thirdly, in guarding and protecting all legitimate American interests; and, fourthly, in aiding to prevent a spread of the disorders to the other provinces of the Empire and a recurrence of such disasters. It is, of course, too early to forecast the means of attaining this last result; but the policy of the government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire." For. Rel. 1900, 299, Moore, Dig., V, 481, 482.

The text of the final protocol of Sept. 7, 1901, between the Allied Powers, on the one hand, and China, on the other, is contained in Malloy's Treaties, II, 2006. See Intervention, The Conduct of the United States, *supra*, § 83; William Roscoe Thayer, Life and Letters of John Hay, Boston, 1915, II, Chap. XXVI.

<sup>6</sup> See The Protection of Backward Communities or of Countries of Unique Civilization, *supra*, § 25.

See cases of the landing of American forces to protect American interests in Nicaragua in 1910, For. Rel. 1910, 749-754; also case of the landing of such forces in Honduras, 1910-1911, as set forth in Appendix to Memorandum of J. R. Clark, Jr., Solicitor of Department of State, 1929 ed., 77-78, with documents there quoted. The situation is somewhat meagerly set forth in For. Rel. 1911, 295-305.

See, also, Nicaragua, *supra*, §§ 23 and 82D.

<sup>7</sup> Numerous instances are recorded in Hackworth, Dig., II, § 154, embracing a résumé of "incidents relating to the use of armed forces of the United States during the years 1912-1927 for the protection of the lives and property of American citizens in foreign countries or in the fulfillment of its treaty obligations with respect to certain countries, submitted to Representative Strong by the Department of State on February 28, 1928," citing Mr. Kellogg, Secy. of State, to Representative Strong, Feb. 28, 1928, *id.*, 330.

<sup>8</sup> According to an Associated Press dispatch from Foochow, China, of Jan. 15, 1934, published in the *New York Times* of like date, Commander Reinicke of the U.S.S. *Tulsa*, in pursuance of a request by Mr. Burke, American Vice Consul, landed a naval force at Foochow for the protection of American residents in that place who were endangered by the conflict between the Nationalist Government and forces there in rebellion against it.

<sup>9</sup> See, for example, punishment of natives in Formosa, in 1867, by a naval force under

The landing of American forces has, however, oftentimes been productive of intervention, as where the effort to protect American life and property has assumed a form that has been identified with and difficult to distinguish from, direct participation in a domestic conflict being waged for the control of the reins of government.<sup>10</sup> Again, such action has at times been incidental to the taking of reprisals.<sup>11</sup> The point to be observed is that the landing of foreign forces, whether American or any other, is a form of conduct of which the lawfulness in the particular case may be dependent upon the existence of special considerations. It must be looked upon as conduct which at least normally has a sinister aspect because of its seeming contempt for the supremacy of the territorial sovereign within its own domain. Nevertheless, a policy that would encourage the retention by a State of its military forces within its own territorial limits must always reckon with the fact that the price of the inviolability of any territory is the maintenance of justice therein.<sup>12</sup> Accordingly, when that price is not paid in relation to foreign life and property, the landing of forces for their protection is to be anticipated.<sup>13</sup>

## (3)

## THE EXERCISE BY A STATE OF CERTAIN RIGHTS AS SOVEREIGN WITHIN ITS OWN DOMAIN

## (a)

§ 202A. Civil and Political Rights. It has been observed by the Legal Adviser of the Department of State that "in general the guaranties regarding personal and civil rights contained in the Constitution of the United States extend without distinction as to nationality to all persons within the country."<sup>1</sup> This statement reflects the view of the Supreme Court of the United States, which has declared that "aliens have constitutional rights," that the Fourth, Fifth, and Fourteenth Amendments are not limited in their application to citizens and apply generally to all persons within the jurisdiction of the United States.<sup>2</sup> It must be observed that such a concession through the fundamental

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Commander G. C. Belknap, U. S. N., Report of Secy. of the Navy, 1867, 7-8, and noted in Memorandum of J. R. Clark, Jr., Solicitor of Department of State, 1929 ed., 64.

<sup>10</sup> See Intervention, Interference with Revolutionary Movements in Latin America: The Establishment of Neutral Zones, *supra*, § 83A; Nicaragua, § 82D.

<sup>11</sup> See Reprisals, The Tampico Incident, 1914, *infra*, § 591.

<sup>12</sup> See The Resumption of the Policy of Non-Intervention, *supra*, § 83B.

<sup>13</sup> See The Principle of Self-Determination: Some Conclusions, *supra*, § 109E.

Declared Mr. McLane, American Minister to Mexico, to Mr. Cass, Secy. of State, Dec. 14, 1859, in transmitting a proposed treaty of transit and commerce with Mexico, signed Dec. 14, 1859 (which failed to be consummated): "I have also concluded and forward herewith a convention with the government of Mexico to enforce treaty stipulations, and to maintain order in the territory of the republics of Mexico and the United States, by which it will be perceived that, while the independence of Mexico is in no degree compromised, the United States acquires the right to intervene in support of its own treaty rights and the security of its own citizens whenever Mexico may be unable to guaranty the same, without incurring the obligation or necessity of a general intervention in the domestic affairs of that country." (Senate Ex. Doc. No. 98, confidential, 36 Cong., 1 sess., 2.)

§ 202A. <sup>1</sup> Hackworth, Dig. III, 555.

<sup>2</sup> Home Insurance Company v. Dick, 281 U. S. 397, 411. See also Schenck ex rel. Chow Fook Hong v. Ward, 24 F. Supp. 776.

law is to be attributed to the policy of the United States rather than to any requirement of international law. This is true notwithstanding the increasing tendency of States by conventional arrangement to yield civil rights to aliens.<sup>3</sup> Such individuals are not, however, "as a rule admitted to the exercise of political rights; they are generally excluded from holding office under the Government of the United States."<sup>4</sup>

(b)

§ 203. **The Private Ownership and Control of Property.** A State enjoys an exclusive right to regulate matters pertaining to the ownership of property of every kind which may be said to belong within its territory. Thus it may determine not only the processes by which title may be acquired, retained or transferred,<sup>1</sup> but also what individuals are to be permitted to enjoy privileges of ownership.<sup>2</sup>

The United States is far from challenging this principle when invoked by a foreign State; and that principle is not necessarily involved in discussions concerning the lack of freedom of a territorial sovereign to confiscate or impair the value of property lawfully acquired by aliens within its dominions.<sup>3</sup>

<sup>3</sup> See, for example, Art. 5 of the Inter-American Convention on the Status of Aliens, signed at Habana on February 20, 1928, U. S. Treaty Vol. IV, 4723, declaring that "States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties."

<sup>4</sup> Statement in Hackworth, Dig. III, 559.

§ 203. <sup>1</sup> "It is an established principle of international law that every State has the right to regulate the conditions upon which property within its territory, whether real or personal, shall be held and transmitted." Mr. Gresham, Secy. of State, to Mr. Huxton, Dec. 20, 1893, 194 MS. Dom. Let. 598; Moore, Dig., II, 33.

"The right which a sovereign State has to concede or refuse to foreigners the privilege of acquiring real estate in its territory is indisputable and universally recognized, as well as to establish a limit to this right when it has been conceded." (Mr. Ruelas, Mexican Minister of Foreign Affairs, to Gen. Foster, American Minister to Mexico, May 26, 1879, For. Rel. 1879, 810.)

<sup>2</sup> Declared Taney, C. J., in the course of the opinion of the Court in the case of *Mager v. Grima*, 8 How., 490, 493: "Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the States of this Union at this day, real property devised to an alien is liable to escheat."

"It is a fundamental principle of the law of nations that not only may rights conferred upon citizens be reserved from non-resident aliens, but even that aliens permanently residing in the country may be denied rights which are given citizens; and this rule applies not only to civil rights, but to property rights as well. In this connection it is necessary to do more than cite, as to civil rights, the all but universal and the unquestioned practice of denying to aliens the right of suffrage; and as to property rights, the very general denial to aliens of the right to hold real property and to have the same descend in the same manner in which real property may be held by and may descend to citizens." Mr. Adee, Acting Secy. of State, to the Italian Ambassador, at Washington, No. 891, Oct. 1, 1910, For. Rel. 1910, 664, 671.

<sup>3</sup> "Every sovereign State has the absolute right within its own jurisdiction to make laws governing the acquisition of property acquired in the future. This right can not be questioned by any other State. If Mexico desires to prevent the future acquisition by aliens of property rights of any nature within its jurisdiction, this Government has no suggestion whatever to make. When, however, any foreign government seeks to divest aliens of property rights which have already been legally acquired, this Government, so far as its citizens may be concerned, rests under a positive duty to make representations and efforts to avoid such action." (Mr. Kellogg, Secy. of State, to the Mexican Minister for Foreign Affairs, Jan. 28,

A State may not unreasonably forbid aliens, especially if they reside outside of its domain, to acquire or retain property belonging within its territory, and whether movable or immovable.<sup>4</sup> At the present time States do not appear to be disposed to prevent the acquisition of or succession to movable property by aliens. Numerous treaties of the United States have provided for the enjoyment by such persons of that privilege.<sup>5</sup>

A State may be unwilling to permit the succession to and retention of title to immovable property within its domain by persons other than its own nationals, or by aliens who are non-residents. No rule of international law is believed to prescribe a different course.

The Government of the United States has exhibited restraint in generally refraining from attempts to hinder the several States of the Union from shaping their own policies with regard to lands within their respective territorial limits.<sup>6</sup> It has by treaty permitted "goods and effects" (deemed to embrace

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1926, Rights of American Citizens in Certain Oil Lands in Mexico, Senate Doc. No. 96, 69 Cong., 1 sess., 22.)

See The Expropriation of Immovable Property belonging to Aliens, *infra*, § 217A.

Concerning the right of aliens at common law to succeed to lands, see Story, J., in *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603, 619; *McCreery's Lessee v. Somerville*, 9 Wheat. 354; Field, J., in *Phillips v. Moore*, 100 U. S. 208; *Wunderle v. Wunderle*, 144 Ill. 40.

<sup>4</sup> *Droit d'aubaine*. Declares Wheaton: "The municipal laws of all European countries formerly prohibited aliens from holding real property within the territory of the State. During the prevalence of the feudal system, the acquisition of property in land involved the notion of allegiance to the prince within whose dominions it lay, which might be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the *jus albinagii* or *droit d'aubaine* was established; by which all the property of a deceased foreigner (movable and immovable) was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the decedent. In the progress of civilization, this barbarous and inhospitable usage has been, by degrees, almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French Revolution of 1789, the *droit d'aubaine* had been either abolished or modified, by treaties between France and other States, and it was entirely abrogated by a decree of the constituent Assembly, in 1791, with respect to all nations, without exception and without regard to reciprocity. This gratuitous concession was retracted, and the subject placed on its original footing of reciprocity by the Code Napoleon, in 1803; but this part of the Civil Code was again repealed by the Ordinance of the 14th July, 1819, admitting foreigners to the right of possessing both real and personal property in France, and of taking by succession *ab intestato*, or by will, in the same manner with native subjects.

"The analogous usage of the *droit de détraction*, or *droit de retraite* (*jus detractûs*) by which a tax was levied upon the removal from one State to another of property acquired by succession or testamentary disposition, has also been reciprocally abolished in most civilized countries." Dana's 8 ed., 138-139. Also, *Nielsen v. Johnson*, 279 U. S. 47, 54-57.

By Art. XI of the treaty of amity and commerce between the United States and France of Feb. 6, 1778, Malloy's Treaties, I, 471, there was mutual abolition of the *droit d'aubaine*, and also of the *droit de détraction*.

<sup>5</sup> For example, Art. II of the treaty with Great Britain of March 2, 1899, provides that: "The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases." Malloy's Treaties, I, 774.

See, also, paragraph 2 of Article IV of treaty of friendship, commerce and consular rights with Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4192.

<sup>6</sup> See, however, Art. XI of the treaty of amity and commerce with France, of Feb. 6, 1778, Malloy's Treaties, I, 471; also Art. VII of the convention with France of Sept. 30, 1800, *id.*,

real property) owned by nationals of a foreign contracting State to pass by testamentary disposition or descent, to non-resident nationals of such State.<sup>7</sup> Again, it has subordinated the alien acquisition and disposition of lands to the will of the particular State of the Union wherein they might be located.<sup>8</sup> It is not understood that the United States is a party to any treaty now in force which in terms purports to permit the nationals of another contracting party, residing abroad, to succeed to (by devise or descent) and retain indefinitely, title to lands in the several States of the Union, where such a privilege is opposed by the local law. In the more recent treaties, such as those of the present century, the United States has agreed to permit the nationals of the other contracting party to enjoy the privilege of succession by inheritance or otherwise, allowing such successor a reasonable period of time within which to sell the property so acquired and to remove the proceeds.<sup>9</sup> "Whether and the extent

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498. See, in this connection, *Carneal v. Banks*, 10 Wheat. 181, at 189, where Chief Justice Marshall in the course of the opinion of the Court declared: "This court decided, in the case of *Chirac v. Chirac* (2 Wheat. 259), that the treaty of 1778, between the United States and France, secures the citizens and subjects of either power the privilege of holding lands in the territory of the other."

<sup>7</sup> *Todok v. Union State Bank*, 281 U. S. 449, where the Supreme Court of the United States, in 1930, had occasion to interpret Article 6 of the treaty with Sweden of April 3, 1783, revived by the treaty with Sweden and Norway of Sept. 4, 1816, which was replaced by the treaty with Sweden and Norway of July 4, 1827, then in force with Norway. (Malloy's Treaties, II, 1754; also, *id.*, 1300.)

It was there provided that "the subjects of the contracting parties in the respective States may freely dispose of their goods and effects, either by testament, donation or otherwise in favor of such persons as they think proper." While the conclusion was reached that the phrase "goods and effects" included real estate, it was also held that a subsequent law of the State of Nebraska providing for the establishment of homesteads with special exemption from execution and forced sale, and inhibiting conveyances of homestead property by any instrument not joined in by both husband and wife, was not invalidated by the treaty as applied to a citizen of Norway who had established such a homestead in that State. In this connection the Court declared, through Chief Justice Hughes: "It is not to be supposed that the treaty intended to secure the right of disposition in any manner whatever regardless of reasonable regulations in accordance with the property law of the country of location, bearing upon aliens and citizens alike. For example, conveyances of land would still be subject to non-discriminatory provisions as to form or recording. Nor can the right to 'dispose,' secured by the treaty, be deemed to give a wholly unrestricted right to the alien to acquire property, without regard to reasonable requirements relating to particular kinds of property and imposed upon both aliens and citizens without discrimination." (*Id.*, 455.) The treaty provision here under interpretation is no longer in force. See U. S. Treaty Vol. IV, 4527.

See, also, *Adams v. Akerlund*, 168 Ill., 632.

<sup>8</sup> By the terms of Art. VII of the consular convention with France of Feb. 23, 1853, it was declared that "in all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

"As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right." Malloy's Treaties, I, 531.

Concerning the application of this Article to the District of Columbia, see *Geofroy v. Riggs*, 133 U. S. 258; and to Nebraska, see *Bahuaud v. Bize*, 105 Fed. 485.

See, also, Art. V of treaty with Switzerland of Nov. 25, 1850, Malloy's Treaties, II, 1765, and concerning its interpretation, *cf. Hauenstein v. Lynham*, 100 U. S. 483.

<sup>9</sup> Thus, according to Article IV of the treaty of friendship, commerce and consular rights with Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4192, "where, on the death of any person holding real or other immovable property or interests therein within the territories

to which aliens may acquire interest in real property in the United States are, in the absence of applicable treaty provisions, matters to be determined by the law of the particular State in which the property is situated."<sup>10</sup>

The United States is not at the present time disposed to yield by treaty, for the benefit of the nationals of a foreign contracting State, the privilege of acquiring lands within American territory save where, as has been observed, such acquisition is by way of succession to the rights or interests in such lands as are possessed by the nationals of such States.<sup>11</sup> A few treaties to which the United States is a party have, however, reflected the willingness of a foreign contracting State to permit American nationals to acquire immovable property within its domain.<sup>12</sup>

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of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn."

See, also, Art. IV treaty with Estonia, Dec. 23, 1925, U. S. Treaty Vol. IV, 4105, 4106; Art. IV treaty with Hungary, June 24, 1925, U. S. Treaty Vol. IV, 4319; Art. IV treaty with Honduras, Dec. 7, 1927, U. S. Treaty Vol. IV, 4307; Art. IV treaty with Latvia, April 20, 1928, U. S. Treaty Vol. IV, 4401; Art. IV treaty with Salvador, Feb. 22, 1926, U. S. Treaty Vol. IV, 4616; Art. IV treaty with Austria, June 19, 1928, U. S. Treaty Vol. IV, 3931; Art. IV treaty with Norway, June 5, 1928/Feb. 25, 1929, U. S. Treaty Vol. IV, 4527; and Art. IV treaty with Poland, June 15, 1931, U. S. Treaty Vol. IV, 4572.

See also, Art. II treaty with Austria, May 8, 1848, Malloy's Treaties, I, 34; Art. II treaty with Bavaria, Jan. 21, 1845, *id.*, 57; Art. XII treaty with Bolivia, May 13, 1858, *id.*, 117; Art. XI treaty with Brazil, Dec. 12, 1828, *id.*, 136; Art. II treaty with Brunswick-Lüneburg, Aug. 21, 1854, *id.*, 157; Art. XII treaty with Colombia (New Granada), Dec. 12, 1846, *id.*, 305; convention with Great Britain, March 2, 1899, *id.*, 774; Art. I convention with Guatemala, Aug. 27, 1901, *id.*, 876; Art. VII treaty with Hanseatic Republics, Dec. 20, 1827, *id.*, 903; Art. II convention with Hesse, March 26, 1844, *id.*, 947; Art. X treaty with Mecklenburg-Schwerin, Dec. 9, 1847, *id.*, 1078; Art. X treaty with Russia, Dec. 18, 1832, *id.*, II, 1517; Art. II treaty with Saxony, May 14, 1845, *id.*, 1610; Art. III treaty with Spain, July 3, 1902, *id.*, 1702; Art. V treaty with Switzerland, Nov. 25, 1850, *id.*, 1765; Art. II treaty with Württemberg, April 10, 1844, *id.*, 1893.

For a discussion of the judicial interpretation of the earlier treaties of the United States, see "Aliens under the Federal Laws of the United States," by Samuel MacClintock, *Illinois Law Rev.*, IV, 95.

<sup>10</sup> Statement in Hackworth, Dig., III, 679. Concerning the restrictions laid down by the several States of the United States, see lists in Hackworth, Dig., III, 680-683, and also documents there cited.

<sup>11</sup> According, however, to Article IV of a proposed treaty between the United States and Turkey, signed at Lausanne, Aug. 6, 1923, and which failed to be consummated: "As regards the acquisition, possession, and disposition of immovable property, as well as the right to engage in the various kinds of commerce and industry, the above-mentioned companies and associations, nationals of each of the High Contracting Parties, shall enjoy in the territory of the other Party, upon condition of reciprocity, the treatment generally accorded by the local laws to similar foreign companies." (Cong. Rec., March 25, 1926, Vol. 67, Part 6, 6251.)

Article I of the treaty between the United States and Japan, of Feb. 21, 1911, did not, in the opinion of the Supreme Court of the United States, as set forth in the case of *Terrace v. Thompson*, 263 U. S. 197, confer upon subjects of Japan the right to own or lease or have title to or interest in land for agricultural purposes within American territory. See U. S. Treaty Vol. III, 2712. See correspondence between the United States and Japan, For. Rel., 1913, 625-653, and *id.*, 1914, 426-434.

<sup>12</sup> See Arts. III and XIV of the treaty between the United States and China of Oct. 8, 1903, Malloy's Treaties, I, 263 and 268, respectively, in relation to the rights of American merchants and missionaries, to acquire interests in land in China. See, also, Mr. Root, Secy.

In the treaty concluded with Germany on December 8, 1923, provision was made that the nationals of either high contracting party might, within the territories of the other, reciprocally and upon compliance with the conditions there imposed, enjoy such rights and privileges as had been or might thereafter be accorded the nationals of any other State "with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the other."<sup>13</sup> This arrangement which was incorporated in certain other subsequent treaties conditioned the obligation to yield the concession upon its being granted to the nationals of a third State.<sup>14</sup>

As a result of Acts of Congress enacted in 1897 and 1905,<sup>15</sup> no alien or person who is not a citizen of the United States, or who has not declared his intention to become such in the manner provided by law, is permitted to acquire title to or own any land in any of the Territories of the United States, or within the District of Columbia, save under exceptional conditions that are specified. Thus, the prohibition is not applicable to cases in which the right to hold or dispose of land in the United States is secured by existing treaties to citizens or subjects of foreign countries.<sup>16</sup> Nor does it apply to land owned (March 2, 1897) by aliens, which was acquired on or before March 3, 1887, so long as it is held by the then owners, their heirs or legal representatives; nor does it apply to any alien who becomes a *bona fide* resident of the United States. It is declared that any alien who becomes such a resident, or who duly declares

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of State, to Mr. Rockhill, American Minister to China, March 22, 1906, For. Rel. 1906, I, 277.

See agreement between the United States and Turkey of Aug. 11, 1874, regarding the admission of American citizens to the right of holding real estate within the dominions of Turkey, as granted to foreigners by the law promulgated Jan. 18, 1867, Malloy's Treaties, II, 1344.

<sup>13</sup> Art. XIII, U. S. Treaty Vol. IV, 4196.

<sup>14</sup> See also, for example, Art. X, treaty with Hungary, June 24, 1925, U. S. Treaty Vol. IV, 4322; Art. XII, treaty with Poland, June 15, 1931, U. S. Treaty Vol. IV, 4578. In the latter treaty the following additional sentence was appended: "It is understood, however, that neither High Contracting Party shall be required by anything in this paragraph to grant any application for any such right or privilege if at the time such application is presented the granting of all similar applications shall have been suspended or discontinued."

<sup>15</sup> An Act of March 3, 1887 (24 Stat. 476), established prohibitions with respect to real estate in the Territories of the United States and in the District of Columbia. An Act of March 2, 1897 (29 Stat. 618 and 619), of which certain provisions are referred to in the text, was by its terms withheld from application to the District of Columbia, but amended the Act of 1887 with respect to lands in the Territories. An Act of Feb. 23, 1905 (33 Stat. 733), amended the Act of 1897, so as to extend to aliens the same rights and privileges concerning the acquisition, holding, owning and disposition of real estate in the District of Columbia as were conferred upon them in respect of real estate in the Territories by the Act of 1897. It should be observed that the Act of 1887 prohibited the acquisition, holding or owning of real estate or of any interest therein by alien corporations. The same Act declared that no corporation or association, more than twenty per cent of the stock of which was or might be "owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States," should thereafter acquire or hold or own any real estate in any of the Territories of the United States or of the District of Columbia. (Sec. 2, 24 Stat. 477.) Through an Act of June 30, 1902, the permitted alien interest in corporations was increased to 50 per cent of the stock ownership. (32 Stat. 530.)

Concerning the devise of remainder in fee of realty in the District of Columbia, to a municipal corporation of the province of Ontario, Canada, under provisions of the Act of 1905 (33 Stat. 733), see *Larkin v. Washington Loan & Trust Co.*, 31 F. (2d) 635, decided on March 5, 1929.

<sup>16</sup> It is declared, however, that such rights, so far as they may exist by force of any treaty, are to continue to exist so long as such treaty is in force, and no longer.

his intention to become a citizen of the United States, may acquire and hold lands, provided, however, that if such resident alien shall cease to be a *bona fide* resident of the United States, he shall have ten years from the time of the cessation of that residence in which to alienate such lands.<sup>17</sup>

The restrictions imposed by the United States in its legislation and also reflected in its treaties manifest a disposition in contrast to that shown by certain other States.<sup>18</sup> It should be borne in mind, however, that the extensive area of American territory, both within and without the limits of the several States of the Union, available for use and acquisition by residents of foreign origin, and oftentimes also of foreign nationality, requires special safeguarding to prevent the transfer to, and protracted ownership of, considerable portions thereof by non-resident aliens. Such ownership by such individuals of large and various areas of land within American territory might fairly, and would in fact, be regarded as essentially detrimental to the welfare of the nation. This circumstance serves to bring home to the Federal Government a sense of the importance of refraining from agreeing to yield for the benefit of nationals of particular States privileges which, for any reason, it might be thought desirable to withhold from those of any others.

With the yielding to an alien of the privilege of acquiring and holding property of any kind within its domain, the territorial sovereign finds itself subjected to a corresponding obligation to make reasonable endeavor to protect the same, and to abstain itself, through any of its agencies, from conduct injurious to it.<sup>19</sup> This obligation has vast scope of which the limits need at times to be

<sup>17</sup> It is provided that the Act of 1897 is not to be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town or village, or in any mine or mining claim, in any of the Territories of the United States (and by virtue of the Act of 1905, within the District of Columbia).

The Act of 1897 makes provision for the acquisition by aliens of lands by inheritance or in the collection of debts, requiring, however, ultimate sale within a specified period. Arrangements for escheat proceedings and condemnations and sales thereunder are also specified.

Concerning the history of the legislation of the United States, see Samuel MacClintock, in *Illinois Law Rev.*, IV, 27.

See, also, Hawaiian Homes Commission Act, approved July 9, 1921, 42 Stat. 108, 117-118.

See the liberal provisions of Art. VI of convention between the United States and Denmark providing for the cession of the Danish West Indies, of Aug. 4, 1916, with respect to the rights of Danish citizens not residing in the islands but owning property therein at the time of the cession. U. S. Treaty Vol. III, 2558.

See also documents in Hackworth, Dig., III, 678-679, with reference to the statutory law of the United States indicating limitations imposed by the Federal Government with respect to the acquisition of immovable property in the Territories and the District of Columbia, and pertaining also to homestead rights as well as public lands.

<sup>18</sup> See, for example, the British Act of May 12, 1870, 33 Vict. c. 14, § 12; also, Moore, Dig., IV, 43-50, with respect to the laws of certain other States.

See Art. 10 of draft convention prepared by the Economic Committee of the League of Nations to serve as a basis for discussion at the international conference of 1929, League of Nations Doc. C.36.M.21.1929.II., p. 5; also, draft report of Committee A on Article 10 and the protocol ad Article 10 submitted to the Conference by M. Pilotti (Italy), Proceedings of the International Conference on Treatment of Foreigners, League of Nations, Doc. C.97. M.23.1930.II., Annex A, 32, p. 520.

See J. W. Cutler, "The Treatment of Foreigners," *Am. J.*, XXVII, 225.

<sup>19</sup> See Instruction to the Embassy in Madrid, Aug. 3, 1936, Hackworth, Dig., III, 654-655, footnote.

See case of Victor A. Ermerins, American-Mexican Claims Commission, convention of Sept. 8, 1923, Opinions of Commissioners, 1929, 219.



ascertained when that sovereign has recourse to expropriation. The matter is discussed elsewhere.<sup>20</sup> It here suffices to observe that the thought prevailing in the mind of the Department of State was exemplified in the terms of Article 1 of the treaty with Germany of December 8, 1923,<sup>21</sup> and which has since been incorporated in numerous other treaties, such as that with Finland of February 13, 1934, in the following language: "The nationals of each High Contracting Party shall receive within the territory of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation."<sup>22</sup>

(c)

§ 204. **Pursuits and Occupations. Practice of Learned Professions.** A State may exercise a large control over the pursuits, occupations and modes of living of the inhabitants of its domain. In so doing it may doubtless subject resident aliens to discrimination without necessarily violating any principle of international law.

In the United States, local legislative enactments have not infrequently manifested such a purpose. Thus in 1909 a statute of Pennsylvania rendered it unlawful for unnaturalized foreign-born residents to kill wild game except in defense of their persons or property.<sup>1</sup> The United States Supreme Court has repeatedly held within recent years that such discriminatory legislation is not necessarily unconstitutional, and it has not intimated that constitutional discriminatory legislation was at variance with the principles of international law.<sup>2</sup> It should be observed, however, that discriminatory legislation may in fact assume a form which violates the Fourteenth Amendment affording the inhabitants of every State equal protection of its laws. In such case the resident alien may invoke this constitutional provision which is judicially applied for his benefit as well as for that of every other aggrieved inhabitant of the State concerned.<sup>3</sup> If it adjudges a local discriminatory enactment to be uncon-

<sup>20</sup> See *infra*, § 217A.

<sup>21</sup> U. S. Treaty Vol. IV, 4191, 4192.

<sup>22</sup> Art. I, U. S. Treaty Vol. IV, 4138, 4139.

§ 204. <sup>1</sup> *Patson v. Pennsylvania*, 232 U. S. 138.

<sup>2</sup> See, for example, *Patson v. Pennsylvania*, *supra*; also *Heim v. McCall*, 239 U. S. 175; *Crane v. New York*, 239 U. S. 195, where it was held that a State statute regarding the employment of laborers, otherwise valid, was not unconstitutional under the equal provision clause of the Fourteenth Amendment because it made distinctions between aliens and citizens. See also *Clarke v. Deckebach*, 274 U. S. 392; *Ex parte Ramirez*, 193 Calif. 633; *Alsos v. Kendall et al.*, 111 Oregon 359.

<sup>3</sup> Numerous statutory provisions have been enacted in the various States excluding aliens from engaging in certain professions, trades, and occupations, such as accountancy, architecture, medicine, engineering, law, optometry, pharmacy, teaching, auctioneering, barbering, taxidermy, peddling, mining, etc. These enactments have generally been defended on the ground that they represent a justifiable and necessary exercise of the police power." (Statement in *Hackworth*, Dig., III, 618. See data following this statement in footnote, *id.*)

<sup>4</sup> See *Truax v. Raich*, 239 U. S. 33, where it was held that a statute of Arizona, of 1914, requiring that employers should only employ a specified percentage of alien employees, denied to alien inhabitants of that State the rights accorded them under the Fourteenth Amendment to the equal protection of its laws. In the course of the opinion of the court, Mr. Justice

stitutional, the Supreme Court of the United States appears to be indisposed to determine also whether the law is violative of any treaty rights invoked by the alien litigant.<sup>4</sup>

It has recently been observed that "the Congress of the United States has deemed it necessary to limit the right of aliens to participate in certain professions and industries, especially those related to the merchant marine and public communications."<sup>5</sup> Such action is not believed to have been violative of any requirements under international law.

The United States has not infrequently undertaken by treaty to accord the nationals of other States residing within its territories the same measure of protection for their persons and property, and the same rights and privileges for their commerce and navigation, as are possessed by the "natives."<sup>6</sup> In consequence, there have been numerous adjudications involving the inquiry whether a particular local law, discriminatory in design or effect, was in conflict with such requirements.<sup>7</sup> The resulting interpretations which, when expressed by the Supreme Court, have been deemed to bind the executive department of the Government,<sup>8</sup> have revealed the fact that the treaty provisions of the nineteenth

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Hughes declared, pp. 39-40, 41-42, 43: "The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States. Thus in *McCready v. Virginia*, 94 U. S. 391, 396, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the State, and an analogous principle was involved in *Patsone v. Pennsylvania*, 232 U. S. 138, 145, 146, where the discrimination against aliens upheld by the court had for its object the protection of wild game within the States with respect to which it was said that the State could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein v. Lynham*, 100 U. S. 483; *Blythe v. Hinckley*, 180 U. S. 333, 341, 342); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise. . . . The discrimination against aliens in the wide range of employment to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved. . . . The discrimination is against aliens as such in competition with citizens in the described range of enterprises and in our opinion it clearly falls under the condemnation of the fundamental law."

Mr. Justice McReynolds rendered a dissenting opinion.

<sup>4</sup> *Id.*, 43.

<sup>5</sup> See Mr. Wilson, Assist. Secy. of State, to the Portuguese Minister in Washington, Sept. 30, 1937, Hackworth, Dig., III, 614, footnote.

<sup>6</sup> See, for example, Art. III of the treaty with Italy of Feb. 26, 1871, Malloy's Treaties, I, 970, where it was provided that "the citizens of each of the high contracting parties shall receive, in the States and Territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives." See, also, Art. I of the same treaty, where it was provided that such individuals "shall enjoy, respectively, within the States and possessions of each party, the same rights, privileges, favors, immunities, and exemptions for their commerce and navigation as the natives of the country wherein they reside, without paying other or higher duties or charges than are paid by the natives, on condition of their submitting to the laws and ordinances there prevailing." See, also, Art. I of treaty with Japan of Feb. 21, 1911, U. S. Treaty Vol. III, 2712.

<sup>7</sup> See, for example, *Maiorano v. Baltimore & Ohio R. R. Co.*, 213 U. S. 175; *Patsone v. Pennsylvania*, 232 U. S. 138; *Heim v. McCall*, 239 U. S. 175.

<sup>8</sup> In this connection, see Mr. Adee, Acting Secy. of State, to the Italian Ambassador at Washington, No. 891, Oct. 1, 1910, For. Rel. 1910, 664, 670.

century were wholly inadequate to shield from practical discrimination important interests of numerous resident aliens engaged in industrial occupations.<sup>9</sup> Those interests were, for example, affected adversely by statutes confining the benefits of laws creating a right of action in case of death caused by the negligence of an employer, or limiting the benefits of so-called workmen's compensation acts, to the resident heirs of individuals killed in the course of employment.<sup>10</sup> In view of these circumstances, the United States and Italy sought, by a convention concluded February 25, 1913, to broaden the scope of the existing treaty of commerce and navigation of 1871, so as to cover this situation.<sup>11</sup> The attempt was fairly successful.<sup>12</sup> The treaty did not, however, purport to be applicable to a situation where a statute of an American State denied compensation to alien non-resident parents in a compensation act providing for benefits in case of death, without negligence or fault, of a son employed in that State.<sup>13</sup>

The United States, in the first of a series of fresh commercial treaties concluded after World War I—that with Germany of December 8, 1923—took a step forward. In Article II it was provided that:

With respect to that form of protection granted by National, State or Provincial laws establishing civil liability for injuries or for death, and giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary benefit, such relatives or heirs or dependents of the injured party, himself a national of either of the High Contracting Parties and within any of the territories of the other, shall regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.<sup>14</sup>

<sup>9</sup> See, for example, *Maiorano v. Baltimore & Ohio R. R. Co.*, 213 U. S. 175.

<sup>10</sup> See discussion between the Department of State and the Italian Embassy at Washington, respecting the *Maiorano* case in *For. Rel.* 1909, 391–393, and *id.*, 1910, 657–673.

<sup>11</sup> U. S. Treaty Vol. III, 2699.

According to Article I, "The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any State or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

<sup>12</sup> It may be observed that even before the conclusion of any treaty that was deemed to be a complete deterrent of such action, there was a marked tendency in both Federal and State legislation to refrain from discriminations adverse to non-resident alien beneficiaries. See, for example, the provisions of the Federal Act imposing liability on common carriers by railroads engaged in interstate or foreign commerce, for injuries to employees from negligence, as set forth in Act of April 22, 1908, 35 Stat. 65–66, and § 9, added April 5, 1910, 36 Stat. 291. See *McGovern v. Philadelphia & Reading Ry. Co.*, 235 U. S. 389, where it was held that this Act should be interpreted as applicable to non-resident alien relatives of a decedent.

<sup>13</sup> See *Liberato v. Royer*, 270 U. S. 535.

<sup>14</sup> U. S. Treaty Vol. IV, 4192. The reason for this provision was that unforbidden discriminations against non-resident alien dependents of aliens employed in the United States would serve definitely to encourage American employers to give a preference to resident alien workmen possessed of families abroad because of the freedom, in the event of the death of such employees, from an obligation to pay benefits to non-resident alien dependents. In a word, freedom to discriminate was a blow to the American workman.

The Article quoted in the text has since been incorporated in numerous other treaties of

This provision obviously served as a check upon subsequent enactments at variance therewith.

It may be observed that the same treaty set forth with some detail the privileges with respect to occupation that were yielded to the nationals of each of the contracting States permitted to enter the territories of the other, and in this regard reflected a broader design than had been apparent in the previous agreements of the United States. Such individuals were permitted

to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established.<sup>15</sup>

In 1938 and 1939, the Department of State asserted in correspondence with the German Government that privileges conferred upon American nationals in Germany through the foregoing paragraph of the treaty were violated by German demands upon American Jews and their spouses for certain declarations as to property (under decree-laws for the registration of property) which were not required of Germans or foreigners of other races.<sup>16</sup> No ultimate accord is understood to have been reached.<sup>17</sup>

The occupational freedom of the alien seeking to enter the United States was restricted by the provisions of the Immigration Act of May 26, 1924,

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the United States, embracing that concluded with Liberia, on Aug. 8, 1938, U. S. Treaty Series No. 956, Hackworth, Dig., III, 627.

<sup>15</sup> Art. I.

Interpretative of occupational and residential privileges conferred by Art. I of the treaty between the United States and Japan of Feb. 21, 1911 (U. S. Treaty Vol. III, 2712), see *Terrace v. Thompson*, 263 U. S. 197; *Asakura v. City of Seattle*, 265 U. S. 332; *Jordan v. Tashiro*, 278 U. S. 123.

<sup>16</sup> See documents in Hackworth, Dig., III, 642-646.

<sup>17</sup> In a note of Dec. 30, 1938, the German Foreign Office declared: "There is, however, no general principle in international law according to which a State would be bound to refrain from discriminatory treatment of foreign citizens residing in its country based on race or creed or other characteristics. The American Government is probably aware that the German Government is not the first, nor is it the only, Government that has considered such differential treatment necessary in specific cases. In no case has it done so, however, on the basis of the foreign citizenship of the persons affected; it has applied special measures of the kind in question to certain categories of foreign citizens only when its own citizens of the same categories were likewise subjected to these measures. Beyond that, out of special consideration and where it proved to be technically feasible, the German Government even legally conceded more favorable treatment in this connection to foreign citizens than to its own citizens.

"Therefore the only question remaining to be answered is whether and to what extent any special treaty agreements between Germany and the United States of America may stand in the way of the application to American citizens of the German measures challenged by the American Government." (Hackworth, Dig., III, 644-645.)

See also discussion in 1938, between the American Government and the Italian Foreign Office, referred to in Hackworth, Dig., III, 646-647.

whereby, as has been observed elsewhere,<sup>18</sup> the Congress excepted from its definition of the word "immigrant" a narrow group of aliens embracing "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."<sup>19</sup> The Department of Labor has since made vigorous effort to prevent the alien entering the United States for purposes of trade in virtue of a treaty to which the Act was deemed applicable, from exercising privileges of local trade bereft of international character, or from changing his status from a trading alien to an immigrant alien, without at least foregoing the privilege of continued residence in the United States.<sup>20</sup> Again, non-quota immigrant aliens, such as those permitted by the Act to enter for purposes of study, are not permitted during their limited period of sojourn in American territory to engage in occupations for gain except for the purpose of supplementing income insufficient to cover necessary expenses.<sup>21</sup>

The new series of commercial treaties of the United States that was consummated after the World War did not become operative until after the enactment of the Immigration Act of 1924. The Senate conditioned its approval of the treaty with Germany of December 8, 1923, of which the ratifications were exchanged on October 14, 1925, upon the addition to Article I thereof of the words: "Nothing herein contained shall be construed to affect existing statutes of either country in relation to the immigration of aliens or the right of either country to enact such statutes."<sup>22</sup> It is understood that the Department of State regards this addition as sufficing to bring the treaty within the purview of the Immigration Act of 1924, and that it also regards similar or kindred additions to the subsequent commercial treaties of the United States as of like effect.<sup>23</sup>

The United States has concluded numerous conventions whereby "Manufacturers, merchants, and traders domiciled within the jurisdiction of one of the High Contracting Parties may operate as commercial travelers either personally or by means of agents or employes within the jurisdiction of the other High Contracting Party on obtaining from the latter, upon payment of a single fee, a license which shall be valid throughout its entire territorial jurisdiction."<sup>24</sup> These conventions, together with commercial treaties embodying provisions

<sup>18</sup> See *The Admission of Aliens, supra*, § 60.

<sup>19</sup> 43 Stat. 153. The words "and his wife, and his unmarried children under twenty-one years of age, if accompanying or following to join him" were added by an amendment of July 6, 1932, 47 Stat. 607.

<sup>20</sup> Dept. of Labor, *Immigration Laws and Rules* of Jan. 1, 1930, as amended up to and including Dec. 31, 1936, Rule 3, Subdivision H, paragraph 3, p. 130.

<sup>21</sup> *Id.*, Rule 10, Subdivision A, paragraph 1, p. 157; also Department of State, *Admission of Aliens into the United States, Notes to Section 361, Consular Regulations*, Revised to Jan. 1, 1936, Washington, 1936, 51-53. See Section 4 (e) of Immigration Act of 1924.

Concerning the requirements as to the international aspect of trade contemplated by Sec. 3 (6) of the Immigration Act of 1924, see documents in Hackworth, Dig., III, § 298. See *supra*, § 60A.

<sup>22</sup> U. S. Treaty Vol. IV, 4191.

<sup>23</sup> See Note 92 to Section 361 of the Consular Regulations of the United States, as set forth in *Admission of Aliens into the United States*, Department of State, 1932, 48-49.

<sup>24</sup> See, for example, Convention with El Salvador, Facilitating the Work of Traveling Salesmen, of Jan. 28, 1919, U. S. Treaty Vol. III, 2826.

taken from them,<sup>25</sup> make appropriate arrangements designed to increase the exchange of commodities by facilitating the work of traveling salesmen.

A State may reasonably exercise a rigid control over the practice of learned professions within its territory. Thus, it may prescribe tests of the fitness of persons to be permitted to practice, and that regardless of their nationality. Unless restrained by treaty, it may not unlawfully discriminate against aliens. Nor is it under any obligation to accept as assurances of fitness the degrees issued by foreign institutions of learning, and especially certificates emanating from those not operating under governmental supervision or enjoying local official recognition. The territorial sovereign must be free to establish for itself the extent and mode of recognizing the attainments of persons trained in foreign countries. The United States has necessarily acknowledged the propriety of the application of this principle with respect to Americans seeking to practice a learned profession in a foreign State. It has demanded, however, that governmental regulations be applied impartially to American residents, and without discrimination favorable to those of other alien nationalities.<sup>26</sup> Thus, in 1933, the Department of State declared that it recognized the right of the several Mexican States to prescribe rules and regulations governing new admissions to the practice of medicine so long as they did not discriminate against American citizens as such.<sup>27</sup> The Department has, however, been disposed to seek under some conditions modifications of local requirements as an act of grace in order to shield an American national from seemingly harsh treatment.<sup>28</sup>

The practice of a particular profession, such as that of the law, may be fairly deemed to entail a connection with and devotion to the State within whose territory that privilege is sought to be exercised that is incompatible with the retention of allegiance to a foreign country.<sup>29</sup> Accordingly, admission to the bar

<sup>25</sup> See, for example, Arts. XIV and XV of treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4196-4197.

<sup>26</sup> Mr. John Davis, Acting Secy. of State, to Mr. Matthews, Consul at Tangier, Aug. 11, 1883, 108 MS. Inst. Consuls, 82, Moore, Dig., II, 182; Mr. Frelinghuysen, Secy. of State, to Mr. Wallace, Minister to Turkey, March 27, 1884, For. Rel. 1884, 553, Moore, Dig., II, 183; Mr. Bayard, Secy. of State, to Mr. Chase, Aug. 3, 1886, 161 MS. Dom. Let. 134, Moore, Dig., II, 181; also case of expulsion of Paul Edwards from Belgium in 1900, For. Rel. 1900, 45-53, Moore, Dig., IV, 93-94.

Concerning the requirements of certain foreign States respecting the practice of medicine within their respective territories, see documents cited in Moore, Dig., II, 181-184. For the laws of the Argentine Republic, For. Rel. 1905, 35-38; *id.*, 1906, I, 11.

The convention relating to the practice of the liberal professions, signed at the Second Pan-American Conference at Mexico, Jan. 28, 1902, Moore, Dig., II, 184, was the subject of a resolution of approval and confirmation at the Third Pan-American Conference at Rio de Janeiro, Aug. 22, 1906. For. Rel. 1906, II, 1609-1610.

<sup>27</sup> Mr. Caffery, Assist. Secy. of State, to Ambassador Daniels, Oct. 27, 1933, Hackworth, Dig., II, 156.

<sup>28</sup> *Id.* See Mr. Lansing, Secy. of State, to the Embassy in Mexico City, Nov. 12, 1917, Hackworth, Dig., II, 156; Mr. Adee, Assist. Secy. of State, to Minister Dodge, Oct. 5, 1922, Hackworth, Dig., II, 157.

<sup>29</sup> See in this connection, Art. 7 of draft convention concerning the Treatment of Foreign Nationals, 1929, International Conference on the Treatment of Foreigners, Preparatory Documents, League of Nations, Doc. No. C.36.M.21.1929.II, p. 4. Also statement in Hackworth, Dig., III, 625.

Declared Mr. Welles, Assist. Secy. of State to Chargé Dickson, Jan. 16, 1934: "Although it is the Department's opinion that there is no justification from a legal standpoint for the making of representations on behalf of the American lawyers affected by this decree, it is believed that considerations of equity might properly lead to the conclusion that informal

of the several States of the United States, or of the territorial possessions thereof, is commonly conditioned upon (among other things) the possession by the applicant of American nationality.<sup>30</sup> There is a tendency, moreover, to establish a like prerequisite for eligibility for the practice of certain other professions.<sup>31</sup>

In a word, it seems to be clear that a State is on strong ground when it lays down the conditions under which learned professions may be practiced within its territorial domain, and when also, in the course of so doing it sees fit to confine the privilege of practice to individuals who are its own nationals.

(d)

§ 204A. **Corporations.** It is appropriate and desirable that States should endeavor to reach agreement expressive of the extent of their common willingness that corporate entities and kindred bodies produced by a contracting party be permitted to function or enjoy privileges within the territory of another.<sup>1</sup> In the case of the United States, there is reluctance to make large commitments out of respect for the policy of the several States of the Union which may and are likely to be averse to the exercise within their respective territorial limits of corporate powers by entities created by and peculiarly associated with foreign States.<sup>2</sup> The more recent commercial treaties of the United States reflect, however, an effort on its part to yield what appears to be reciprocally desirable and feasible. Thus, the treaty of friendship, commerce and consular rights with Germany, of December 8, 1923, declared that limited liability and other corporations and associations, whether or not for pecuniary profit, which had been or might thereafter be organized in accordance with and under the laws, National, State, or Provincial, of either High Contracting Party, and maintained a central office within the territories thereof, should have their "juridical status" recognized by the other High Contracting Party, provided that they

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representations would be justifiable. It would seem that the decree, if put into force, would operate very harshly in terminating so briefly the professional activities of the Americans concerned, and would constitute a hardship, not only upon the lawyers themselves who, it is understood, for the most part have practiced in Cuba for many years, but also upon their American clients, of whom there are undoubtedly a large number, who have entrusted the legal side of their business and property interests to these American lawyers." (Hackworth, Dig., III, 158.)

See Act of March 3, 1915, to regulate the practice of pharmacy in the consular districts of the United States in China, 38 Stat. 817, and discussion of its applicability in Hackworth, Dig., III, 159.

<sup>30</sup> See Rules for Admission to the Bar in the Several States and Territories of the United States, in force March 1, 1941, Twenty-eighth Edition, West Publishing Company, St. Paul, 1941.

<sup>31</sup> Thus, in the State of New York, the issuance of a certificate of certified public accountant requires that the applicant therefor be a citizen of the United States or a person who has declared his intention of becoming such citizen. Chap. 15, Education Law, § 1492, Cahill's Consolidated Laws of New York, 2 ed., Chicago, 1930, p. 786.

§ 204A. <sup>1</sup> Concerning interposition in behalf of corporations and American nationals interested therein, see Corporations, *infra*, §§ 278-280.

<sup>2</sup> "The right of corporations, either domestic or foreign, to engage in business in this country is controlled by the laws of the separate States. The general rule is that foreign corporations are usually permitted to carry on business in any of the various States, subject, of course, to such regulations and restrictions as may be imposed by the laws of such States." (Mr. Redfield, Secy. of Commerce, to the Counselor of the Department of State, Jan. 9, 1918, Hackworth, Dig., III, 707.)

pursued no aims within its territory contrary to its laws.<sup>3</sup> The right of such entities so recognized, to establish branch offices and fulfill their functions within the domain thereof was to "depend upon, and be governed solely by, the consent of such Party as expressed in its National, State or Provincial laws."

Again, the nationals of either Party within the territories of the other were accorded most-favored-nation treatment with respect to the organization of and participation in such entities, "including the rights of promotion, incorporation, purchase and ownership and sale of shares and the holding of executive or official positions therein."<sup>4</sup> In the exercise of such rights, and with respect to the regulation or procedure concerning the organization or conduct of such entities, such individuals were to enjoy most-favored-nation treatment.<sup>5</sup> It was declared that the rights of any of such corporations or associations as might be organized or controlled or participated in by the nationals of either party within the territories of the other, to exercise any of their functions therein should be governed by the laws and regulations, National, State or Provincial, which were in force or might thereafter be established within the territories of the Party wherein it was proposed to engage in business. It was significantly added that the foregoing stipulations were not applicable to the organization of and participation in political associations.<sup>6</sup>

(e)

§ 205. **Taxation.** In levying taxes to defray the expenses of government, no duty is imposed upon a State to leave unburdened either property owned by

<sup>3</sup> Art. XII, U. S. Treaty Vol. IV, 4191, 4195.

They were, moreover, to be allowed to enjoy free access to the courts of law and equity under certain equitable conditions.

<sup>4</sup> Art. XIII.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

The same article contained as a separate paragraph the following provisions: "The nationals of either High Contracting Party shall, moreover, enjoy within the territories of the other, reciprocally and upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other State with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the other."

See, in this connection, Art. XVI (concerning the "treatment of foreign companies") of draft convention on the Treatment of Foreigners, prepared by the Economic Committee of the League of Nations in 1929, League of Nations, Doc. C.36.M.21.1929.II, p. 6.

The Governing Board of the Pan American Union approved on Jan. 8, 1936, a declaration on the juridical personality of foreign companies in which it was declared: "Companies constituted in accordance with the laws of one of the Contracting States, and which have their seats in its territory, shall be able to exercise in the territories of the other Contracting States, notwithstanding that they do not have a permanent establishment, branch or agency in such territories, any commercial activity which is not contrary to the laws of such States and to enter all appearances in the courts as plaintiffs or defendants, provided they comply with the laws of the country in question." (Hackworth, Dig., III, 706, citing Treaty Information Bulletin, 83, Aug., 1936, 13, 20.) It has been said (Hackworth, Dig., III, 706, citing Treaty Information Bulletin 117, June, 1939, 116-117) that the declaration was signed on behalf of the United States on June 23, 1939, subject to the following understandings: "1. It is understood that the companies described in the Declaration shall be permitted to sue or defend suits of any kind, without the requirement of registration of domestication. 2. It is further understood that the Government of the United States of America may terminate the obligations arising under the Declaration at any time after twelve months' notice given in advance."

Concerning the right of an American company unregistered in accordance with requirements of the Commercial Code of Mexico, to maintain an action in the Courts of that country to protect a trade-mark against infringement therein, see documents in Hackworth, Dig., III, 711-714.



aliens, or persons who may themselves be aliens.<sup>1</sup> Nor does any principle of international law forbid the territorial sovereign to impose, in some instances, a heavier burden upon the interests of such individuals than is placed upon those of its own nationals.<sup>2</sup> The existing practice in so far as it is manifested by conventional arrangements tends, however, to place aliens generally upon an equal footing with nationals.<sup>3</sup> Save in cases indicating a marked abuse of power, or a disregard of the terms of a treaty, the United States does not appear to find in the taxation of its nationals or of their property abroad reasons for diplomatic remonstrance or interposition.<sup>4</sup> An abuse of power is seen when the laws of the taxing State are violated,<sup>5</sup> or when a tax is fairly to be deemed confiscatory in character,<sup>6</sup> or when the imposition of a tax marks the duplication of a previous collection by a governmental entity in de facto control of the area to which such tax appertains.<sup>7</sup>

§ 205. <sup>1</sup> See statement in Hackworth, Dig., III, 575.

Also Mr. F. W. Seward, Acting Secy. of State, to Mr. Acosta y Foster, April 8, 1878, 122 MS. Dom. Let. 403, Moore, Dig., II, 56; Mr. Cadwalader, Asst. Secy. of State, to Mr. Melizet, March 16, 1875, 107 MS. Dom. Let. 172, Moore, Dig., IV, 20; Mr. Fish, Secy. of State, to Mr. Cushing, Minister to Spain, Jan. 12, 1876, MS. Inst. Spain, XVII, 432, Moore, Dig., IV, 21; Mr. Evarts, Secy. of State, to Mr. Kasson, Minister to Austria-Hungary, Jan. 17, 1880, MS. Inst. Austria-Hungary, III, 80, Moore, Dig., II, 56. See, also, Frantz's Appeal 52, Pa. St. 367. With respect to Forced Loans and War Taxes, *cf.* Neutral Persons and Property within Belligerent Territory, *infra*, §§ 630, 631.

<sup>2</sup> See, for example, Act 130 of the Louisiana law of July 11, 1894, imposing an inheritance tax of ten per cent. on the value of all successions passing to non-resident aliens. Acts passed by the General Assembly of the State of Louisiana, regular session, 1894, p. 165. See, also, E. M. Borchard, Diplomatic Protection, 95-96, § 41.

<sup>3</sup> According to Art. I of the treaty between the United States and Germany of December 8, 1923, U. S. Treaty Vol. IV, 4191. "The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals." A like provision will be found in the subsequent commercial treaties of the United States. In the treaty with Norway of June 5, 1928, U. S. Treaty Vol. IV, 4528, there is added (to the words quoted) the following: "This paragraph does not apply to charges and taxes on the acquisition and exploitation of waterfalls, energy produced by waterfalls, mines or forests."

Among the relevant articles of earlier treaties of the United States may be noted: Art. X treaty with the Argentine Republic (Confederation), July 27, 1853, Malloy's Treaties, I, 23; Art. VII convention with France, Feb. 23, 1853, *id.*, 531; Art. I treaty with Japan, Feb. 21, 1911, Charles' Treaties, 77; Art. II treaty with Spain, July 3, 1902, Malloy's Treaties, II, 1701; Art. II treaty with Serbia, Oct. 14, 1881, *id.*, 1614. See, also, provisions contained in Art. IV of the treaty with China of Oct. 8, 1903, Malloy's Treaties, I, 263; award of Hon. Wm. R. Day, Arbitrator in the matter of the claims of John D. Metzger & Co., against the Republic of Haiti, For. Rel. 1901, 264, 272-276.

<sup>4</sup> See Mr. Fish, Secy. of State, to Mr. Cushing, Minister to Spain, Jan. 12, 1876, MS. Inst. Spain, XVII, 432, Moore, Dig., II, 63, 64; see, also, Mr. Evarts, Secy. of State, to Mr. Langston, Minister to Haiti, No. 25, April 12, 1878, MS. Inst. Haiti, II, 143, Moore, Dig., IV, 23.

<sup>5</sup> See Mr. Calhoun, American Minister to China, to the Secy. of State, Nov. 22, 1910, For. Rel. 1911, 72.

<sup>6</sup> Mr. Lansing, Secy. of State, to Mr. Parker (representing American interests), Jan. 25, 1917, For. Rel. 1917, 1040.

<sup>7</sup> Declared Mr. Lansing, for the Secy. of State, May 18, 1915: "Under the generally accepted principles of international law, American citizens owning property in Mexico are entitled to pay taxes thereon to persons in de facto authority. It would appear, therefore, that having paid taxes upon your property located in the State of Chihuahua to the authorities exercising control in that State, you should be relieved of further payment of such taxes." (For. Rel. 1915, 916.)

Also, Mr. Bryan, Secy. of State, to Special Agent Silliman, May 28, 1915, For. Rel. 1915, 972; Mr. Carr, for the Acting Secy. of State, to Consul Simpich, Aug. 31, 1915, For. Rel. 1915, 979.

See especially Mr. Hughes, Secy. of State, to the American Ambassador in France, March 5, 1923, For. Rel. 1923, II, 194.

A State may doubtless wrongly determine that persons or property within its territory is subject to taxation. Thus, it may, for example, attempt to impose a tax on the person of an alien who has no actual residence within its domain. Or it may endeavor to tax tangible property as such which happens to be merely temporarily therein and which belongs elsewhere.<sup>8</sup> It must be clear that in so far as international law is concerned the right of a State to impose a personal tax upon an individual depends upon the intimacy and closeness of the relationship that has been established between itself and him. Internationally, a sufficient relationship always exists between the State and its national, and that regardless of his residence.<sup>9</sup> It will be observed, however, that circumstances other than nationality may also suffice to create the necessary relationship. It must be clear that the right of the territorial sovereign to tax property as such depends upon its having such a connection with the taxing State as to justify the conclusion that it is an asset belonging thereto, protected by its power and from which contribution should be made to support the government. These principles require constant recognition. They point to the broad power of the taxing State. The extent to which they have met with judicial approval in the United States may be noted. It should be borne in mind, however, that American tribunals have in most instances not found occasion to apply restrictive tests derivable from international law as such, but rather those deemed to be prescribed by the Constitution of their country.<sup>10</sup> The thought of the Supreme Court of the United States touching the scope of the jurisdiction of an American commonwealth to exercise the taxing power under restrictions imposed by the Constitution, and to a lesser degree by the principles of Conflict of Laws, has in recent years undergone changes.<sup>11</sup> The circumstance that the Fourteenth Amendment is now deemed to oppose barriers to particular assertions of that power which formerly were not seen, is not indicative that those assertions register a violation of international law, or that the reasoning of earlier decisions in support of them might not offer a solid

<sup>8</sup> See, in this connection, an illuminating paper by Joseph H. Beale, entitled "Jurisdiction to Tax," *Harv. Law Rev.*, XXXII, 587; same writer, "The Progress of the Law, 1923-1924: Taxation," *id.*, XXXVIII, 281.

<sup>9</sup> Thus no international problem arises if a State endeavors to tax personally a non-resident national and to collect what is levied against him out of his property found within its territory. In case no such property is there to be found, all diplomatic protection may be withheld from such a national who declines to pay what is assessed against him. The imposition of such a penalty is hardly a matter of international concern, except in so far as it fails to harmonize with proposals for the elimination of double taxation. See John G. Herndon, *Relief from International Income Taxation*, Chicago, 1932, 264.

It may be observed that the Income Tax Law of Sept. 8, 1916, contemplated the taxation generally of every "citizen" as well as "resident" of the United States. 39 Stat. 756.

See also Sec. 19.11-1 and Sec. 19.11-2, Treasury Department Regulations 103. (*Income Tax*, 1940.)

See *United States v. Bennett*, 232 U. S. 299, in which the constitutionality of § 37 of the Tariff Act of 1909, imposing a tax on foreign-built yachts, was upheld, and the law applied to a yacht owned by an American citizen but which had not been within the jurisdiction of the United States during any part of the period for which the tax was levied.

Also, *Cook v. Tait*, 265 U. S. 47.

<sup>10</sup> Compare, however, the situation in the case of *Burnet v. Brooks*, 288 U. S. 378.

<sup>11</sup> See *Safe Deposit & T. Co. v. Virginia*, 280 U. S. 83; *Farmers Loan Co. v. Minnesota*, 280 U. S. 204; *Baldwin v. Missouri*, 281 U. S. 586; *First National Bank v. Maine*, 284 U. S. 312.

defense as against a charge from abroad of an abuse of power.<sup>12</sup> Even the contention that reliance upon a particular theory might open the door to double taxation would, in so far as the law of nations is concerned, be one calculated at the present time to challenge the wisdom of the taxing policy rather than the right to have recourse thereto.<sup>13</sup> In a word, repudiation, for constitutional reasons, of doctrines that once obtained in the Supreme Court (such as that pertaining to the right to tax a debt at the domicile of the debtor)<sup>14</sup> yields no intimation that those doctrines sustained what the law of nations forbade.

It is not here sought to trace the steps in the development and changes in American constitutional law in relation to taxation, as they have been reflected by the Supreme Court.<sup>15</sup> It may suffice to note that they have been attributable in large degree to an endeavor to find protection for the tax-payer against double taxation, and to a resulting desire to lessen the influence of fiction or fact that would tend to sustain such action.

In general, all immovable property within the territory of a State, regardless of the residence or nationality of the owner, is, with a few notable exceptions which are explainable on precise grounds,<sup>16</sup> subject to taxation;<sup>17</sup> likewise, all movable property therein, provided it may be fairly regarded as incorporated in the mass of property there belonging.<sup>18</sup> Difficulties may arise in ascertaining whether a particular chattel falls within such a category, and is to be so regarded. Normally, the problem is oftentimes one of fact rather than of law. It has been held, however, that a vessel having no permanent location within another State of the Union, possesses an artificial *situs* for purposes of taxation at the domicile of the owner.<sup>19</sup> It is acknowledged that moneys, notes and evidences of credit may be taxed in the State where they are employed and found, irrespective of the legal home of the owner.<sup>20</sup> It has been held that stocks,

<sup>12</sup> *Farmers Loan Co. v. Minnesota*, 280 U. S. 204, 210.

<sup>13</sup> "There is no rule of International Law which prescribes to States, in absence of treaties, to relieve partially or entirely, from taxation some subjects, on the sole ground that they happen to be taxed by another State as well." (A. N. Sack, "Double and Multiple Taxation: The Legal Phase of the Subject," in *Current Problems in Finance*, Commerce Clearing House, Inc., 1933, 11-12.)

<sup>14</sup> *Blackstone v. Miller*, 188 U. S. 189.

<sup>15</sup> See, in this connection, Arthur Leon Harding, *Double Taxation of Property and Income*, Cambridge (Mass.), 1933.

<sup>16</sup> The property owned by a foreign government and used as its embassy or legation may be noted as an exception. Concerning the taxation of diplomatic officers, *infra*, § 440; concerning that of consular officers, *infra*, § 472.

<sup>17</sup> See, for example, *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224. Conversely, a State cannot lawfully tax immovable property in a foreign country. *Mr. Root, Secy. of State, to Mr. Leishman, American Minister to Turkey*, Feb. 27, 1906, *For. Rel.* 1906, II, 1408.

<sup>18</sup> Cf. how this principle has been worked out and applied, for example, in *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Blackstone v. Miller*, 188 U. S. 189; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Ayer & Lord Tie Co. v. Kentucky*, 202 U. S. 409; *New York Central Railroad v. Miller*, 202 U. S. 584; *Union Tank Line Co. v. Wright*, 249 U. S. 275; *Safe Deposit & T. Co. v. Virginia*, 280 U. S. 83, at 93. Also cf. *Beale's Cases on Conflict of Laws*, III, Summary, § 35; *Lorenzen's Cases on Conflict of Laws*, 291, note; *Harvard Law Rev.*, XX, 138, note.

<sup>19</sup> *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, where the principle stated in the text was applied to ships owned by the Plaintiff in Error, itself incorporated in Kentucky, when the vessels were enrolled at the port of New York, engaged in the Atlantic coastwise trade, and had never touched at any Kentucky port. They were deemed to be taxable in Kentucky as the property of a Kentucky corporation.

<sup>20</sup> *New Orleans v. Stempel*, 175 U. S. 309; *Metropolitan Life Ins. Co. v. New Orleans*, 205

bonds and mortgages secured upon property in the United States or payable by persons or corporations there domiciled, owned by a non-resident alien and in the hands of an agent in the United States empowered to sell, assign and transfer any of them, and to invest and re-invest the proceeds, are to be deemed property within the United States.<sup>21</sup> It has been declared, however, that the mere presence of notes within a State which is not the domicile of the owner does not bring the debts of which they are the written evidence within the taxing power of that State.<sup>22</sup> Again, it has been held that income derived by a non-resident from property within an American commonwealth is a thing to be deemed taxable as an asset within such commonwealth.<sup>23</sup>

## (i)

§ 206. **The Same.** Obstacles attributed to the Constitution, difficulties in attempting to attach a *situs* to a debt, as well as failure to observe or conclude whether an endeavor was being made in a particular case to tax property as such, rather than an individual as such by reason of his connection with the taxing entity,<sup>1</sup> have seemingly prevented American judicial opinion from remaining steadfast to satisfactory conclusions concerning the right to tax incorporeal property. A fiction has oftentimes been employed to connect such property with the State that endeavored to tax it. The domicile of the owner within its territory has at times been regarded as the link requisite or sufficient to tether such property to itself. Accordingly, the domicile of an individual within its territory has been declared to justify a State in levying a tax upon shares owned by him in foreign corporations doing no business within its territory, on the theory that such intangible interests of the shareholder might be justly regarded, for purposes of taxation, as belonging to, or having a so-called *situs* within, the State of the domicile.<sup>2</sup> Again, the State of the domicile of a decedent has been deemed to possess authority to tax the succession to intangible property evidenced by certificates of stock and bonds kept within

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U. S. 395; *Burke v. Wells*, 208 U. S. 14; *De Ganay v. Lederer*, 250 U. S. 376, where the property was owned by a non-resident alien.

<sup>21</sup> *De Ganay v. Lederer*, 250 U. S. 376. It was, accordingly held that the income from such property was to be deemed income from "property owned in the United States by persons residing elsewhere," under the Income Tax Law of Oct. 3, 1913.

<sup>22</sup> *Buck v. Beach*, 206 U. S. 392. It should be noted, however, that in this case the effort was made to tax a debt as such, rather than the evidences thereof as chattels or property in the place where they were kept.

<sup>23</sup> *Shaffer v. Carter*, 252 U. S. 37, 52.

§206.<sup>1</sup> "Taxes generally are imposed upon persons, for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed, on grounds not of fiction but of fact." (Holmes, J., dissenting opinion in *Safe Deposit & T. Co. v. Virginia*, 280 U. S. 83, 97.)

"It seems to me going still further astray to rely upon the *situs* of the debt. A debt is a legal relation between two parties and, if we think of facts, is situated at least as much with the debtor against whom the obligation must be enforced as it is with the creditor. To say that a debt has a *situs* with the creditor is merely to clothe a foregone conclusion with a fiction. The place of the property is not material except where inability to protect carries with it inability to tax." (*Id.*, 97-98.)

<sup>2</sup> *Hawley v. Malden*, 232 U. S. 1; also *Darnell v. Indiana*, 226 U. S. 390; *Kidd v. Alabama*, 188 U. S. 730.

the domain of another commonwealth.<sup>3</sup> Nevertheless, the applicability of this theory has been denied in certain situations where it was regarded as inequitable to apply it.<sup>4</sup> Thus, it has been declared that intangible property, such as stocks and bonds, in the hands of the holder of the legal title "with definite taxable *situs* at its residence, not subject to change by the equitable owner," might not be taxed at the domicile of that owner in another State.<sup>5</sup> In a case where the domicile (New York) of the decedent coincided with the place where negotiable bonds and certificates of indebtedness were kept, the commonwealth of issuance (Minnesota) was not permitted to tax their transfer by will.<sup>6</sup> Where the owner of credits for cash deposited in banks in Missouri, as well as of bonds and notes also physically in that State, died domiciled in Illinois, where her estate was administered, it was held that the credits, bonds and notes were not to be deemed within the jurisdiction of Missouri for taxation purposes.<sup>7</sup> Somewhat later, in 1932, it was held that the State of Maine could not tax the shares in a domestic corporation owned by persons domiciled elsewhere.<sup>8</sup> Regardless of whether there be a distinction between the theory to be relied upon in the effort to tax the succession to incorporeal property, and the effort to tax a debt,<sup>9</sup>

<sup>3</sup> *Blodgett v. Silberman*, 277 U. S. 1. Declared Chief Justice Taft, in the course of the opinion of the court: "Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case. For present purposes it suffices that intangible personalty has such a *situs* at the domicil of its owner that its transfer on his death may be taxed there." (*Id.*, 10.)

<sup>4</sup> "Ordinarily this Court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett v. Silberman*, 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise." (McReynolds, J., in the opinion of the court in *Safe Deposit & T. Co. v. Virginia*, 280 U. S. 83, 92.)

<sup>5</sup> *Safe Deposit & T. Co. v. Virginia*, 280 U. S. 83.

In his concurring opinion (in which Mr. Justice Brandeis also concurred) Mr. Justice Stone declared: "No attempt was made by Virginia to tax the equitable interests of the beneficiaries of the trust. . . . If the question were here I should not be prepared to go so far as to say that the equitable rights in *personam* of the beneficiaries of the trust might not have been taxed at the place of their domicile quite as much as a debt secured by a mortgage on land in another jurisdiction, notwithstanding the fact that the land is also taxed at its situs." (*Id.*, 95 and 96.) See, also, dissenting opinion of Holmes, J., *id.*, 96.

<sup>6</sup> *Farmers Loan Co. v. Minnesota*, 280 U. S. 204.

<sup>7</sup> *Baldwin v. Missouri*, 281 U. S. 586, where Mr. Justice McReynolds, in the course of the opinion of the court declared: "So far as disclosed by the record, the situs of the credit was in Illinois, where the depositor had her domicile. There the property interest in the credit passed under her will; and there the transfer was actually taxed. This passing was properly taxable at that place and not elsewhere." (*Id.*, 593.) See dissenting opinion of Holmes, J., with which Mr. Justice Brandeis and Mr. Justice Stone were in agreement. (*Id.*, 595.)

<sup>8</sup> *First National Bank v. Maine*, 284 U. S. 312. Compare dissenting opinion of Mr. Justice Stone, with whom Justices Holmes and Brandeis concurred, *id.*, 331.

<sup>9</sup> It should be observed that the Supreme Court of the United States appears to have likened the effort to tax a succession to property by will or intestacy to the effort to tax property as such, in that it has regarded the propriety of what the State of a decedent's domicile sought to achieve by its actual relationship to the thing transferred. See *Frick v. Pennsylvania*, 268 U. S. 473, in relation to tangible chattels, as well as *Blodgett v. Silberman*, 277 U. S. 1, in relation to incorporeal property. In the case of tangible chattels, it has been the absence of the power to control devolution of those outside of the State of the domicile that has been deemed to impair the right of that State to tax the succession. In the case of incorporeal property, it has been the implications of the fiction that associated such property with the domicile of the owner that has been the basis of the justification of the conduct of the State of the domicile in taxing the succession.

the Supreme Court has (for reasons perhaps to be imputed primarily to obstacles of a constitutional character) departed from conclusions formerly enunciated through the opinions of Mr. Justice Holmes, to the effect that the control of the taxing authority over the debtor confers the right to tax the transfer of a debt.<sup>10</sup> In permitting the State of the domicile to tax the succession to incorporeal property when the tangible evidences of it have been kept outside of its territorial limits, the approval of a fiction deep-rooted in American law has been renewed; for in such a case it is not apparent that actual succession is necessarily attributable to the will of a taxing State.

Nevertheless, the Supreme Court has within quite recent years emphasized its awareness of the fact that the relationship between intangible property and its owner is a thing which is itself subject to taxation by the State within whose domain such owner is connected as by domicile therein, and that no constitutional obstacle to the right to tax by such State is apparent from the circumstance that another State acting on a different theory may find it possible to tax the property concerned because evidences of it are within its physical control.<sup>11</sup> This acknowledgment however calculated to facilitate double taxation, has the great merit of revealing anew distinctive bases of taxation which are not competitive and which respect the requirements of logic.

In view of the opposing theories that in different decades have prevailed in its courts, the United States could not well maintain that a foreign State which invoked any of them necessarily abused its power or violated international law.

<sup>10</sup> Mr. Justice McReynolds, in the course of the opinion of the court in *Farmers Loan Co. v. Minnesota*, 280 U. S. 204, at 209, said that the case of *Blackstone v. Miller*, 188 U. S. 189, and certain approving opinions, had lent support to the doctrine "that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two States may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the Fourteenth Amendment." He added that "having considered the supporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled."

It may be observed that in the case of *Blackstone v. Miller*, 188 U. S. 189, in sustaining the right of the State of New York to tax the transfer by will or intestate law of property within the State of a non-resident decedent, as applied to a deposit in a New York bank owned by a resident of Illinois who died when domiciled in Chicago, the Supreme Court, through Mr. Justice Holmes declared: "If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax." (*Id.*, 205.)

<sup>11</sup> See *Curry v. McCanless*, 307 U. S. 357, where Mr. Justice Stone, in the course of the opinion of the Court, declared: "But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another State, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each State concerned to tax. Whether we regard the right of a State to tax as founded on power over the object taxed, as declared by Chief Justice Marshall in *McCulloch v. Maryland*, *supra*, through dominion over tangibles or over persons whose relationships are the source of intangible rights; or on the benefit and protection conferred by the taxing sovereignty, or both, it is undeniable that the State of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in which more than one State may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles." (367-368.)

See also *Pearson v. McGraw*, 308 U. S. 313.

Thus, if such a State taxed a debt due to an American national residing abroad, when or because the debtor was an individual or entity established within its territorial limits; or if it taxed the succession by will of an American national residing permanently within its limits, to incorporeal property evidenced by certificates of indebtedness kept in America; or if it regarded as taxable property incorporeal property belonging to a non-resident American national evidenced by certificates of stock or bonds kept and utilized within its domain, its conduct would find support in expressions of American judicial opinion. This would also be true were such a State to tax the income locally derived from investments made within its territory, despite the alienage and non-residence of the owner.<sup>12</sup>

Adverting to a distinction between limitations under the Constitution upon an American commonwealth to tax, and the broad authority of the Federal Government in that regard, the Supreme Court of the United States, in 1933, sustained the application of the Federal inheritance tax to certain intangible property of a non-resident alien decedent, when that property assumed the form of bonds of foreign corporations, of foreign governments, of domestic corporations and of a domestic municipality and stock in a foreign corporation, as well as of a balance of a cash deposit in the United States.<sup>13</sup> In this connection, it was declared by Chief Justice Hughes, in the course of the opinion of the court:

So far as our relation to other nations is concerned, and apart from any self-imposed constitutional restriction, we cannot fail to regard the property in question as being within the jurisdiction of the United States, — that is, it was property within the reach of the power which the United States by virtue of its sovereignty could exercise as against other nations and their subjects without violating any established principle of international law. This view of the scope of the sovereign power in the matter of the taxation of securities physically within the territorial limits of the sovereign is sustained by high authority and is a postulate of legislative action in other countries.<sup>14</sup>

A State may, without violating any requirement of international law, tax persons as such who, regardless of their nationality, have, by reason of the closeness of their connection with its territory, established such a relationship with it as to justify the inference that they are residents thereof.<sup>15</sup> Such a relationship does not require the acquisition of a domicile as that term is understood either in America or England. It is founded rather on the sheer fact of residence.<sup>16</sup> As the Attorney General declared on March 1, 1921, in response to an

<sup>12</sup> *Shaffer v. Carter*, 252 U. S. 37.

<sup>13</sup> *Burnet v. Brooks*, 288 U. S. 378. See in this connection, *Holsten*, as Ancillary Executor v. Commissioner of Internal Revenue, 35 B.T.A. 568, 571, *Hackworth*, Dig., III, 592, footnote.

<sup>14</sup> *Id.*, 396, citing *Winans v. Attorney-General*, [1910] A. C. 27.

<sup>15</sup> Mr. Fish, Secy. of State, to Mr. Cushing, Minister to Spain, Jan. 12, 1876, MS. Inst. Spain, XVII, 432, *Moore*, Dig., II, 63, 64.

<sup>16</sup> This is well illustrated by the exaction by Japan of an income tax from foreign missionaries. For. Rel. 1900, 760-762; see, also, Mr. Fish, Secy. of State, to Mr. Davis, Minister to Germany, Nov. 21, 1874, For. Rel. 1875, I, 488-489; *Moore*, Dig., II, 58-60. Compare the attempt of the authorities of Frankfort-on-the-Main, in 1887, to levy an income tax on Mrs.

inquiry from the Secretary of the Treasury: "It is not essential in order to constitute an alien a 'resident alien' that he must be domiciled in the United States; it is enough if he abides here long enough to constitute himself something more than a mere transient or sojourner. And, conversely, an alien who is found within the United States can not be said to be a 'nonresident alien' unless his stay or habitation is transient. He may abide in the United States for pleasure, or for education, entertaining at all times an intention to return to a foreign domicile, and yet be for the time he remains here, if such stay is not transient, a resident."<sup>17</sup> An American national who met every requirement of the common law for the retention of a legal home in American territory, might still, in consequence of actual residence in a foreign country, be there subjected not unreasonably to the payment of an income tax.<sup>18</sup>

Personal taxes levied upon individuals subject thereto may assume a variety of forms. When they are levied upon aliens, the law of nations appears to offer few restrictions beyond the possible requirement that the tax be in a broad sense uniform and general in its operation. Such individuals may be subjected, for example, to the payment of a poll tax,<sup>19</sup> or of an income-tax;<sup>20</sup> and in the latter

S. R. Honey, the wife of an American citizen, domiciled in the United States, *For. Rel.* 1888, I, 623, 630, 642, 650, 655, *Moore, Dig.*, II, 60-61.

<sup>17</sup> 32 *Ops. Attys.-Gen.* 497, 503, *Hackworth, Dig.*, III, 580, 581.

Interpretative of the term "resident alien" under the income-tax laws of the United States, 53 Stat. 1-103, Treasury Department Regulations 103 (*Income Tax*, 1940), Sec. 19.211-2 contain the following announcement: "An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances." (*Hackworth, Dig.*, III, 580.)

<sup>18</sup> See Mr. Adce, Second Assist. Secy. of State, to Mr. Gross, June 29, 1921, *Hackworth, Dig.*, III, 575; Mr. Hughes, Secy. of State, to Senator Kellogg, Aug. 14, 1922, *Hackworth, Dig.*, III, 579, footnote; Mr. Moss, Assist. Secy. of the Treasury, to Mr. Kellogg, Secy. of State, Jan. 23, 1926, *Hackworth, Dig.*, III, 579, footnote. See also memorandum of law officer of Department of State, March 1, 1909, *For. Rel.* 1909, 285.

"Since a State may, incidental to rights as sovereign, impose a tax upon a company incorporated by itself and engaged in business within its territorial limits, and as that right is not affected by the alien ownership of shares in the corporation, this Government would find difficulty in protesting against the action of the German authorities in the present case unless it could be conclusively shown that this action constituted a discrimination against an American interest in a German corporation as compared with the treatment accorded alien interests, other than American, in other German corporations." (Mr. Harrison, Assist. Secy. of State, to Mr. Fishback, April 13, 1925, *Hackworth, Dig.*, III, 576.)

<sup>19</sup> *Opinion of Justices*, 7 Mass. 523; *Opinion of Justices*, 8 N. H. 573; *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65.

Concerning the unconstitutionality of certain sections of the Political Code of California of 1921, which imposed a poll tax of \$10 a year upon every alien male inhabitant of the State within specified ages, as at variance with the Fourteenth Amendment to the Constitution of the United States, see *Ex parte Kotta*, 187 Calif. 27, *Hackworth, Dig.*, III, 593-594.

<sup>20</sup> See Mr. Fish, Secy. of State, to Mr. Davis, Minister to Germany, Nov. 21, 1874, *For. Rel.* 1875, I, 488-489, *Moore, Dig.*, II, 58-60. As to the procedure to be followed by an American citizen abroad who alleges that he is not properly liable to the exaction of an income tax in



case, in the treatment of the resident alien, the tax may doubtless be assessed according to the amount of income from whatsoever source derived, and whether or not from assets outside of the taxing State.<sup>21</sup> It may be doubted, moreover, whether any rule of international law forbids discrimination on grounds of alienage.

It has been recently observed that "under the Internal Revenue Code, approved February 10, 1939, resident aliens are liable equally with citizens of the United States to the payment of income taxes on their entire income"; that "this is true even though the alien's income is derived wholly from sources without the United States"; that "however, such aliens are allowed a credit for 'the amount of any such taxes paid or accrued during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country.'"<sup>22</sup> When a tax is levied upon the income of a non-resident alien, it is obviously in the nature of a tax upon his property within the control of the territorial sovereign rather than a personal tax.<sup>23</sup> It is said that "non-resident aliens are taxable only upon income derived from sources within the United States."<sup>24</sup> In 1936, the Board of Tax Appeals held that a judgment recovered by a Dutch corporation in the United States Court of

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the country of his sojourn, *cf.* Mr. Hay, Secy. of State, to Mr. Harris, Minister to Austria-Hungary, May 31, 1899, For. Rel. 1899, 50; Moore, Dig., II, 61; also, Mr. Bayard, Secy. of State, to Mr. Honey, March 21, 1887, For. Rel. 1888, I, 631, Moore, Dig., II, 61, note.

See Memorandum of the Solicitor for the Department of State, on the payment of income taxes by American Consular Officers in Great Britain, March 1, 1909, For. Rel. 1909, 285; correspondence with Germany in 1906, concerning the exemption of American citizens in the territory of that Empire from the payment of church taxes, For. Rel. 1906, I, 658-660; correspondence with Haiti in 1907, respecting the requirement of that State compelling foreign firms to take out retail licenses in lieu of the enforcement of the Haitian tax law of 1876, For. Rel. 1907, II, 728-742.

In 1910, the Department of State, noting that several European Powers opposed the collection of a supplemental income tax from foreigners engaged in business in Bulgaria, on the ground that by the operation of the capitulations existing under the Turkish régime which were "still in force in Bulgaria," the government of that country lacked the right to enforce the collection of any new taxes upon foreign residents without the consent of their respective governments, gave its approval to representations made by the American Chargé d'Affaires, that American citizens be accorded the same treatment as that applied to other foreigners engaged in business in Bulgaria. For. Rel. 1910, 128.

<sup>21</sup> Foreign Relations 1900, 760-762.

<sup>22</sup> Statement in Hackworth, Dig., III, 579, citing 53 Stat. 5, 56; also Treasury Department Regulations 103 (Income Tax, 1940), Sec. 19.131-1.

<sup>23</sup> Thus, according to the Act of Sept. 8, 1916, 39 Stat. 756, provision was made for the taxation upon the entire net income received in the preceding calendar year from all sources within the United States "by every individual, a non-resident alien, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise." See, in this connection, *De Ganay v. Lederer*, 250 U. S. 376, sustaining a tax under the Income Tax Law of Oct. 3, 1913, upon the income from certain stocks, bonds, and mortgages owned by a non-resident alien, and in the hands of his agent in the United States.

It should be observed that according to the Act of Oct. 3, 1917, 40 Stat. 337, it was declared that the existing Income Tax Law should not be construed as taxing the income of foreign governments received from investments in the United States in stocks, bonds, or other domestic securities, owned by such foreign governments, or from interest on deposits in banks in the United States of moneys belonging to foreign governments.

<sup>24</sup> Hackworth, Dig., III, 582, citing Section 211 of the Internal Revenue Code of 1939, 53 Stat. 75; Treasury Department Regulations 103 (Income Tax, 1940), Sec. 19.211-1.

See documents in Hackworth, Dig., III, 582-588, concerning what are deemed to be sources of income within the United States.

Claims for a substantial sum as damages for the detention by the United States of a particular vessel did not constitute income from such sources within the meaning of the terms of the Revenue Act of 1932.<sup>25</sup>

It may be observed that "the net estate of a resident alien dying in the United States is subject to the same tax as that imposed upon the estate of a citizen."<sup>26</sup>

When, in 1925, the Supreme Court of the United States denied the right of the State of Pennsylvania, the domicile of a decedent, to tax the transfer by will of tangible personal property in another commonwealth,<sup>27</sup> it placed a limitation upon the application of the theory that the State of the domicile of a decedent may tax the succession to the *universitas* as incidental to the *persona* of the decedent.<sup>28</sup> As has been observed, however, the State of the domicile of a decedent was regarded by the same tribunal in 1929, as possessed of requisite authority to tax the succession to intangible property, regardless of the place where evidences thereof might be kept.<sup>29</sup> It is believed that the United States might fairly invoke the doctrine set forth in the former decision as indicative of a theory of a restraint to be observed by any foreign power. Conversely, it would have difficulty in denying that the invocation by such power of the principle enunciated in the later decision was unreasonable.

(ii)

§ 206A. **Aspects of Double Taxation.** At the present time, States are not oftentimes vexed by discussion of the extent of the privilege of a territorial sovereign, as tested by the law of nations, to tax alien persons or property within its control. They are rather concerned with the solution of problems touching the extent to which they should mutually refrain from the exercise of acknowl-

<sup>25</sup> *N. V. Koninklijke Hollandische Lloyd (Royal Holland Lloyd) v. Commissioner of Internal Revenue*, 34 B.T.A. 830, Hackworth, Dig., III, 588.

See also claim of the Scotia Lumber Company, Limited, a Canadian corporation, in 1935, where objection was made to the imposition of income taxes in the United States upon income derived by that corporation from certain transactions in Canada with American companies, and where the Treasury Department concluded that it "constituted both a production and sale of personal property without the United States," and that consequently the profit derived from the sale was not taxable as income from sources within the United States under relevant provisions of the statutory law. Hackworth, Dig., III, 588-589.

<sup>26</sup> Statement in Hackworth, Dig., III, 589, citing Internal Revenue Code of 1939, § 810 (53 Stat. 120).

<sup>27</sup> *Frick v. Pennsylvania*, 268 U. S. 473.

The court declared that the Pennsylvania tax was "not a property tax but one laid on the transfer of property on the death of the owner." (*Id.*, 492.) Nevertheless, by demanding that the right to tax the transfer of tangible personal property depended upon actual control over such property, the court dealt with the problem somewhat as though a tax on property were involved. (*Id.*, 495.)

<sup>28</sup> See *Frothingham v. Shaw*, 175 Mass. 59; *Eidman v. Martinez*, 184 U. S. 578; *Blackstone v. Miller*, 188 U. S. 189, 204; *Bullen v. Wisconsin*, 240 U. S. 625, 631, where it was said by Mr. Justice Holmes in the course of the unanimous opinion of the Court: "As the States where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicil, whatever the limitations of power over the specific chattels may be, as is especially plain in the case of contracts and stock." See, also, *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 59.

<sup>29</sup> *Blodgett v. Silbermann*, 277 U. S. 1.

edged rights, and the character of reciprocal concessions through which common sacrifices may be desirable.

American decisions have borne testimony to the power of more than a single taxing authority, through the taxation of persons as such or of property as such, and through processes artificially assigning to incorporeal property a situs in the domain of a territorial sovereign, to subject the owner of property to duplicated burdens. Accordingly, what is permitted without interference with any rule of international law may produce grave hardship.<sup>1</sup> There has been brought home to the international society a sense of need of agreement that the individual State should not in various situations exercise the taxing power with respect to property of an alien even fairly within its grasp, or to put it differently, that two or more States should not through the operation of consistent but differing theories duplicate the burden of taxation impressed upon the owner.

Prevention of double taxation calls for the relinquishment of the taxing privilege by the State or States other than that which has the closest relationship with the thing sought to be taxed and which, therefore, is in a position to claim that its equities as a taxing power are inherently superior to those of any other. As yet, however, there is neither general understanding as to tests that unerringly establish such a relationship in reference to many forms of property, nor a common acceptance of the theory that closeness of relationship of the thing taxed to a particular territorial sovereign is or should be necessarily decisive of the superiority and exclusiveness of its claim. The United States is, for example, indisposed to give up the right to tax its nationals resident abroad on certain categories of income derived from foreign investments, regarding the bond of nationality as the foundation of a legal right that should not be given up.<sup>2</sup> The present time bears witness to the scrutiny of criteria that are suggested as establishing bases of exclusive claims, rather than to a common disposition to make large sacrifices productive of the ultimate abandonment of legal rights and amendatory of the law in which they still find a place. Nevertheless, the wide sense of the need of eliminating or minimizing double taxation points unerringly to the fact that through appropriate reciprocal arrangements the problem will ultimately be solved by processes serving to accentuate the superiority of the claim of a particular territorial sovereign, and to brand as inequitable those of any other.<sup>3</sup>

§ 206A. <sup>1</sup> Declared Chief Justice Hughes in the opinion of the Court in the case of *Burnet v. Brooks*, 288 U. S. 378, at 399: "As jurisdiction may exist in more than one government, that is, jurisdiction based on distinct grounds—the citizenship of the owner, his domicile, the source of income, the situs of the property—efforts have been made to preclude multiple taxation through the negotiation of appropriate international conventions. The endeavors, however, have proceeded upon express or implied recognition, and not in denial, of the sovereign taxing power as exerted by governments in the exercise of jurisdiction upon any one of these grounds."

See in this connection documents in Hackworth, Dig., III, 594–598.

<sup>2</sup> See, in this connection, John A. Herndon, *Relief from International Income Taxation*, Chicago, 1932, 264.

<sup>3</sup> "Treaties specifically devoted to the prevention or limitation of international double taxation first appeared about the middle of the nineteenth century and increased slowly thereafter in scope and number. Only about twenty were in effect when the war broke out

Under the statutory law of the United States, as of 1939, the income of a non-resident alien individual or foreign corporation which consists exclusively of earnings derived from the operation of a ship or ships documented under the laws of a foreign country which grants an equivalent exemption to citizens of the United States and to corporations organized in the United States shall not be included in gross income and shall be exempt from taxation.<sup>4</sup> In accordance with similar provisions in earlier legislation, agreements have been entered into with numerous countries designed to afford relief from double income tax on shipping profit.<sup>5</sup> As a Foreign Service officer of the United States has had oc-

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and most of these lapsed as a result of the war. Immediately after the war, in 1919, the International Chamber of Commerce started, and a little later the League of Nations assumed the more active direction of, a sustained movement to reduce international taxation, which has had notable results. . . .

"The first step in the League's campaign was a careful analysis of the economic fundamentals of the problem by four economic scholars, Professor Bruins of Holland, Senator Einaudi of Italy, Sir Josiah Stamp of England, and Prof. E. R. A. Seligman of Columbia University. The Economists' Report was published under date of April 5, 1923. This was followed by a series of conferences and reports by a committee of Technical Experts, composed largely of the administrative heads of the tax systems of leading European countries. Their final report (1927) was amended and expanded at a General Meeting of Government Experts on Double Taxation and Tax Evasion held at Geneva, October 22-31, 1928, at which twenty-seven countries were represented. The Report of the Government Experts (Publications of the League of Nations, II, Economic and Financial, 1928, II, 49) presents model treaties or draft bilateral conventions (I) For the Prevention of Double Taxation in the Special Matter Of Direct Taxes (more particularly income taxes), and here three distinct drafts adapted to countries with fiscal systems and policies are given, drafts Ia, Ib and Ic; (II) For the Prevention of Double Taxation in the Special Matter Of Succession Duties; (III) On Administrative Assistance in Matters of Taxation; and (IV) On Assistance in the Collection of Taxes. In the following year, the work was taken up by a standing committee of the League of Nations, the Fiscal Committee, which has carried on extensive researches into a number of the more difficult technical questions arising in its field, particularly the possibility of framing plurilateral conventions for the avoidance of double taxation on certain categories of income and the allocation or apportionment of the income of business enterprises operating in two or more countries, and has stimulated or coöperated in the conclusion of a number of international agreements the most recent of which, perhaps, is the Convention Between The United States of America and France on the Subject of Double Taxation, signed April 27, 1932." (Thomas S. Adams, "Interstate and International Double Taxation," in *Lectures on Taxation*, Columbia University Symposium, 1932, edited by Roswell Magill, 1932, 103-105.)

For texts of the 1928 model draft conventions, see League of Nations document C.562.M.178.1928.II.

Also, Taxation of Foreign and National Enterprises, League of Nations documents C.73.M.38.1932.II.A.3.; C.425.M.217.1933.II.A.; C.425(a).M.217.(a).1933.II.A.; C.425(b).M.217(b).1933.II.A.; C.425(c).M.217(c).1933.II.A. See Hackworth, Dig., III, 594-595, footnote, for a list of Reports of the Fiscal Committee of the League of Nations, 1929-1939, in relation to the matter.

See also, E. R. A. Seligman, *Double Taxation and International Fiscal Coöperation*, New York, 1928; Mitchell B. Carroll, "A Brief Survey of Methods of Allocating Taxable Income Throughout the World," in *Lectures on Taxation*, Columbia University Symposium, 1932, 131, edited by Roswell Magill, New York, 1932; Thomas S. Adams, "Interstate and Double Taxation," *id.*, 101; John G. Herndon, *Relief from International Income Taxation*, Chicago, 1932; Arthur Leon Harding, *Double Taxation of Property and Income*, Cambridge (Massachusetts), 1933; "Double and Multiple Taxation, The Legal Phase of the Problem," Alexander N. Sack, in *Current Problems in Finance*, Commerce Clearing House, Inc., 1933, 11-12.

<sup>4</sup> Internal Revenue Code of 1939, §§ 212(b) and 231(d), 53 Stat. 76 and 78, respectively, 26 U.S.C.A. §§ 212(b), and 231(d). See also like provisions in the Revenue Act of 1921, 42 Stat. 239, and statement in Hackworth, Dig., III, 595.

<sup>5</sup> See, for example, Exchange of Notes between the United States and Italy, March 10 and May 5, 1926, U. S. Executive Agreement Series No. 10; also exchange of notes between the United States and Canada of Aug. 2 and Sept. 17, 1928, *id.*, No. 4. See also other instances given in Hackworth, Dig., III, 595, footnote.

casion recently to observe: "Within the last few years, as numerous double taxation conventions have been concluded among other countries, the Government has perceived a distinct value in such bilateral agreements, notwithstanding their shortcomings. It has implemented its reciprocity offers concerning shipping profits by a number of agreements providing for relief with respect to such profits and also has concluded more general agreements with France (1932), Canada (1936), and Sweden (1939). In the middle of 1939, negotiations were being conducted for a convention with the Netherlands, an addendum to the convention with Canada, and a new agreement with France."<sup>6</sup> The convention with France, signed on April 27, 1932, and proclaimed by the President of the United States on April 16, 1935, announced in Article I: "Enterprises of one of the contracting States are not subject to taxation by the other contracting State in respect of their industrial and commercial profits except in respect of such profits allocable to their permanent establishments in the latter State. No account shall be taken, in determining the tax in one of the contracting States, of the purchase of merchandise effected therein by an enterprise of another State for the purpose of supplying establishments maintained by such enterprise in the latter State."<sup>7</sup> The convention with Canada signed on December 30, 1936, was proclaimed by the President on August 16, 1937.<sup>8</sup> The convention and protocol with Sweden were signed at Washington March 23, 1939, and proclaimed by the President on December 12, 1939.<sup>9</sup>

(f)

**§ 207. Duties on Imports and Exports.** In order to safeguard and sustain its economic interests, and incidentally to protect its revenues, a State may control and regulate the importation into, and exportation from, its territory

<sup>6</sup> James W. Gantenbein, *Financial Questions in United States Foreign Policy*, New York, Columbia University Press, 1939, 222-223.

<sup>7</sup> U. S. Treaty Vol. IV, 4184. See Report of the Secy. of State to the President, May 27, 1932, Hackworth, Dig., III, 597; Mitchell B. Carroll, "The Development of International Tax Law: Franco-American Treaty on Double Taxation—Draft Convention on Allocation of Business Income," *Am. J.*, XXIX, 286.

On September 26, 1940, the Senate, by unanimous consent, agreed to return to the Secretary of State without the advice and consent of that body to ratification, "in view of the political changes effected through military operations in Europe since these conventions were signed," three particular conventions, one of which was that with France signed on July 25, 1939, for the avoidance of double taxation and the establishment of rules of reciprocal administrative assistance in the case of income and other taxes. See Dept. of State Bulletin, Jan. 11, 1941, 80.

<sup>8</sup> U. S. Treaty Vol. IV, 4013. Concerning the purposes of the convention, see statement in Hackworth, Dig., III, 598.

<sup>9</sup> U. S. Treaty Series No. 958. Declared Secy. Hull in relation to the convention: "The convention has three aspects, (a) avoidance of double taxation, (b) exchange of information, and (c) mutual coöperation in enforcement of the taxes to which the convention relates. . . . The convention represents the most comprehensive agreement yet achieved by this Government in the field of conventions looking to avoidance of double taxation and its related problem of fiscal coöperation. The terms of the convention constitute a distinct step forward in organized avoidance of double taxation, and thereby contribute toward removal of an important impediment to international trade. With respect to fiscal coöperation, the view is entertained that through this convention there will be established broad principles of fiscal coöperation, facilitating negotiations looking to similar conventions with other countries. It is believed that the provisions of the convention are satisfactory in this regard and establish a basis for the ultimate accomplishment of these desired objectives." (Hackworth, Dig., III, 598.)

of articles of every character.<sup>1</sup> The right to control embraces the right to prohibit ingress or egress, as well as to levy duties upon imports and exports.<sup>2</sup> Incidentally, a State may impose appropriate penalties upon persons who attempt to defy its prohibitions or regulations. Penalties may assume various forms, including the confiscation of articles of which an unlawful introduction is attempted, or the fining or imprisonment of the person making such an attempt.<sup>3</sup>

The successful operation of tariff policies may call for the conclusion of treaties responsive thereto. No rule of international law offers a barrier. None forbids a State to commit itself to arrangements providing either for reciprocal commercial concessions,<sup>4</sup> or the unconditional most-favored-nation treatment of the commerce of another.<sup>5</sup>

(g)

§ 207A. **Cargo and Tonnage Duties.** It is not unreasonable for a State to impose upon a vessel of any nationality entering its ports from a foreign port a duty measured according to the tonnage of the ship. Such an exaction is known as a tonnage duty. The United States, like other maritime States, has long exercised such a right.<sup>1</sup>

A cargo duty so-called is an exaction imposed upon a shipment of goods en-

§ 207.<sup>1</sup> Mr. Fish, Secy. of State, to Mr. Williamson, Minister to Central America, Feb. 15, 1875, MS. Inst. Costa Rica, XVII, 232, Moore, Dig., II, 66.

"Subject to such international undertakings as may circumscribe its freedom of action, a State may prohibit or regulate the importation into and the exportation from its territories of goods and commodities in such manner and to such extent as in its judgment may best serve its interests. The treatment to be accorded by a State to another State and its nationals in these respects is frequently covered by a treaty or other form of international agreement." (Hackworth, Dig., II, 55.)

<sup>2</sup> See, for example, Section 3 of the National Prohibition Act of October 28, 1919, Chap. 85, 41 Stat. 305, 308. Also in this connection, *Grogan v. Walker & Sons*, 259 U. S. 80; *Cunard S.S. Co. v. Mellon*, 262 U. S. 100.

<sup>3</sup> See, for example, provisions of the Act of Oct. 3, 1913, with reference to the forfeiture of obscene books, lottery tickets, etc., sought to be imported into the United States, and also the penalties imposed by the Act upon an officer, agent or employee of the Government, knowingly aiding or abetting the violation of the law prohibiting the importation of such articles. 38 Stat. 194 and 195.

See Mr. Blaine, Secy. of State, to Mr. Bingham, M. C., Jan. 11, 1890, 176 MS. Dom. Let. 86, Moore, Dig., II, 68. Also For. Rel. 1901, 252-260, concerning complaint by a naturalized American citizen of the confiscation by Guatemala of silver belonging to him, Moore, Dig., II, 69.

<sup>4</sup> See, for example, commercial arrangement between the United States and Germany, July 10, 1900, in conformity with the Customs Act of the United States, of July 24, 1897, Malloy's Treaties, I, 558; also commercial convention with Cuba, of Dec. 11, 1902, and approved by Act of Congress of Dec. 17, 1903, Malloy's Treaties, I, 353. See *United States v. American Sugar Refining Co.*, 202 U. S. 563, in relation to the date when the agreement took effect.

In an announcement on and summary of a reciprocal tariff agreement between the United States and Cuba, of Aug. 24, 1934, the Department of State declared on that date: "Although this agreement has been concluded under the Trade Agreements Act of June 12, 1934, it stands, nevertheless, in a square category. Geographical propinquity and historical considerations have given rise to especially close economic relationships between the United States and Cuba. Reciprocity with Cuba still is 'a proposition that stands entirely alone.'" *New York Times*, Aug. 25, 1934, p. 4.

<sup>5</sup> See, for example, Art. VII, of Treaty between United States and Germany, of December 8, 1923, U. S. Treaty Vol. IV, 4191, 4193.

§ 207A.<sup>1</sup> See, for example, Section 36, Act of August 5, 1909, 36 Stat. 111; Act of March 4, 1915, 38 Stat. 1193, 46 U.S.C.A. § 121.

tering or leaving a port. It may be in fact levied by reason of the nationality of the ship in which transportation is had, or the nationality of the owner of the cargo, or by reason of the place from which the cargo originates.

A State may not unlawfully proceed to discriminate against foreign shipping, and notably in the matter of tonnage and cargo duties. Such discriminating duties constitute those "in excess of what would be charged, in the particular country, one of its own vessels and the cargo imported in it."<sup>2</sup> They serve to penalize the ship because of its foreign nationality, or the owner of the cargo because of his use of the foreign ship for the carriage of his goods.

It is still true that, as Professor Moore was able to state in 1918, "since the Act of Congress of May 24, 1828, the United States has made a standing offer . . . for the reciprocal abolition of all discriminating duties without regard to the origin of the cargo or the port from which the vessel came."<sup>3</sup> Arrangements in pursuance of the statutory law have been effected by treaty,<sup>4</sup> and by executive proclamation suspending the collection of discriminating charges.<sup>5</sup>

A reason justifying such a course is that as merchant ships under the American flag are necessarily competitors of the ships of other maritime States with whom it may contract, a convention assuring merely most-favored-nation treatment would fail to safeguard the contracting parties against discriminations which either might make in favor of its own vessels or cargoes transported

<sup>2</sup> J. B. Moore, *Principles of American Diplomacy*, 1918, 172; Report of Mr. Bayard, Secy. of State, to the President, Jan. 14, 1889, For. Rel. 1888, II, 1857-1864, Moore, Dig., II, 74.

<sup>3</sup> J. B. Moore, *Principles of American Diplomacy*, 1918, 173. See R.S. Section 4228, as amended by Chapter 13, Act of July 24, 1897, 30 Stat. 214, 46 U.S.C.A. § 141.

See statement in Hackworth, Dig., II, 263.

**LIGHT DUES.** A State may doubtless without impropriety charge a foreign vessel entering one of its ports a fee on account of benefits derived from a lighthouse visible to the vessel in the course of its passage. See correspondence with Great Britain in 1933, as set forth in Hackworth, Dig., II, § 147, and documents there cited. Declared the Department of State in an instruction to the American ambassador at London, on Feb. 2, 1933: "This Government does not impose light dues except under exceptional conditions; see sections 4219 R.S. as amended and 4225 R.S. It has been held that the light dues under 4225 R.S. are imposed only under the conditions and in a like manner with those imposed under 4219 R.S." Hackworth, Dig., II, 271. It should be noted that 4219 R.S. has reference to tonnage duties. R.S. 4225, 46 U.S.C.A. § 128, makes reference to what is called "light money." Reciprocal national treatment in the matter of lighthouse duties is provided in numerous treaties to which the United States is a party. See, for example, Art. IX of treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4194.

<sup>4</sup> See also Agreement effected by exchange of notes with Finland, signed Dec. 21, 1925, Treaty Vol. IV, 4132.

See, for example, commercial arrangement between the United States and Germany, July 10, 1900, in conformity with the Customs Act of the United States, of July 24, 1897, Malloy's Treaties, I, 558; Arts. VII and VIII of treaty with Spain, July 3, 1902, Malloy's Treaties, II, 1703.

See arrangement between the United States and Sweden for the reciprocal exemption of pleasure yachts from all navigation dues, effected by an exchange of notes signed Oct. 22 and 29, 1930, U. S. Executive Agreement Series, No. 21.

<sup>6</sup> Mr. Hay, Acting Secy. of State, to Mr. Chen Lan Pin, August 23, 1880, For. Rel. 1880, 304, Moore, Dig., II, 72.

See Proclamation of President Roosevelt of Jan. 16, 1934, declaring that the foreign discriminating duties of tonnage and imposts within the United States were suspended and discontinued so far as respected the vessels of the Union of Soviet Socialist Republics and the produce, manufactures, or merchandise imported in said vessels into the United States from the Union of Soviet Socialist Republics or from any other foreign country. Dept. of State, Press Releases, Jan. 20, 1934, p. 32.

As interpretative of the applicable statutory law see *Flensburger Dampfercompagnie v. United States*, 73 Ct. Cls. 646; *Standard Oil Company v. United States*, 77 Ct. Cls. 205.

therein. Another cogent reason is the fact that discriminations by the United States in favor of its own shipping would not only provoke retaliation, but also, as a consequence thereof, expose the export trade of the United States to special harm owing to the circumstance that American dutiable ocean-borne exports are, in respect to tonnage, much greater than dutiable ocean-borne imports.<sup>6</sup>

By the Merchant Marine Act of June 5, 1920, the Congress declared that in its judgment articles or provisions in treaties or conventions to which the United States was a party which restricted the right of the United States to impose discriminating customs duties on imports entering the United States in foreign vessels and in vessels of the United States, and which also restricted the right of the United States to impose discriminatory tonnage dues on foreign vessels and on vessels of the United States entering the United States, should be terminated; and the President was authorized and directed within ninety days after the Act became a law, to give notice to the several Governments, respectively, "parties to such treaties or conventions," that so much thereof as imposed any such restriction on the United States would terminate on the expiration of such periods as might be required for the giving of such notice by the provisions of such treaties or conventions.<sup>7</sup>

Inasmuch as the Congress did not contemplate the violation of any existing treaty provisions restricting discrimination, and as most of the treaties containing them contained no arrangement for the termination by notice of those provisions, which could only be effected by the termination of the entire treaties of which they constituted a small part, and as the termination of such treaties *in toto* would expose the commerce of the United States to harm in the absence of assurance that satisfactory arrangements could be made in lieu of those to be relinquished, President Wilson and his successors, Presidents Harding and Coolidge, felt no obligation to take any action in consequence of the Act. They took none.<sup>8</sup>

By the treaty of friendship, commerce and consular rights with Germany, signed December 8, 1923, arrangements were made for reciprocal national treat-

<sup>6</sup> These reasons were emphasized by Mr. Hughes, Secretary of State, in a statement made by him before the Senate Committee on Foreign Relations, Feb. 2, 1925.

<sup>7</sup> Section 34, 41 Stat. 1007.

It should be noted that Section 317 of the Tariff Act of September 21, 1922 (42 Stat. 944) made provision for the imposition of retaliatory penalties applicable to a foreign country which discriminated in fact against the commerce of the United States, directly or indirectly. Paragraph (i) of the same section announced: "That when used in this section the term 'foreign country' shall mean any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced." Subject to the limitations thus expressed, the section did not appear to cover discriminations which a foreign State might make in favor of its own shipping in respect to cargo and tonnage duties and the like. It was apparently sought to safeguard most-favored-nation treatment rather than reciprocal national treatment.

<sup>8</sup> See Department of State, statement for the press, Sept. 24, 1920; address of President Harding to the Congress, Dec. 6, 1921, House Doc. No. 135, 67 Cong., 2 Sess., pp. 5-6; address of President Harding to a joint session of the Senate and the House of Representatives, Feb. 28, 1922, House Doc. No. 201, 67 Cong., 2 Sess.

See Jesse S. Reeves, "The Jones Act and the Denunciation of Treaties," *Am. J.*, XV, 33; H. T. Kingsbury, "The Refusal of the President to Give Notice of Termination of Certain Treaty Provisions under the Jones Act," *id.*, 39.



ment of shipping in relation to cargo, tonnage, harbor, pilotage, lighthouse, quarantine or other similar or corresponding duties or charges.<sup>9</sup> Various Senators doubted the wisdom of incorporating in a new treaty provisions serving to prevent the United States from thus discriminating in favor of its own shipping; and this consideration caused delay in the action of the Senate with respect to the treaty. On February 2, 1925, the Secretary of State, Mr. Hughes, appeared before the Senate Committee on Foreign Relations and explained why, in his judgment, the provisions for reciprocal national treatment were necessary in order to safeguard the commerce of the United States.<sup>10</sup> On February 10, 1925, the Senate advised and consented to the ratification of the treaty subject to two reservations, of which the second was:

That the fifth paragraph of Article VII and Articles IX and XI shall remain in force for twelve months from the date of exchange of ratification, and if not then terminated on ninety days previous notice shall remain in force until Congress shall enact legislation inconsistent therewith when the same shall automatically lapse at the end of sixty days from such enactment, and on such lapse each high contracting party shall enjoy all the rights which it would have possessed had such paragraph or articles not been embraced in the treaty.

Germany accepted the reservation, and ratifications of the treaty were duly exchanged on October 14, 1925. In view of the terms of the Act of June 5, 1920, it is perhaps of greater significance that the United States has continued to conclude treaties providing for reciprocal national treatment of shipping than that articles making appropriate provision therefor were subjected to the possibility of termination according to the terms set forth in the reservation above quoted.<sup>11</sup>

(h)

**§ 208. Industrial Property. Trade-Marks. Copyright. Patents.** A State is free to fix the process by which rights of industrial property may be acquired within its territory, and also to determine what persons may enjoy the privilege of acquiring them.<sup>1</sup> In the absence of treaty, there may doubtless be lawful discriminations against aliens. The territorial sovereign is not obliged to issue patents for inventions or designs to the nationals of a foreign State, or to permit them to register trade-marks. Strongest reasons of policy may, however, prevent

<sup>9</sup> Articles VII (fifth paragraph), IX, and XI, U. S. Treaty Vol. IV, 4191, 4194.

<sup>10</sup> In the course of his statement Secretary Hughes declared that if the influence of the United States were to be cast in favor of world peace it should aim to diminish rather than to increase the field of economic reprisals. He stated that the policy of the open door, of equal opportunity, of promoting agreements serving to put an end to discriminations which would breed ill-will and strife, was that which he believed the United States should adopt. He said that with equal opportunity his country could hold its own throughout the world.

<sup>11</sup> See for example, Arts. VII (fifth paragraph), IX and XI, of treaty with Estonia, of Dec. 23, 1925, and provisions for termination thereof in Art. XXIX (third paragraph), U. S. Treaty Vol. IV, 4105, 4115; also Article VII (sixth paragraph) of treaty with Hungary, of June 24, 1925, and provisions for termination thereof set forth in an exchange of notes of same date, U. S. Treaty Vol. IV, 4318, 4328.

<sup>12</sup> § 208. <sup>1</sup> See, for example, with respect to patents, Mr. Frelinghuysen, Secy. of State, to Mr. Mann, Dec. 27, 1884, 153 MS. Dom. Let. 515, Moore, Dig., II, 34; also Mr. Bayard, Secy. of State, to Mr. Avery, May 4, 1887, 164 MS. Dom. Let. 78, Moore, Dig., II, 34.

the exercise of this prerogative. The legislation of the United States, with respect to patents for inventions and designs, has extended its benefits to the inventors of every nationality, without reference to treaties.<sup>2</sup>

The existing statutory law provides that the owner of a trade-mark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided he be domiciled within the territory of the United States, or reside in or be located in any foreign country, which, by treaty, convention, or law, affords similar privileges to the citizens of the United States, may obtain registration of such trade-mark, by complying with certain specified requirements.<sup>3</sup>

The United States adhered to the Convention for International Protection of Industrial Property, concluded at Paris, March 20, 1883,<sup>4</sup> and was a party to the Additional Act concluded at Brussels, December 14, 1900.<sup>5</sup> It was also a party to the Industrial Property Convention of June 2, 1911, and to the final protocol of that date.<sup>6</sup> According to the international arrangement established

<sup>2</sup> Rev. Stat., § 4886, amended March 3, 1897, 29 Stat. 692, and as amended May 23, 1930, 46 Stat. 376, 35 U.S.C.A. § 31; also Rev. Stat., § 4929, amended May 9, 1902, 32 Stat. 193, 35 U.S.C.A. § 73.

*Cf.* Mr. Bayard, Secy. of State, to Mr. Herbert, British Chargé, Jan. 18, 1889, MS. Notes to Great Britain, XXI, 38, Moore, Dig., II, 42, 43; also memorandum from the American Ambassador to the German Government, Oct. 19, 1894, For. Rel. 1895, I, 529, Moore, Dig., II, 40.

*See*, also, agreement by exchange of notes June 22 and June 26, 1906, between the United States and Denmark, in which it was formally declared that "under the laws of the United States, it is not necessary, in order to secure the protection of Danish industrial designs or models, that the articles they represent shall be manufactured in the United States." For. Rel. 1906, I, 533.

<sup>3</sup> Act of Feb. 18, 1909, 35 Stat. 628, 15 U.S.C.A. § 81. According to the Act of Feb. 20, 1905, 33 Stat. 725, 15 U.S.C.A. § 83, the applicant for registration, or for renewal of registration of a trade-mark, "who is not domiciled within the United States," is obliged, before the issuance of a certificate of registration to designate a person residing within the United States for service of process or notice in respect to proceedings affecting the right of ownership of the trade-mark.

*See* also amendatory Act of June 20, 1936, 49 Stat. 1539, 15 U.S.C.A. § 84, concerning the effect of previous application filed in a foreign country and the registration of a collective mark. That Act purported to "effectuate certain provisions of the International Convention for the Protection of Industrial Property as revised at The Hague on November 6, 1925."

Concerning the interpretation of the Act of March 3, 1881, 21 Stat. 502, *see* Mr. Bayard, Secy. of State, to Mr. Herbert, British Chargé, Jan. 18, 1889, MS. Notes to Great Britain, XXI, 38, Moore, Dig., II, 42; also Mr. Hay, Secy. of State, to the Secy. of the Interior, Nov. 4, 1898, 232 MS. Dom. Let. 466, Moore, Dig., II, 36.

<sup>4</sup> Malloy's Treaties, II, 1935.

<sup>5</sup> Malloy's Treaties, II, 1945; Pelletier, Michel, & Vidal-Naquet, *La convention d'Union pour la protection de la propriété industrielle du 20 mars 1883 et les conférences de revision postérieures*, Paris: 1902.

A brief protocol, respecting the expenses of the International Office (Industrial Property) was signed at Madrid, April 15, 1891. The ratification of the United States was accompanied by a reservation on the part of the Senate, expressed in the instrument of ratification. (Brit. and For. St. Pap., LXXXIII, 676.) The protocol was mentioned as having been replaced in relation to the countries which had ratified it, by Art. 18 of the convention signed at Washington, June 2, 1911. The Madrid protocol should not be confused with an "arrangement" concerning the International Registration of Trade Marks, signed in behalf of a group of States at Madrid on April 14, 1891. (Brit. and For. St. Pap., XCVI, 839.) "The United States has never acceded to this arrangement which was revised at Brussels in 1900, at Washington in 1911, at The Hague in 1925, and at London in 1934." (Hackworth, Dig., II, 21.)

Interpretative of Art. 4 *bis* of the Treaty of Brussels of Dec. 14, 1900, *see* Cameron Septic Tank Co. v. Knoxville, 227 U. S. 39.

<sup>6</sup> U. S. Treaty Vol. III, 2953. Concerning the interpretation of Art. I of the treaty between the United States and Austria-Hungary of Nov. 25, 1871, *see* J. & P. Baltz Brewing Co. v. Kaiserbrauerei, Beck & Co., 74 Fed. 222; Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19.

thereby, the nationals of the contracting parties are accorded the right to enjoy in all of the other countries of the Industrial Union, "with regard to patents of invention, models of utility, industrial designs or models, trade-marks, trade names, the statements of place of origin, suppression of unfair competition, the advantages which the respective laws now grant or may hereafter grant to the citizens of that country."<sup>7</sup> It is provided also that nationals of States which do not form part of the Union, who are domiciled or own effective and *bona fide* industrial or commercial establishments in the territory of any of the countries of the Union, are to be assimilated to the subjects or citizens of the contracting parties.<sup>8</sup>

On January 22, 1931, the United States deposited with the Government of the Swiss Confederation its ratification of the Convention for the Protection of Industrial Property, signed at The Hague November 6, 1925.<sup>9</sup> In Article 18 it was announced that the "act" should replace, as regards relations between the countries which ratified it, the Convention of the Union of Paris of 1883, revised at Washington, June 2, 1911, and its final protocol, which should remain in force as regards relations with countries which had not ratified "the present act." At the conclusion of the International Conference for the Protection of Industrial Property held at London in May and June, 1934, a revised convention for the Protection of Industrial Property was signed on June 2, 1934, on behalf of the United States and most of the other countries which were members of the International Union for the Protection of Industrial Property. While the London convention followed largely the text of that signed at The Hague in 1925, there were certain notable modifications in relation to the treatment of patents and trade marks.<sup>10</sup>

The United States accepted the Convention for the Protection of Inventions, Patents, Designs, and Industrial Models, signed at Buenos Aires, August 20,

<sup>7</sup> Art. II. It is declared in the same Article that the nationals of each contracting party shall have in all of the other countries of the Union the same protection as the nationals of those countries, and the same legal remedies against any infringements of their rights, provided they comply with the formalities and requirements imposed by the national laws of each State upon its own citizens. It is added that "any obligation of domicile or of establishment in the country where the protection is claimed shall not be imposed on those who enjoy the benefits of the Union."

<sup>8</sup> Art. III. According to Art. 286 of the treaty of peace with Germany, of June 28, 1919, it was agreed that the convention of June 2, 1911, should again come into effect, as from the coming into force of the treaty, subject to the exceptions and restrictions resulting from the latter, U. S. Treaty Vol. III, 329, 3452. *Cf.*, also, Arts. 306-311 with respect to industrial property, *id.*, 3479-3483.

<sup>9</sup> U. S. Treaty Vol. IV, 4945. The Convention was proclaimed by the President of the United States on March 6, 1931.

See Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, (Harvard Studies in International Law, edited by Manley O. Hudson, III), New York, 1938.

<sup>10</sup> See Dept. of State Press Releases, July 7, 1934, p. 22; also U. S. Treaty Vol. IV, 5516. This convention, which appears in U. S. Treaty Series as No. 941, was proclaimed by the President on Oct. 28, 1938.

"Article 18 of the convention of 1934 provides that it shall replace, as regards relations between the countries to which it applies, the convention of 1883 and the subsequent acts of revision and that the convention of 1925 shall remain in force as regards the countries to which the convention of 1934 does not apply and to which the convention of 1925 does apply. It further provides that the convention of 1911 shall remain in force as regards countries to which neither the convention of 1934 nor that of 1925 applies." (Hackworth, *Dig.*, II, 19.)

1910, at the Fourth International Conference of American States,<sup>11</sup> as well as the Convention for the Protection of Trade-Marks of like date, emanating from the same conference.<sup>12</sup>

In 1924, the Department of State had occasion to inform the Cuban Ambassador at Washington, that "it was the settled policy of the United States Patent Office to refuse registration under the convention of 1910 of trade-marks owned by persons residing in Europe and that that office did not, and would not in the future, request inter-American registration for any trade-mark registered in the United States which did not appertain to a business located in this country."<sup>13</sup> On October 16, 1935, Mr. Hackworth, the Legal Adviser of the Department of State, after referring to certain multi-partite conventions for the protection of industrial and intellectual property to which the United States was a party, declared that "while the treaties mentioned provide in general terms for the right to the protection of industrial and intellectual property, respectively, the protection available in a particular country can be obtained only by compliance with the applicable laws and regulations of that country."<sup>14</sup>

The United States became a party to the Convention signed at Santiago April 28, 1923, at the Fifth International Conference of American States, for the Protection of Commercial, Industrial and Agricultural Trade-marks and Commercial Names,<sup>15</sup> and also to the General Inter-American Convention for Trade Mark and Commercial Protection, and Protocol on the Inter-American Registration of Trade-Marks, signed at Washington February 20, 1929, at the Pan American Trade-Mark Conference.<sup>16</sup>

The United States has concluded numerous bi-partite conventions for the reciprocal protection of trade marks and patents.<sup>17</sup> It may be observed that the

<sup>11</sup> U. S. Treaty Vol. III, 2930.

<sup>12</sup> *Id.*, 2935.

"Article XI of the inter-American trade-mark convention, signed August 20, 1910, provided for the establishment of two international bureaus, one in Habana, Cuba, and the other in Rio de Janeiro, Brazil, to perform certain functions in connection with the inter-American registration of trade-marks. One 'Inter-American Trade Mark Bureau' at Habana is provided for under article 14 of the protocol on the inter-American registration of trade-marks signed at Washington on February 20, 1929. The Inter-American Trade Mark Bureau (formerly called the International Trade-Mark Registration Bureau) was established at Habana in 1917. No bureau was, in fact, ever established at Rio de Janeiro." (Hackworth, Dig., II, 21.)

<sup>13</sup> Statement in Hackworth, Dig., II, 22, citing Mr. Hughes, Secy. of State, to Ambassador de la Torriente, May 14, 1924.

<sup>14</sup> Communication to Mr. Walter Baker, Oct. 16, 1935, Hackworth, Dig., II, 23.

See documents in Hackworth, Dig., II, § 116, illustrative of the interpretation and application by the Government of the United States of its several contractual obligations in relation to trade-marks.

<sup>15</sup> U. S. Treaty Vol. IV, 4681. The preamble referred to the convention as a "revision of the Convention of Buenos Aires of 1910" (for the protection of trade marks).

See in this connection, *Bacardi Corporation of America v. Domenech*, 311 U. S. 150.

<sup>16</sup> U. S. Treaty Vol. IV, 4768. The Convention marked the attempt of the contracting parties, as reflected in the preamble, to revise that signed at Santiago on April 28, 1923.

See Resolution on the Protection of Patents, approved by the Seventh International Conference of American States at Montevideo, Dec. 23, 1933, Seventh International Conference of American States, Final Act (Provisional Edition), 62.

<sup>17</sup> See lists contained in Hackworth, Dig., II, 20, footnote (Trade-Marks), and *id.*, 41, footnote (Patents).

See also statement in Hackworth, Dig., II, 37, concerning agreements, concluded by the United States between 1905 and 1907, with certain other countries, through exchanges of

United States, on May 8, 1922, revived, by notice given in pursuance of Article 289 of the Treaty of Versailles, of June 28, 1919 (to the benefits of which it became entitled through its treaty with Germany of August 25, 1921) the agreement with Germany relating to patents, signed at Washington February 23, 1909.<sup>18</sup>

The following description of a feature of the statutory law of the United States in relation to patents is worthy of attention:

Section 4887 of the Revised Statutes of the United States, as amended March 3, 1897, March 3, 1903, and June 19, 1936, provides that no person otherwise entitled thereto shall be debarred from receiving a patent for his invention or discovery nor shall any patent be declared invalid by reason of its having first been patented in a foreign country, unless the application for the foreign patent was filed more than 12 months, in the case of patentable inventions and discoveries, and 6 months, in the case of designs, prior to the filing of the application in the United States, in which case no patent shall be granted in this country. It further provides that an application for patent for an invention or discovery or design filed in the United States for which an application for a patent has been previously regularly filed in a foreign country affording by treaty, convention, or law similar privileges to citizens of the United States shall have the same force and effect as if filed in the United States on the date on which the application was first filed in such foreign country provided the application in the United States is filed within 12 months in the case of patentable inventions and discoveries and within 6 months in the case of designs from the earliest date on which any such foreign application was filed. It also provides that no patent shall be granted on an application for a patent for an invention or discovery or design which has been patented or described in a printed publication in the United States or any foreign country more than two years before the date of the actual filing of the application in the United States or which has been in public use or on sale in this country for more than two years prior to such filing.<sup>19</sup>

The Department of State has found occasion to observe that "the recognition by a government of the patentability of an invention does not afford a basis for

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notes, for the protection in China of trademarks registered in the United States by nationals of those countries and registered in those countries by nationals of the United States.

<sup>18</sup> U. S. Treaty Information Bulletin, Dec. 31, 1932, No. 39, Supplement, 127. For the text of the agreement of Feb. 23, 1909, see Malloy's Treaties, I, 578.

See treaty between the United States and Germany, of Aug. 25, 1921, Restoring Friendly Relations, U. S. Treaty Vol. III, 2596; also, articles 306-311, concerning industrial property, of Treaty of Versailles, of June 28, 1919, *id.*, 3479-3483. See in this connection *Robertson v. General Electric Co.*, 32 F. (2d), 495.

<sup>19</sup> Hackworth, Dig., II, 43, citing Rev. Stat. sec. 4887; 29 Stat. 692, 693; 32 Stat. 1225; 49 Stat. 1529; 35 U.S.C.A. § 32.

As interpretative of the statutory law of the United States, see Hackworth, Dig., II, § 117, and cases there cited.

The Supreme Court of the United States declared in 1915 that "the right conferred by a patent under our law is confined to the United States and its Territories (Rev. Stat., § 4884) and infringement of this right cannot be predicated of acts wholly done in a foreign country." (*Dowagiac Mfg. Co. v. Minnesota Plow Co.*, 235 U. S. 641, 650.)

questioning the refusal of another government to admit its patentability.”<sup>20</sup>

Reasons of policy encourage States to extend the benefits of their copyright laws to aliens.<sup>21</sup> The United States has entered into numerous agreements appropriate to such an end.<sup>22</sup> It became a party to the Convention on Literary and Artistic Copyrights, signed at the Second International Conference of American States at Mexico City, January 27, 1902,<sup>23</sup> also to the Convention on Literary and Artistic Copyright signed at the Fourth International Conference of American States at Buenos Aires, August 11, 1910.<sup>24</sup> It did not, however, accept the Convention concluded at Habana, February 20, 1928, at the Sixth International Conference of American States, revising the Convention signed at Buenos Aires in 1910.<sup>25</sup>

The United States did not adhere to the International Copyright Convention concluded at Berne September 9, 1886, and which was productive of the International Copyright Union;<sup>26</sup> and it did not accept the Convention and Protocol revising the Berne Convention which were signed, respectively, at Berlin November 13, 1908,<sup>27</sup> and at Berne March 20, 1914.<sup>28</sup> Nor has the United States as yet accepted the Convention signed at Rome June 2, 1928, for the Protection of Literary and Artistic Works, which purported to replace between the countries of the Union, the Convention of Berne of September 9, 1886, and the Acts by which it was successively revised.<sup>29</sup>

The legislation of the United States extends the benefit of copyright to the work of an author or proprietor who is an alien, only when such individual is domiciled within the United States at the time of the first publication of his work; or when the State of which he is a national, either by agreement or law,

<sup>20</sup> Hackworth, Dig., II, 44, citing Mr. Welles, Assist. Secy. of State, to Mr. Steinhardt, Minister to Sweden, Aug. 13, 1934.

<sup>21</sup> See generally, Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, New York, 1938.

<sup>22</sup> See, for example, Copyright Convention between the United States and Japan, of Nov. 10, 1905, and correspondence relating thereto, For. Rel. 1906, II, 968-986, Malloy's Treaties, I, 1037.

For a list of bi-partite agreements with respect to copyright which have been concluded by the United States, see Hackworth, Dig., II, 48, footnote.

<sup>23</sup> Malloy's Treaties, II, 2058.

See Herbert A. Howell, "International Copyright Relations of the United States," *Yale Law J.*, XXVII, 348.

<sup>24</sup> U. S. Treaty Vol. III, 2925.

<sup>25</sup> For the text, see Sixth American Conference of American States, Final Act, Motions, Agreements, Resolutions and Conventions, Habana, 1928, 123; also, Hudson, *Int. Legislation*, No. 188.

<sup>26</sup> *Brit. and For. St. Pap.*, LXXVII, 22.

<sup>27</sup> *Brit. and For. St. Pap.*, CII, 619.

<sup>28</sup> *Brit. and For. St. Pap.*, CVII, 353.

<sup>29</sup> League of Nations, Treaty Series, No. 2816, CXXIII, 233, Hudson, *Int. Legislation*, No. 199.

See Thorvald Solberg, former Register of Copyrights, in "Present Copyright Situation," Proceedings, American Library Association Conference, Chicago, Oct., 1933; also, same writer, "The International Copyright Union," *Yale Law J.*, XXXVI, 68.

See Annual Report of the Register of Copyrights, Mr. C. L. Bouvé, for the fiscal year ending June 30, 1939, 7.

See Resolution on Inter-American Copyright Protection approved, Dec. 16, 1933, by Seventh International Conference of American States at Montevideo, Seventh International Conference of American States, Final Act (Provisional Edition), p. 18.

See also Milton Diamond and Jerome H. Adler, "Proposed Copyright Revision and Phonograph Records," *Air Law Review*, XI, 29.

grants to citizens of the United States the benefit of copyright on substantially the same basis as to its own nationals, or copyright protection substantially equal to the protection secured to a foreign author under the Act of Congress or by treaty; or when that State is a party to an international agreement providing for reciprocity in the granting of copyright, by the terms of which the United States may, at its pleasure, become a party thereto.<sup>80</sup> It is provided that the existence of such reciprocal conditions is to be determined by the President by proclamation made from time to time, as the purposes of the Act may require. In accordance with the law, the President has, by proclamation, announced reciprocal copyright relations between the United States and numerous countries.<sup>81</sup>

An amendatory Act of December 18, 1919, provided that "all works made the subject of copyright by the laws of the United States first produced or published abroad after August 1, 1914, and before the date of the President's proclamation of peace, of which the authors or proprietors are citizens or subjects of any foreign State or nation granting similar protection for works by citizens of the United States, the existence of which shall be determined by a copyright proclamation issued by the President of the United States, shall be entitled to the protection conferred by the copyright laws of the United States from and after the accomplishment, before the expiration of fifteen months after the date of the President's proclamation of peace, of the conditions and formalities prescribed with respect to such works by the copyright laws of the United States."<sup>82</sup>

<sup>80</sup> Act of March 4, 1909, § 8, 35 Stat. 1077, 17 U.S.C.A. § 8. See Report of Mr. Moore, Third Assist. Secy. of State, to the President, June 27, 1891, interpreting the conditions upon which the nationals of foreign States were entitled to the benefits of Section 13 of the Act of March 3, 1891, For. Rel. 1892, 261, Moore, Dig., II, 45. See, also, *Bong v. Campbell Art Co.*, 214 U. S. 236, to the effect that under that section of the Act of 1891, no rights were conferred on the nationals of countries which were parties to a copyright union to which the United States might also become a party, independent of the President's proclamation. See, especially, the language of Mr. Justice McKenna, in the opinion of the Court, *id.*, 248.

As further interpretative of the Act of March 4, 1909, see Hackworth, Dig., II, § 118, and documents there cited.

<sup>81</sup> See list of presidential proclamations contained in "The Copyright Law of the United States of America," Library of Congress, Copyright Office, Copyright Office Bulletin, No. 14, 1934, pp. 39-40A. The same document contains a Prefatory Note by William L. Brown, Register of Copyrights, on the Act of March 4, 1909, and amendments thereof.

See also lists of proclamations in Stephen P. Ladas, *The International Protection of Literary and Artistic Property*, 1938, II, § 389.

<sup>82</sup> Chap. 11, 41 Stat. 368-369, amending §§ 8 and 21 of the Copyright Act of March 4, 1909.

§ 21 provided that in the case of a book first published abroad in the English language on or after the date of the President's proclamation of peace, the deposit in the copyright office, not later than sixty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the book, should secure to the author or proprietor an *ad interim* copyright, which should have all the force and effect given to copyright by the Act, and should endure until the expiration of four months after such deposit in the copyright office. 41 Stat. 369.

By a proclamation of April 10, 1920 (to take effect as from Feb. 2, 1920), pursuant to the existing statutory law, there was granted to the subjects of Great Britain and the British Dominions, Colonies, and Possessions (with the exception of the self-governing Dominions of Canada, Australia, New Zealand, South Africa and Newfoundland), the protection of the American copyright law of March 4, 1909, and the Acts amendatory thereof. The enjoyment of the rights and benefits of the Copyright Act was conditional upon compliance with the requirements and formalities prescribed by the laws of the United States. Protection was also granted to contrivances, including records, perforated rolls, and other devices by means

The numerous and elaborate conventional arrangements concerning trademarks, copyright and patents which the United States has found it expedient to accept are illustrative of the fact that the international aspect of problems pertaining to such matters has been perceived, and that with that perception there has grown up a realization, in the United States as well as out of it, that the solution of those problems demands general agreement and can not be assured by the solitary and unfettered action of the individual State.

## (i)

## CONCESSIONS

## (i)

§ 209. **Monopolies.** In the granting of concessions a State enjoys large discretion. It may at will grant a monopoly, such, for example, as an exclusive privilege to lay and operate a cable, and that, to an alien. In such case no ground of foreign complaint is apparent unless the action of the grantor violates the provisions of a treaty.<sup>1</sup> When the object of a concession is to facilitate the accomplishment of an end which, in the judgment of the territorial sovereign, may be appropriately or best attained through the instrumentality of a single grantee, the creation of a monopoly in favor of an alien who is not a national of a State whose treaty with the grantor provides unconditionally for the enjoyment of the most-favored-nation privileges, is not necessarily conclusive of a breach of the agreement.<sup>2</sup> In such case the real source of grievance is the decision of

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of which a musical work might be mechanically performed. The proclamation served to put into effect an arrangement which had been proposed by the British Government in August, 1918. An order in council of Feb. 9, 1920, in conformity with the British Copyright Act of 1911, extended copyright protection to works first published in the United States between Aug. 1, 1914, and the termination of the war, which had not been republished prior to Feb. 2, 1920, in the parts of the British Dominions to which the order applied. The enjoyment of rights conferred by the British Copyright Act of 1911, was conditional upon publication of the work in Great Britain not later than six months after the termination of the war, and was to commence from and after such publication. The order in council embraced in its application contrivances by means of which musical works might be mechanically performed, including records, perforated rolls, etc. 41 Stat. (Proclamations) 50. *Cf.* Dept. of State, statement for the Press, April 14, 1920, No. 1.

The British Government in interpreting the expression "termination of the war" as used in the order in council of Feb. 9, 1920, advised the Department of State that the expression as so used was "intended to mean the date of the general termination of the war and not the date of the termination of the war between His Majesty and any particular State," and added that the actual date would be fixed by an order of His Majesty in council, and that if it should happen that such date should be in advance of the date of the President's proclamation of peace, the British Government would be prepared to take the necessary steps to vary the order in council of Feb. 9, 1920, by substituting for the expression "termination of the war," a date corresponding to that of the Presidential proclamation. Dept. of State, statement for the Press, July 8, 1920, No. 1.

As interpretative of the Act of Dec. 18, 1919, see Mr. Hughes, Secy. of State, to the Hungarian Minister at Washington, May 16, 1922, Hackworth, Dig., II, 53, footnote.

§ 209.<sup>1</sup> In a communication from Mr. Foster, Secy. of State, to Messrs. McKesson and Robbins, Nov. 12, 1892, it was declared that while the grant of a monopoly "is inconsistent with American ideas and probably would be prejudicial to American interests, any official protest against it, unless based upon treaty obligations, would necessarily have the appearance of attempting to interfere with the sovereign right of a country to regulate its own export and import trade." 189 MS. Dom. Let. 151, Moore, Dig., II, 77.

<sup>2</sup> Compare Mr. Forsyth, Secy. of State, to Mr. Hunter, Chargé to Brazil, Dec. 17, 1834,



the territorial sovereign to attain its end by means of a single agency immune from dangers of competition. While the method of choosing or favoring a special concessionaire might, in the particular case, possibly justify the charge of an unjust discrimination, it is believed that the determination to create a monopoly, even in favor of an alien entitled to no special privileges by virtue of any treaty with his country, would hardly suffice to do so.

Nevertheless, the Department of State has announced that monopolistic concessions granted by a foreign government to nationals of another country other than the United States would probably in many cases be considered objectionable on grounds of discrimination; and it has been declared that the Department "desires its representatives in foreign countries to endeavor to prevent the adoption of discriminatory measures directed at or injuriously affecting American interests."<sup>3</sup> This statement doubtless reflects a national policy.<sup>4</sup> It does not necessarily point to the existence of a rule of international law that forbids a State to grant a monopolistic concession to the nationals of a particular favored foreign country. Obviously, however, a territorial sovereign may limit its own freedom by treaty, and in so doing acknowledge restrictions that might not otherwise exist.<sup>5</sup>

When the granting of concessions or of the privilege of participating in them is confined to the nationals of two or more specially favored States, charges of unjust discrimination may at times find solid support. In such cases, however, the reasonableness of foreign complaint must depend upon the character of conventional arrangements between the grantor and the aggrieved foreign State. Thus, the basis of the claim of the United States in 1909, of a right to participate, through American citizens, in a foreign loan to China, to be divided among

MS. Inst. Brazil, XV, 15, Moore, Dig., II, 76. See, also, Case of Boston Ice Co. in Colombia, For. Rel. 1888, I, 411, 420, 429; Mr. Bayard, Secy. of State, to Mr. Hall, Minister to Central America, March 27, 1888, For. Rel. 1888, I, 134, 136, 137, Moore, Dig., II, 76.

<sup>3</sup> Mr. Davis, Under Secy. of State, to the American Chargé in Argentina, Nov. 13, 1920, For. Rel. 1920, I, 369. It was added: "To this end it might be urged informally and discreetly whenever there is an appropriate opportunity that monopolistic measures tend to restrict freedom of commerce and increase the possibility of misunderstandings, friction, and entanglements, leading to possible movements for retaliation and consequent ill feeling. In the case of Argentina, a monopolistic concession relating to petroleum production would violate the principle of reciprocity and it might have injurious effects on trade between Argentina and the United States. If the Argentine Government, however, after giving careful consideration to the American point of view, decides to grant a monopolistic concession, you should impress upon the Argentine Government the feeling of this Government that citizens of the United States should have the same opportunity to participate in such a concession as the citizens of any other country."

"Monopolistic concessions for petroleum production or transportation are viewed by the Department as of particular importance from the standpoint of the national interest and all proposals for such concessions should be studied and reported with special care and promptness." (*Id.*, 369-370.)

See also in this connection, Mr. Hull, Secy. of State, to the Embassy in Paris, Sept. 28, 1933, Hackworth, Dig., II, 62.

<sup>4</sup> See statement in Hackworth, Dig., II, 62, concerning the passage quoted.

<sup>5</sup> See, for example, Art. XV of treaty between the United States and China, of July 3, 1844, Malloy's Treaties, I, 200; Art. III of the treaty Relating to the Principles and Policies to be Followed in Matters Concerning China, Feb. 6, 1922, U. S. Treaty Vol. III, 3122; also documents in Hackworth, Dig., II, § 120.

See also Art. VIII of reciprocal trade agreement with Sweden, May 25, 1935, U. S. Executive Agreement Series, No. 79, 7.

financial institutions representative of certain powers, was the political and commercial relationship which had been established by treaty in favor of the United States and for the benefit of its citizens.<sup>6</sup>

The disposition of a State to approve of and support monopolistic concessions in favor of its own nationals is a matter of domestic policy,<sup>7</sup> which in the case of the United States is believed to be generally adverse to such a course.<sup>8</sup> It is interested primarily in securing fair and equal opportunity for American nationals in foreign fields, and accordingly, it is inclined to express regret when a foreign State takes action tending to deny the principle of the open door in the development of its natural resources as by monopolistic concessions of a nature to exclude the possibility of American participation therein.<sup>9</sup>

(ii)

§ 210. **Cancellation of Concessions.** In creating a concession the territorial sovereign may prescribe the conditions upon which it is to be operated or enjoyed. Those may, for example, provide that the failure of the grantee to perform certain acts shall serve either automatically to put an end to the concession, or to give the grantor the right to cancel or revoke it at will. In exercising the right of cancellation or revocation, the grantor is obviously obliged to conform to the terms of the agreement.<sup>1</sup> The United States has been confronted with numerous cases where a grantor ignored this obligation and by so doing abused its power. The United States has protested against the cancellation of contracts, leases, or other forms of conveyance attributable to the failure of a concessionaire to meet contractual obligations or to conform to the requirements of the grantor State when failure was produced by military operations and disturbed political conditions, and non-compliance became for that reason unavoidable.<sup>2</sup>

Whether the grantor, in the course of cancelling a concession violated international law and so became guilty of a breach of an international obligation towards the State of the grantee, raises a question of which the solution may,

<sup>6</sup> Respecting the assistance rendered by the Department of State through the medium of the American Legation of Peking, in 1909, to an American group of capitalists to participate in the Hukuang railway loan, see For. Rel. 1909, 144-215; *id.*, 1910, 269-291; Message of President Taft, Dec. 7, 1911, *id.*, 1911, XVII. Compare Circular telegram of Mr. Adey, Acting Secy. of State, to the American Embassies at Paris, London, Berlin, St. Petersburg and Tokio, and to the American Legation at Peking, March 19, 1913, For. Rel. 1913, 170.

<sup>7</sup> See Mr. Castle, Assist. Secy. of State, to the Chargé d'Affaires in Haiti, Aug. 11, 1930, Hackworth, Dig., II, 63.

<sup>8</sup> See Mr. Hengstler, Chief of the Consular Bureau, to Consul Honaker, Jan. 24, 1924, Hackworth, Dig., II, 64.

<sup>9</sup> See Mr. Hughes, Secy. of State, to Mr. Grant-Smith, Minister to Albania, Feb. 27, 1923, For. Rel. 1923, Vol. I, 373.

§ 210. <sup>1</sup> Relative to the effect of a provision in a concession to an alien that all questions arising therefrom, and not amicably settled by the contracting parties, shall be adjusted by the courts of the grantor's State, and that no recourse shall be had to diplomatic interposition, see Senate Doc. No. 413, 60 Cong., 1 Sess., 79-85; letter of John W. Foster to S. M. Cullom, Chairman of Senate Committee on Foreign Relations, April 14, 1908, concerning Venezuelan claims, 9-17; Moore, Dig., VI, 293-309, and documents there cited. Cf. *infra*, §§ 303, 304.

<sup>2</sup> See Mr. Bryan, Secy. of State, to the British Ambassador at Washington, June 2, 1914, proposing agreement in relation to the protection of nationals having oil interests in Mexico, For. Rel. 1914, 707; Mr. Lansing, Acting Secy. of State, to Vice Consul Bevan, Nov. 3, 1914, *id.*, 716.

in the event of dispute, call for an adjudication in an international forum. It suffices here to observe that the question whether a grantor has cause for cancellation commonly resolves an issue which, in the event of a dispute with the grantee, should normally be adjusted by judicial process as a safeguard against the charge that international law has been violated.<sup>3</sup>

(j)

§ 210A. **Foreign Exchange.** A State enjoys the right to control the character, extent and procedure applied in operations pertaining to its foreign trade.<sup>1</sup> In the exercise of that right a State is free to determine, among other things, from what particular foreign countries imports are to be had, the volume of them, and even the mode by which payments are to be made. When economic conditions within its domain cause it to conclude that accepted tokens of monetary value, such as gold, are to be kept within its limits, the territorial sovereign may forbid or restrain importations of articles calling for payment abroad which, if duly made, will cause a depletion of desired stocks of those tokens or assets. Thus, the imported asset may be deemed to be of less value to the State than what is exacted for it.

A variety of considerations may serve to induce a State either to forbid purchases from those countries whose exports to itself have greatly exceeded its own exports thereunto, or to permit no immediate payments to the foreign exporting State save as they are covered or balanced by imports from itself. Governmental control of foreign exchange offers a means by which desired restraints may be applied. By such process, a State may decline to have available for purchase within its territory, or permit the purchase therein, of bills of exchange on fiscal institutions of exporting countries. Thus, through its control measures it may limit or regulate the sale of foreign exchange, or allocate, by special preferences or otherwise, the amounts of permitted purchases thereof.

As a witness of numerous measures for the control of foreign exchange which have been taken by certain foreign States within recent years, the United States has acknowledged the right of a territorial sovereign to have recourse to such procedure. Thus, in 1932, the Department of State, responding to a request that it protest against foreign exchange regulations then operative in Chile, declared:

The Department understands that the Chilean exchange control decrees are general legislative acts applicable to foreign transactions irrespective of the nationality of the foreign interest affected. Such legislation does not

<sup>3</sup> Cf. For. Rel. 1905, 124-135, relative to cancellation of the American China Development Company's Canton-Hankau Railway Concession.

§ 210A. <sup>1</sup> "Exchange control consists in the centralization of all dealings in foreign exchange in the hands of a public authority (treasury, central bank or an institution created *ad hoc*). The State (through one of its organs) assumes the exclusive right of buying and selling foreign exchange at rates fixed by its authority. These may be rates corresponding to the parities which existed at the time when exchange control is being introduced, but they may be other rates." (M. A. Heilperin, *International Monetary Economics*, New York, 1939, 238.)

See James W. Gantenbein, *Financial Questions in the United States Foreign Policy*, New York, 1939, 93-100.

ordinarily afford grounds for protest by foreign governments in the absence of discrimination against their respective nationals. The establishment of priorities of right to such foreign exchange as becomes available is usually considered within the right of the government exercising control; and provided these priorities do not form a discrimination against American interest the Department cannot ordinarily seek to modify them.<sup>2</sup>

Again, it has been observed that exchange control authorities are generally charged with the duty of restricting payments abroad to correspond to the amounts of foreign exchange available, and that within those amounts they must naturally provide first for payments for necessary goods which can be obtained only by importation; but that the question of allowing exchange for the payment of existing debts, and of priorities among such debts, "appears to be a less obvious matter."<sup>3</sup> It has been declared that "the Department of State has no jurisdiction to pass on the propriety of payments for current imports or of the treatment of commercial debts unless the interests of American citizens appear to be discriminated against."<sup>4</sup> In a word, it is discrimination against American citizens, as compared with other foreign interests in the control measures of a State which is the basis of and reason for alertness on the part of the United States to protest against action that may be taken by a foreign country.<sup>5</sup> Accordingly, systems of exchange control which do not so discriminate against American interests are not deemed by the Department of State to afford grounds for protest by the American Government.<sup>6</sup>

It should be observed that in relation to the external debt of a particular country, the American Government made it clear in 1935, that it did not agree that payments on such a debt were contingent on the state of the balance of payments between the lending and the borrowing country.<sup>7</sup> "The Department of State, while striving to obtain a general improvement of exchange conditions, does not undertake to press for special consideration for specific commodities where only a limited amount of controlled dollar exchange is made available,

<sup>2</sup> Mr. Feis, Economic Adviser of Dept. of State, to General Printing Ink Corporation, Sept. 7, 1932, Hackworth, Dig., II, 68.

Also, Mr. Hackworth, Legal Adviser of the Dept. of State, to Columbia Smelting & Refining Works, Inc., Dec. 10, 1936, *id.*; Mr. Bundy, Assist. Secy. of State, to New Home Sewing Machine Company, Dec. 19, 1932, *id.*

<sup>3</sup> Mr. White, Assist. Secy. of State, to General Printing Ink Corporation, April 26, 1933, *id.*, 68-69.

<sup>4</sup> *Id.*

<sup>5</sup> Mr. Feis, Economic Adviser of Dept. of State, to President of Foreign Traders Association, April 10, 1934, Hackworth, Dig., II, 70.

<sup>6</sup> Same to Harper and Brothers, Feb. 1, 1934, *id.*, 71.

Declared Mr. Phillips, Under Secy. of State, in a communication to Mr. S. R. Bertron, April 18, 1933: "These regulations are of course imposed because of a shortage or anticipated shortage of foreign exchange in Rumania in relation to the country's balance of payments. Because of the conflict between different American interests concerned in the allocation of exchange under such circumstances, the Department has had to take the general position that in the absence of any evidence of discrimination against American interests or of failure to accord such interests an opportunity for a fair hearing, it could not appropriately use its good offices in individual cases except when evidence is brought to its attention of circumstances of peculiar hardship warranting a request for special consideration under the pertinent regulations." (*id.*)

<sup>7</sup> Mr. Welles, Assist. Secy. of State, to Chargé Dominican, Nos. 1 and 7, May 25 and June 14, 1935, *id.*, 72.

since such action might be at the expense of other American interests.”<sup>8</sup> It is said, moreover, that the “Department, after careful consideration, has deemed it wise, on grounds of general policy, not to seek to obligate any country to give preferential treatment in the application of exchange restrictions to our trade or other interests.”<sup>9</sup>

The United States has in recent years entered into numerous reciprocal trade agreements which, in varying form, purport to safeguard the contracting parties against the dangers of adverse discrimination through the operation of measures of control over foreign exchange,<sup>10</sup> and also, in some instances, provide that the administration of any control of foreign exchange shall be so managed as to insure the nationals and commerce of the contracting parties a fair and equitable share in the allotment.<sup>11</sup>

It will be recalled that on April 10, 1940, President Roosevelt, by executive order, in pursuance of the existing statutory law, prohibited specified transactions, “if involving property in which Norway or Denmark or any national thereof has at any time on or since April 8, 1940, had any interest of any nature whatsoever, direct or indirect.”<sup>12</sup> Among the acts forbidden were “all transactions in foreign exchange by any person within the United States.”<sup>13</sup>

<sup>8</sup> Mr. Carr, Assist. Secy. of State, to Secy. of Commerce, May 7, 1936, *id.*, 71.

<sup>9</sup> Mr. Feis, Economic Adviser of Dept. of State, to Ad Auriema, Incorporated, May 8, 1934, *id.*, 73.

In an opinion by Mr. Cummings, Atty. Gen., of June 2, 1936, it was said: “German exporters who otherwise would be unable to sell goods in the United States except at a loss are allowed, under special permits issued by German exchange control authorities, to use part of the proceeds received from particular export transactions to purchase ‘scrip’ from the Gold Discount Bank at a discount somewhat less than fifty per cent. Thereupon the particular exporter may present the ‘scrip’ to the conversion bank and receive its full face value. The German authorities grant such special permits only if the current policy of the German government deems exportation of the goods desirable; and the amount of ‘scrip’ so allowed to be purchased and redeemed in connection with a particular export transaction is measured by the loss in the export sale which is intended to be off-set by this procedure.” (38 Ops. Attys. Gen., 489, 484.) Accordingly, the Attorney General expressed opinion that through such practices (and others pertaining to bonds) there was an effort to assist German exporters constituting the bestowal “directly or indirectly” by the German Government of a bounty or grant within the meaning of the existing statutory law of the United States, a fact obliging the Secretary of the Treasury, under that law, to impose countervailing duties on articles imported from Germany, in respect of which bounties or grants were paid or bestowed through such practices.

<sup>10</sup> See, for example, Art. IX of Reciprocal Trade Agreement with Sweden, May 25, 1935, U. S. Executive Agreement Series, No. 79; Art. IX of Reciprocal Trade Agreement with Guatemala, April 24, 1936, *id.*, No. 92; Art. VI of Reciprocal Trade Agreement with Brazil, Feb. 2, 1935, and exchange of interpretative notes of like date, *id.*, No. 82.

<sup>11</sup> See Art. X of Reciprocal Trade Agreement with Ecuador, Aug. 6, 1938, U. S. Executive Agreement Series, No. 133.

<sup>12</sup> “The policy of the United States Government in the matter of exchange restrictions (which the Government maintained only for a few months in 1933-1934, and then for the most part only in nominal form) has been not to view such restrictions unsympathetically in instances where they might seem warranted as a means of protecting balances of payments, but to view them as nevertheless inherently objectionable institutions which should by degrees be discontinued. Through its trade-agreements program and by its influence in other ways, such as at Pan American conferences and through diplomatic channels, the Government has made progress in minimizing the rigors of exchange control, particularly in the matter of discrimination in exchange allocations.” (James W. Gantenbein, *Financial Questions in United States Foreign Policy*, New York, 1939, 99.)

See Arthur Nussbaum, *Money in the Law*, Chicago, 1939, §§ 38-39.

<sup>13</sup> Executive Order, 8389.

The order defined the terms “Norway” and “Denmark” and “national” of Norway or Denmark.

<sup>14</sup> Among other transactions which were forbidden were specified transfers of credit, pav-

(k)

§ 211. **The Landing and Protection of Submarine Cables.** A State may lawfully exercise complete control of the landing of submarine cables on its shores. The effecting of such a landing in opposition to its will amounts to illegal conduct.<sup>1</sup> Consent need not be given save on terms which the territorial sovereign itself regards as equitable.<sup>2</sup> If the landing of a cable is effected without its permission or otherwise against its will, that sovereign may fairly prohibit the operation of the line until the conditions which it deems necessary to impose are accepted and observed.<sup>3</sup>

It is not unreasonable for a State to withhold consent to the landing of a cable on its shores until assured that its use, whether directly or indirectly as a part of a foreign system, will not serve to establish a domestic or foreign monopoly in the transmission of messages to foreign territory.<sup>4</sup>

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ments by a banking institution within the United States, and the export or withdrawal from the United States, or the earmarking, of gold or silver coin or bullion or currency by any person within the United States.

§ 211.<sup>1</sup> See opinion of Mr. Richards, Acting Atty.-Gen., to Mr. Sherman, Secy. of State, Jan. 18, 1898, 22 Ops. Attys.-Gen., 13, For. Rel. 1897, 166, Moore, Dig., II, 452. This opinion was affirmed by Mr. Griggs, Atty.-Gen., March 25, 1899, 22 Ops. Attys.-Gen., 408. In support of the proposition stated in the text, Mr. Richards quotes President Grant, Annual Message, Dec., 1875, Sen. Doc. No. 122, 49 Cong., 2 Sess., 70; Mr. Fish, Secy. of State, to Mr. Eckert, Jan. 2, 1877, *id.*, 11, 12; Lacombe, J., in *United States v. La Compagnie Française des Câbles Télégraphiques*, 77 Fed. 495, 496; Marshall, C. J., in *The Schooner Exchange v. McFaddon*, 7 Cranch, 116, 136. See, also, *Naval War College, Int. Law Situations*, 1907, 139-143.

<sup>2</sup> Declared Mr. Bayard, Secy. of State, to Mr. Scrymser, March 7, 1886: "The President has the power to grant or withhold, in his discretion, permission to land a foreign cable on the shores of the United States, and to impose whatever conditions thereon he may deem proper in the public interest, subject to whatever action Congress may take thereon." 159 MS. Dom. Let. 258, Moore, Dig., II, 463, note. As to conditions regarded by the United States as essential, see correspondence in 1899, relative to the landing of a submarine cable by the German-Atlantic Telegraphic Company, For. Rel. 1899, 310-315, Moore, Dig., II, 464-466.

<sup>3</sup> Opinion of Mr. Richards, Acting Atty.-Gen., 22 Ops. Attys.-Gen., 13, 27. The opinion discussed fully the question as to the rights of the Executive in the absence of congressional legislation, to grant permission for the landing of a cable, and adverted to the conflicting views of certain Secretaries of State.

<sup>4</sup> See terms on which in May, 1922, a license was issued to the Western Union Telegraph Company to land a cable from Barbados on the coast of Florida, For. Rel. 1922, I, 518-538; also statement in Hackworth, Dig., IV, 252.

Concerning the frustration by the use or display of naval force by the United States of the attempt of the Western Union Telegraph Company, in the summer of 1920, through the employment of British cable ships, to land cables on the coast of Florida, see documents in For. Rel. 1920, II, 686-699.

The Western Union Telegraph Company brought a suit in the Supreme Court of the District of Columbia against the Secretary of State, the Secretary of War, and the Secretary of the Navy to enjoin them from interfering with its acts. (See *United States v. Western Union Telegraph Company*, 272 Fed. 311, 313.) Thereupon the United States brought suit in the United States District Court for the Southern District of New York against the Western Union Telegraph Company for an injunction and other relief. The court denied the motion for a preliminary injunction and vacated a restraining order previously granted. (*Id.*) The complainant appealed to the Circuit Court of Appeals, which on March 10, 1921, affirmed the order of the lower court and dismissed the bill. In so doing the court made the following significant statement of facts: "The Western Union Telegraph Company, a corporation of the state of New York, entered into a contract with the Western Telegraph Company, Limited, a British corporation, whereby the American company agreed to lay a submarine telegraph cable between the Island of Barbados, West Indies, and a point on Miami Beach, on the east coast of Florida, and the British company agreed to lay a cable from Brazil to Barbados, to be there connected with the cable of the American company. The British company has an inter-port monopoly of ocean cable communication given it by the government of Brazil, which excludes American companies from operating cables directly

By an Act of Congress of May 27, 1921, the landing of submarine cables directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, was forbidden unless a written license to land or operate such cable were issued by the President, who was, moreover, given the privilege of withholding or revoking a license until satisfied, after due notice and hearing, that such action would assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights and interests of the United States or of its citizens in foreign countries, or would promote the security of the United States.<sup>5</sup> The President was also empowered to prevent the landing of any cable about to be landed in violation of specified sections of the law. When such cable was about to be or was landed or was being operated without a license, jurisdiction was conferred, under certain conditions, upon the District Courts of the United States, at the suit of the United States, to enjoin the landing or operation of such cable, or to compel, by injunction, the removal thereof.<sup>6</sup>

With the increasing use of automatic relays, there is believed to be need of general agreement to facilitate the transmission, in time of peace, of messages over connecting cables by the elimination of a censorship in foreign territory constituting merely an intervening link in a chain of communications rather than the destination to which intelligence is addressed.<sup>7</sup>

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from the United States to Brazil. When the Western Union Telegraph Company was about to land the American end of its cable at Miami Beach, the President forbade its doing so, and has actually prevented the landing by means of United States naval vessels. The end of the cable is now buoyed a little more than a marine league from Miami Beach.

"Thereupon the Western Union Telegraph Company, which has three cables from Key West, Fla., to Cojimar, Cuba (one laid upon the Ft. Taylor military reservation under a permit of the Secretary of War dated January 4, 1917, and the other two laid without permit), proposed to splice one of these cables into its uncompleted cable and to deliver messages from the United States to the British cable company in the West Indies, to be resent to destination, and vice versa to receive from the British company messages for the United States and to resend them over its own cable. The President has revoked the permit heretofore granted for one of the cables between Key West and Cojimar, and has transmitted a permit to the Western Union Telegraph Company for all three cables, which the Western Union Telegraph Company has refused to accept." (*United States v. Western Union Telegraph Co.* 272 Fed. 893.) On Oct. 23, 1922, the Supreme Court of the United States, in accordance with a stipulation filed by the parties, reversed the decree of the Circuit Court of Appeals, and remanded the cause to the District Court with directions to enter a decree dismissing the bill without prejudice and without costs to either party. See *United States v. Western Union Telegraph Co.*, 260 U. S. 754.

It should be borne in mind that the litigation in the federal courts was not concerned with the right of the United States to forbid the landing of a cable on its shores, but rather with the powers of the President, without the aid of Congress, to forbid such a landing or the operation of cable lines connecting with foreign countries in a way contrary to executive policy.

See, in this connection, Mr. Daugherty, Atty. Gen., to Mr. Hughes, Secy. of State, Nov. 15, 1922, Hackworth, Dig., IV, 253.

<sup>5</sup> 42 Stat. 8, §§ 1-6.

The President was authorized to condition a license upon such terms as might be necessary to assure just and reasonable rates and service in the operation and use of licensed cables. The Act declared that "the license shall not contain terms or conditions granting to the licensee exclusive rights of landing or of operation in the United States."

<sup>6</sup> See George Grafton Wilson, "Landing and Operation of Submarine Cables in the United States," *Am. J.*, XVI, 68.

<sup>7</sup> See provisions relating to the landing and operation of cables on the Island of Yap contained in Arts. 3 and 4 of treaty between the United States and Japan of Feb. 11, 1922, "Regarding Rights of the Two Governments and Their Respective Nationals in Former Ger-

The protection of submarine cables from injury attributable to willful misconduct or culpable neglect has necessarily become a matter of international coöperation.<sup>8</sup> The United States is a party to the International Convention for the Protection of Submarine Cables concluded March 14, 1884.<sup>9</sup>

At its session at Lausanne in 1927, the Institute of International Law adopted certain *vœux* concerning submarine cables, suggesting that "the various States agree to ratify the rules proposed at the Conference of London in 1913, rules which would effectively complete those proposed by the Conference of Paris of 1884," and that those States should insist that the proprietors or lessees of submarine cables simplify as far as possible and unify the preliminary formalities for the reimbursement for losses of machinery or apparatus destroyed or voluntarily abandoned by fishermen or navigators for the purpose of preserving submarine cables. It was also suggested that those States agree, with regard to the prevention of *délits* or *quasi-délits* committed in the matter of submarine cables, to establish the uniformity advocated by Professor Renault from 1879.<sup>10</sup>

## (I)

## POLICE AND OTHER REGULATIONS

## (i)

§ 212. Display of Foreign Flags. That a State may not unlawfully forbid the display of foreign flags within its territory, appears to have been acknowl-

man Islands in the Pacific Ocean North of the Equator, and in Particular the Island of Yap," U. S. Treaty Vol. III, 2723.

See draft agreement of Dec. 10, 1920, regarding the use of islands and other points as relay stations, annexed to Report of Subcommittee on International Cable and Radio Law and on Cable Landing Rights, Preliminary Conference on Electrical Communications, Washington, 1920, For. Rel. 1920, I, 161.

<sup>8</sup> See, generally, concerning the protection of submarine cables: Franz Scholz, *Krieg und Seekabel*, Berlin, 1904; C. Phillipson, *Two Studies in International Law*, 1908; Victor Perdrix, *Les câbles sous-marins et leur protection internationale*, Paris, 1902; Pierre Jouhannaud, *Les câbles sous-marins, leur protection en temps de paix et en temps de guerre*, Paris, 1904; Wilson, *Submarine Telegraphic Cables in their International Relations*, Naval War College, August, 1901; Bibliography in Clunet, *Tables Gén.*, I, 457-458, 879-880; Bonfils-Fauchille, 7 ed., § 583; Rivier, I, 386-387; L. Renault, "De la Protection internationale des câbles télégraphiques sous-marins," *Rev. Droit Int.*, 1 ser., XII, 251; "La protection des télégraphes sous-marins et Conférence de Paris, Octobre-Novembre, 1882," *id.*, XV, 17; also *id.*, 619; McNair's 4 ed. of Oppenheim, § 286.

See L. B. Tribolet, *The International Aspects of Electrical Communications in the Pacific Area*, Baltimore, 1929.

See Great Northwestern Telegraph Co. Case, American-British Pecuniary Claims Arbitration, under agreement of Aug. 18, 1910, Nielsen's Report, 436.

Concerning the acquisition of cable concessions abroad, see documents in Hackworth, Dig., IV, § 351.

See, also, The Cutting of Submarine Telegraphic Cables in Maritime Warfare, *infra*, § 723.

<sup>9</sup> Malloy's Treaties, II, 1949. See provisions of the Act of Feb. 29, 1888, 25 Stat. 41, for the enforcement of the convention. The United States is also a party to a Declaration of Dec. 1, 1886, respecting the interpretation of certain Articles of the Convention of 1884; and to a final protocol of July 7, 1887, fixing May 1, 1888, as the date of the taking effect of the Convention. Malloy's Treaties, II, 1956, and II, 1958.

<sup>10</sup> See Report presented by Frederic R. Coudert, *Annuaire*, XXXIII, vol. 1, 171; text of *vœux*, *id.*, vol. 3, 297, *Am. J.*, XXI, 728-729.

See Protection of Submarine Telegraph Cables, Preliminary Conference in London on the Further Protection of Submarine Cables, Procès-Verbaux and Annexes, 1913 [Cd. 7079.].



edged by the Department of State. Thus the law of Mexico of 1859, forbidding a foreign consular officer to display his national flag except when the town of his residence was besieged, or mutiny or sedition arose therein, was apparently at one time not regarded by the United States as an arbitrary exercise of power.<sup>1</sup> Moreover, the possession of such a right of a territorial sovereign found some recognition in the consular regulations of the United States, and in its instructions to diplomatic officers.<sup>2</sup>

In 1912, the Department of State declared, however, that the flag of a consul's nation may be displayed by him at all times and not merely on certain holidays; and this was said to be the course followed by American consuls throughout the world, and in accordance with the practice of other nations.<sup>3</sup>

Apart from concessions yielded in behalf of foreign vessels, or certain classes of foreign officials such as consular and diplomatic officers through the conventional or customary law, it would be difficult to establish that a State owes a legal obligation to any other to permit within its domain the display of the national flag of that other. Thus, in 1908, the Department of State declared that "the display of a foreign flag is a matter which may be regulated by the municipal laws of the country,"<sup>4</sup> and in 1909 it announced that the matter was one of "local regulation," and that "international law only takes cognizance of the representative display of flags, as on diplomatic missions, consulates and vessels, and for legitimate protection in extra-territorial countries and in times of civil disturbance involving injury to actual citizens."<sup>5</sup> The Department of State on one occasion declared it to be "generally desirable, in order to avoid any possible cause of friction, that the American flag be not flown over places of business, even though American owned, in foreign countries."<sup>6</sup> Again, the

§ 212.<sup>1</sup> Mr. Day, Asst. Secy. of State, to Mr. Barron, Oct. 20, 1897, 221 MS. Dom. Let. 560, Moore, Dig., II, 134-135. *Compare*, Art. XIV of Regulations concerning immunities of consuls, adopted by the Institute of International Law at its session at Venice, Sept. 26, 1896, *Annuaire*, XV, 304, 307; translation in Stowell, Consular Cases and Opinions, 1, 3, J. B. Scott, Resolutions, 126.

<sup>2</sup> Secs. 70 and 73 of Consular Regulations of the United States, 1896, Moore, Dig., II, 134; Instructions to Diplomatic Officers of the United States, 1897, sec. 64, Moore, Dig., II, 134; Mr. Hay, Secy. of State, to Mr. Powell, Minister to Haiti, July 20, 1899, published as enclosure in For. Rel. 1905, 876.

<sup>3</sup> Mr. Knox, Secy. of State, to the Mexican Ambassador at Washington, June 21, 1912, For. Rel. 1912, 903-905, where it was said that since the reason for displaying the flag above the consular premises "as recognized in international law" was, as expressed in the consular treaties of the United States with other countries, "in order that the consular office or dwelling may be easily and generally known for the convenience of those who may have resort to them," a consul would seem to have the right to display his country's flag at all times. Hope was expressed that the Mexican Government would see fit "fully to recognize the rules and principles of international law governing this matter," and to refrain from insisting upon a strict compliance by American consuls with the provisions of the Mexican law of 1859, "thus permitting them to display the American flag in such manner and at such times as their discretion dictates, unless in particular cases some good reason exists and can be shown why this should not be done."

See Consuls, Display of National Arms and Flag, *infra*, § 470.

<sup>4</sup> Hackworth, Dig., II, 128, citing the Chief Clerk of the Dept. of State, to Consul General Kent, Oct. 31, 1908.

<sup>5</sup> The Director of the Consular Service to Mr. White, Dec. 18, 1909, Hackworth, Dig., II, 129.

<sup>6</sup> Mr. Phillips, Third Assist. Secy. of State, to Messrs. Campbell, Metzger, and Jacobson, Oct. 16, 1916, MS. Dept. of State, file 811.0151/141.

Department has discouraged the display of the American flag in "inappropriate places," such as those where the display is designed to protect a purely foreign interest, or where such action "would add to rather than lessen the danger to American residents or American property."<sup>7</sup>

Frequently a State makes no attempt to prevent, or openly consents to, the official or unofficial display of foreign flags within its territory. In such case, the violent or forcible removal of them without previous notice may be regarded as a "readiness to offend the just sensibilities of the country" to which the emblem belongs.<sup>8</sup> An obligation clearly rests upon a State to endeavor to prevent intentional insult to a foreign flag when displayed within its territory with its consent.<sup>9</sup> When an over-zealous public official, military or civil, is guilty of such an act, his conduct should be disavowed, and the offender subjected to punishment.<sup>10</sup> The offense is the more reprehensible when a public official hauls down the flag displayed by a consular officer over his consular office.<sup>11</sup> There is believed to be no disposition on the part of States generally to treat with disrespect foreign national flags that are locally displayed.

In 1899, Secretary Hay declared that in countries liable to domestic disturbances and in which they were recurrent, it had become the usage of resident aliens to display their national flag in order to indicate the foreign ownership of property, and thereby to insure its protection.<sup>12</sup> The Department of State has within recent years, under appropriate conditions, seemingly approved of the use of the American flag for such purposes.<sup>13</sup>

A State may be called upon to prevent the display upon its merchant vessels

<sup>7</sup> Mr. Hull, Secy. of State, to the Embassy in China, Aug. 7, 1937, Hackworth, Dig., II, 130. Also The Director of the Consular Service to Consul General Dietrich, Oct. 1, 1910, Hackworth, Dig., II, 129.

<sup>8</sup> See Mr. Seward, Secy. of State, to Mr. Molina, Sept. 28, 1863, MS. Notes to Central America, I, 240, Moore, Dig., II, 136.

<sup>9</sup> It is believed that the following statement by Viscount de Santo-Thyrso, Portuguese Minister at Washington, to Mr. Sherman, Secy. of State, Aug. 9, 1897, assigned to a territorial sovereign a heavier burden than the law of nations prescribes: "When a friendly Government permits it [a foreign flag] to be raised in its territory by its own citizens, it naturally guarantees it the respect to which it is entitled." For. Rel., 1897, 434.

<sup>10</sup> See Mr. Foster, Secy. of State, to Mr. Patenôtre, French Minister, July 13, 1892, For. Rel. 1892, 174, Moore, Dig., II, 138; Mr. Adee, Acting Secy. of State, to Viscount de Santo-Thyrso, Portuguese Minister, July 28, 1897, For. Rel. 1897, 433, Moore, Dig., II, 140; Mr. Hay, Secy. of State, to Dr. von Holleben, German Ambassador, Jan. 25, 1900, MS. Notes to German Legation, XII, 398, Moore, Dig., II, 141. See correspondence with Mexico, in November, 1910, For. Rel. 1911, 355-356.

Concerning the action of Colonial authorities at Bermuda in punishing British sailors responsible for hauling down the American flag flying from a hotel at Hamilton, July 4, 1920, and the official regret expressed by British naval authorities, see Dept. of State statement for the Press, July 23, 1920, No. 1.

<sup>11</sup> See Mr. Hughes, Secy. of State, to Minister d'Alte, March 30, 1922, Hackworth, Dig., II, 128.

See *infra*, § 212A.

<sup>12</sup> Mr. Hay, Secy. of State, to Mr. Merry, Minister to Nicaragua, May 8, 1899, For. Rel. 1899, 582, Moore, Dig., II, 136. See, also, correspondence relating to display of foreign flags over private establishments in Haiti in 1903, For. Rel. 1903, 596-597, Moore, Dig., II, 138. Compare statement of Salvadorean Minister of Foreign Affairs, of Feb. 1, 1908, For. Rel. 1908, 705.

<sup>13</sup> See Mr. Clark, Under Secy. of State, to Consul Bursley, June 7, 1929, Hackworth, Dig., II, 126. Also Mr. Bacon, Acting Secy. of State to the Consul at Tabriz, July 15, 1908, Hackworth, Dig., II, 128; the Chief Clerk, Dept. of State, to Consul General Kent, Oct. 31, 1908, Hackworth, Dig., II, 128.

of the national emblem of a foreign power.<sup>14</sup> The United States, although appearing to doubt whether a legal duty attributable to international law is imposed upon a State to prevent the use within its territory of a foreign national emblem for purposes of local advertising,<sup>15</sup> is disposed to urge the coöperation of a foreign territorial sovereign to prevent the abuse within its domain of the American flag in such a way.<sup>16</sup>

§ 212A. **The Same.** The action of so-called demonstrators, in tearing down the German flag flying from the German steamship *Bremen*, shortly before the departure of the vessel from New York on the night of July 26, 1935, was the basis of the "most emphatic protest against this serious insult to the German national emblem" lodged by the German Embassy at Washington with the Department of State on July 29, 1935.<sup>1</sup> Hope was expressed that everything would be done by the appropriate American authorities charged with the prosecution of criminal offenses in order that the guilty persons might be punished. In his response of August 1, 1935,<sup>2</sup> Mr. Phillips, the Acting Secretary of State, submitted to the German Embassy a full report from the police authorities of New York, from which it appeared that they had taken "most extensive precautions to prevent any untoward incident"; that having learned in advance that a demonstration was planned, they had consulted with the representatives of the interested steamship companies and in coöperation with them had taken all measures which seemed calculated to assure order; and that the incident which actually occurred "was in no sense due to neglect on the part of the American authorities."<sup>3</sup> He declared it to be "unfortunate that, in spite of the sincere

<sup>14</sup> Mr. Sherman, Secy. of State, in a communication to Mr. Storer, Minister to Belgium, Feb. 7, 1898, said: "A line of steamers plying between England and the United States under the British flag has for some years past used the United States union jack as its house flag. Upon inquiry being made by the Ambassador in London the British Board of Trade intervened, in virtue of its authority in matters of shipping and navigation, and I am just informed that the line in question has been constrained to adopt another distinctive house flag." (For. Rel. 1898, 159-160, Moore, Dig., II, 137, note.) Cf. For. Rel. 1904, 101-103, regarding complaint by the American Minister at Rio de Janeiro that a Brazilian line of sailing vessels was using a house flag resembling one of the flags of the United States, also Moore, Dig., II, 138.

<sup>15</sup> See incident relating to use of the American flag for advertising purposes in Belgium in 1897, For. Rel. 1898, 157-162, Moore, Dig., II, 137.

<sup>16</sup> See Mr. Wilson, Acting Secy. of State, to Mr. Moses, American Minister to Greece, June 18, 1909 (adverting to a case in Brazil in 1864, mentioned in Moore, Dig., II, 135), For. Rel. 1909, 337, where the attempt was successfully made to enlist the coöperation of the Greek Government in preventing the use by Greeks who had returned from a sojourn in America, of the American flag, in advertisements of saloons and cigar stores.

See, also, For. Rel. 1909, 393-394, with reference to the use of the American flag for advertising purposes in certain cities of Italy, and the coöperation of the Government of that State, notwithstanding the absence of an appropriate local law, in causing a discontinuance of the practice.

See also correspondence with the Netherland Government in 1913, For. Rel. 1913, 1017-1019; also Counselor Lansing to Ambassador Penfield, Dec. 22, 1914, Hackworth, Dig., II, 132.

§ 212A. <sup>1</sup> Herr Leitner, German Chargé d'Affaires *ad interim*, to the Acting Secy. of State, Mr. Phillips, July 29, 1935, Dept. of State Press Releases, Aug. 3, 1935, 100.

<sup>2</sup> *Id.*, 100-101.

<sup>3</sup> He said in this connection: "I invite particular attention to those sections of the report which indicate that a very considerable number of police were detailed to prevent disturbance; that the police suggested measures to prevent persons other than the passengers and other duly authorized visitors from boarding the vessel, but that the officers of the steamship line did not deem it necessary to adopt such measures; that unauthorized persons ac-

efforts of the police to prevent any disorder whatever, the German national emblem should, during the disturbance which took place, not have received that respect to which it is entitled." The disrespect to which that emblem was unhappily subjected did not appear to be attributable to failure on the part of American authorities to fulfill any legal obligation towards a foreign State, but rather to the failure of those in control of the *Bremen*, despite warnings of the possibility of a hostile demonstration, and contrary to the advice of the police authorities, to prevent a considerable number of unidentified visitors from boarding the vessel on the eve of its departure.<sup>4</sup> This circumstance robbed the German protest of its sting.

It may be observed that on January 19, 1941, the Secretary of State expressed regret that a sailor from an American destroyer had ripped the German flag flying from the German consulate at San Francisco.<sup>5</sup>

(ii)

§ 213. **Quarantine Regulations.** Save for the general inhibition that no State shall exercise its power arbitrarily with respect to the outside world, the territorial sovereign is subject to slight restraint in establishing quarantine regulations for the protection of the health of the inhabitants and of other living things within its domain. As Mr. Hackworth has put it: "Every sovereign State has the right to establish, in the interest of its public health, quarantine regulations designed to prevent the introduction into its country of infectious or contagious diseases deleterious to human, animal, or plant life."<sup>1</sup>

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cordingly succeeded in boarding the steamer; that before the vessel sailed such elements started a demonstration; that police authorities took immediate and efficient action with a view to clearing the ship of all unauthorized persons; and that during the course of this action one of the police, namely, Detective Matthew Solomon, in attempting to apprehend the ring leaders, was set upon, knocked down, and sustained serious injury."

The Acting Secretary invited attention also to that section of the report indicating that the persons implicated in the disorder had been apprehended and were being held for trial.  
<sup>4</sup>See Report of Acting Lieutenant Police, James A. Pyke, paragraph 16, July 29, 1935, Dept. of State Press Releases, Aug. 3, 1935, 101, 109.

See also statement by Mr. Hull, Secy. of State, Sept. 14, 1935, Dept. of State Press Releases, Sept. 14, 1935, 196-197.

<sup>5</sup>See *New York Times*, Jan. 20, 1941, p. 1.

§ 213. <sup>1</sup>Hackworth, Dig., II, 132, where it is added: "Consuls stationed in foreign ports are usually authorized to issue bills of health to vessels bound from the foreign ports at which they are stationed to ports in their respective countries. They are not expected and cannot be required to issue bills of health to vessels if, in their opinion, the sanitary conditions aboard are such as to render the entrance of the vessels into the ports of the consuls' home State unsafe from the point of view of sanitation and health. To facilitate the work of consuls in these respects, health officers of the States represented by the consuls are sometimes stationed in foreign ports. Such an arrangement, of course, must be made with the consent of the foreign State in which the officer is stationed. If the foreign State refuses to allow inspection of vessels departing from its ports the authorities of the port of destination may refuse to allow such vessels to enter prior to an inspection and, if necessary, fumigation by the local authorities. These matters are sometimes covered by conventional arrangements."

According to Art. XXVI of the treaty between the United States and Germany of Dec. 8, 1923: "A consular officer of either High Contracting Party shall have the right to inspect within the ports of the other High Contracting Party within his consular district, the private vessels of any flag destined or about to clear for ports of the country appointing him in order to observe the sanitary conditions and measures taken on board such vessels, and to be enabled thereby to execute intelligently bills of health and other documents re-

Foreign States are inclined to make complaint when quarantine regulations are directed against such parts of their territories as may at all times have been free from infection, or in case of the continuance of such regulations as against ports from which the presence of a contagious disease has been completely eradicated.<sup>2</sup> Such States are also resentful of delays suffered by their vessels in consequence of the operation of legitimate quarantine measures.<sup>3</sup>

In numerous treaties of commerce to which the United States is a party, the application of quarantine regulations to the vessels of the contracting parties is governed on the basis of reciprocal national, rather than most-favored-nation treatment.<sup>4</sup> Again, in numerous arrangements concerning imports and exports, it is agreed that prohibitions or restrictions for the protection of public health or that of animal or plant life are not to be denied to the contracting parties.<sup>5</sup>

The safeguarding of States generally against the effects of contagious diseases in foreign places has called for the conclusion of multi-partite sanitary arrangements designed to reduce common dangers through prompt and widespread notification of the fact of the prevalence of certain diseases in affected areas, and by the observance of appropriate and accepted methods of combatting those diseases upon the outbreak thereof, as well as through measures of defense against contaminated territories. To the International Sanitary Convention of January 17, 1912,<sup>6</sup> which was revised June 21, 1926,<sup>7</sup> and to the Pan-American Sanitary Conventions of October 14, 1905,<sup>8</sup> and November 14, 1924,<sup>9</sup> amended by the Additional Protocol of October 19, 1927,<sup>10</sup> the United States became a party.

quired by the laws of his country, and to inform his Government concerning the extent to which its sanitary regulations have been observed at ports of departure by vessels destined to its ports, with a view to facilitating entry of such vessels therein." (U. S. Treaty Vol. IV, 4201.)

As to the force which a State may not unreasonably employ in order to compel obedience to its port regulations, see treatment accorded the French Steamer *La France* by Brazilian authorities in 1885, Mr. Trail, Chargé at Rio de Janeiro, to Mr. Bayard, Secy. of State, Jan. 21, 1887, For. Rel. 1887, 54, 55, Moore, Dig., II, 144. *Compare*, award in favor of Italy in 1893 against Portugal in the Case of Lavarello, for arbitrary operation of quarantine laws in 1884, Moore, Arbitrations, V, 5021-5034.

See provisions of the existing statutory law of the United States as set forth in 42 U.S.C.A. Chap. 2, §§ 81-92.

<sup>2</sup> Mr. Madison, Secy. of State, to American Ministers at Paris, London, and Madrid, May 13, 1805, MS. Inst. to American Ministers, VI, 294, Moore, Dig., II, 142; Mr. Foster, Secy. of State, to Mr. de Lôme, Spanish Minister, Oct. 1, 1892, MS. Notes to Spain, X, 669, Moore, Dig., II, 144; Mr. Gresham, Secy. of State, to Mr. Caruth, Minister to Portugal, Sept. 19, 1893, MS. Inst. Portugal, XVI, 36, Moore, Dig., II, 148. Concerning the objection of the Department of State to the absolute exclusion of the mails as a sanitary measure in 1888, see Mr. Bayard, Secy. of State, to Mr. Walker, Chargé at Bogota, April 17, 1888, For. Rel. 1888, I, 422, Moore, Dig., II, 145, and documents cited *id.*, 146.

<sup>3</sup> See, for example, the British Ambassador at Washington, to Mr. Bryan, Secy. of State, March 17, 1914, Hackworth, Dig., II, 135.

<sup>4</sup> See, for example, Art. IX of treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4194.

<sup>5</sup> See, for example, Art. 4 of convention and protocol between the United States and other powers concerning the Abolition of Import and Export Prohibitions and Restrictions signed at Geneva, Nov. 8, 1927, U. S. Treaty Vol. IV, 5104, 5107; also Art. 4 of Treaty of Commerce and Navigation between the United States and the Turkish Republic, of Oct. 1, 1929, U. S. Treaty Vol. IV, 4667, 4668.

<sup>6</sup> U. S. Treaty Vol. III, 2972.

<sup>7</sup> U. S. Treaty Vol. IV, 4962.

<sup>8</sup> Malloy's Treaties, II, 2144.

<sup>9</sup> U. S. Treaty Vol. IV, 4700.

<sup>10</sup> U. S. Treaty Vol. IV, 4720.

In the Treaty of Relations between the United States and Cuba of May 29, 1934, which served to abrogate that of May 22, 1903, it was agreed that if at any time a situation should arise that appeared to point to an outbreak of contagious disease in the territory of either of the contracting parties, "either of the two Governments" should, for its own protection, and without its act being considered unfriendly, exercise freely and at its discretion the right to suspend communications between those of its ports that it might designate and all or part of the territory of the other party, and for the period that it might consider to be advisable.<sup>11</sup>

The efficacy of a particular quarantine, such as a plant quarantine, may call for the inspection of vessels both public and private, and foreign as well as domestic. In 1927, the Assistant Secretary of the Treasury announced that "as a matter of international comity, armed naval vessels (excluding transports and auxiliaries) of friendly foreign governments may be extended the same treatment as that accorded to similar vessels of the United States."<sup>12</sup> It may be observed that the Department of Agriculture makes effort to obtain the consent of officers commanding foreign public ships, such as vessels of war, when visiting American ports, to inspection of the ships' stores by agents of that Department.<sup>13</sup> With respect to naval vessels of the United States it has been declared to be the policy of that Department, for purposes of plant quarantine, to inspect such vessels returning to the United States from foreign waters.<sup>14</sup>

(iii)

§ 214. **Pilotage.** A State is doubtless free to impose compulsory pilotage on vessels both foreign and domestic which enter or leave its ports.<sup>1</sup> Opportunity for

<sup>11</sup> Art. IV, U. S. Treaty Vol. IV, 4054, 4055. Cf. Art. V of treaty between the United States and Cuba, of May 22, 1903, Malloy's Treaties, I, 364.

See Arrangement effected by exchange of notes signed Oct. 10 and 23, 1929, between the United States and the Dominion of Canada concerning Quarantine Inspection of Vessels Entering Puget Sound and Waters Adjacent Thereto or the Great Lakes via the St. Lawrence River, U. S. Executive Agreement Series, No. 1; also, Convention between the United States and Mexico, of March 16, 1928, Safeguarding Livestock Interests Through the Prevention of Infectious and Contagious Diseases, U. S. Treaty Vol. IV, 4455.

<sup>12</sup> Mr. Schuneman, Assist. Secy. of the Treasury, to the Secy. of State, Jan. 19, 1933, Hackworth, Dig., II, 138.

<sup>13</sup> Declared Mr. Phillips, Acting Secy. of State, to the Secy. of Agriculture, Dec. 22, 1933: "It is understood that upon the visit of foreign war vessels to the United States it is the practice of the Department of Agriculture to inform the appropriate consular officer of the country concerned of the plant quarantine restrictions of the United States Government and to request his intervention with the commanding officers of these vessels for inspection of the ships' stores by agents of the Department of Agriculture. It is further understood that where the commanding officer refuses permission to the agents of the Department of Agriculture to board a foreign vessel, it has been your Department's practice to inform the commanding officer of the plant quarantine restrictions and to request him to give orders to prohibit the landing of plants or plant products.

"In the view of this Department this procedure should be productive of adequate results and meets with its approval." (Hackworth, Dig., II, 138.)

<sup>14</sup> See The Acting Secy. of Agriculture to the Secy. of State, July 20, 1931, Hackworth, Dig., II, 137.

§ 214. <sup>1</sup> See *Homer Ramsdell Co. v. La Compagnie Générale Trans-Atlantique*, 182 U. S. 406; also *The Delaware*, 161 U. S. 459. "In the waters of the United States the regulation of pilotage has been left to the legislatures of the several States." (Moore, Dig., II, 160.)

See also statement in Hackworth, Dig., II, 263.

discrimination in the amount of charges exacted of foreign ships or of those arriving from particular foreign States, is frequently removed by conventional arrangement. The basis of accord in treaties to which the United States is a party is usually reciprocal national, rather than most-favored-nation, treatment.<sup>2</sup>

In the course of a discussion with the Swedish Legation at Washington in 1922 and 1923, the Secretary of State declared that while under the Constitution and statutes of the United States tonnage charges were subject to regulation by Congress, fees and charges for pilotage which were of an essentially different kind were subject to regulation by the several States until such time as Congress might deem it advisable to undertake their regulation. Accordingly, he said that in the absence of applicable legislation by Congress on the subject, he was of the opinion that a modification of the decision of the California authorities with respect to the pilotage fees charged Swedish motor vessels could not properly be arranged by an exchange of notes between the United States and Sweden. He added that such a modification could be effected through the negotiation of a treaty, or through appropriate legislation by Congress, or by the State of California.<sup>3</sup>

(iv)

*Religious Freedom*

(aa)

§ 215. **In General.** A State may doubtless exercise a broad control over the religious training and worship of the inhabitants within its territory.<sup>1</sup> States having an established religion or church, at the present time generally accord to resident aliens who may dissent from its doctrines, a large degree of religious freedom. Their privileges are oftentimes expressed in treaties, if not in local laws.<sup>2</sup> So widespread has become the habit of tolerance that any attempt to

<sup>2</sup> Art. VII of treaty between the United States and Spain of July 3, 1902, Malloy's Treaties, II, 1703; Art. XI of treaty between the United States and Japan, of Feb. 21, 1911, U. S. Treaty Vol. III, 2715; also, Art. IX of treaty with Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4194.

*Cf.*, however, Art. III (4) of Treaty of Commerce and Navigation between the United States and the Turkish Republic, of Oct. 1, 1929, U. S. Treaty Vol. IV, 4667, 4668; also, Agreement effected by exchange of notes between the United States and Finland, Respecting Tonnage Dues and Other Charges, of Dec. 21, 1925, U. S. Treaty Vol. IV, 4132.

<sup>3</sup> Mr. Hughes, Secy. of State, to Captain Wallenberg, July 10, 1922, Hackworth, Dig., II, 268; Mr. Hughes, Secy. of State, to Captain Wallenberg, Jan. 2, 1923, Hackworth, Dig., II, 268.

§ 215. <sup>1</sup> Mr. Buchanan, Secy. of State, to the Rev. Mr. Baird, Oct. 22, 1845, 35 MS. Dom. Let. 299, Moore, Dig., II, 171; Mr. Fish, Secy. of State, to Mr. Delaplaine, Chargé at Vienna, June 2, 1875, MS. Inst. Austria, II, 352, Moore, Dig., II, 172; Mr. Evarts, Secy. of State, to Mr. Kasson, Minister to Austria-Hungary, May 19, 1879, MS. Inst. Austria-Hungary, III, 13, Moore, Dig., II, 174; Mr. Fish, Secy. of State, to Mr. Seward, Minister to China, May 2, 1876, MS. Inst. China, II, 385, Moore, Dig., II, 175; Count D. Tolstoi, Russian Minister of the Interior, to Mr. Hunt, March 3, 1883, 37 MS. Desp. Russia, Moore, Dig., II, 177; Mr. Blaine, Secy. of State, to Mr. Hicks, Minister to Peru, Dec. 5, 1890, MS. Inst. Peru, XVII, 440, Moore, Dig., II, 178.

<sup>2</sup> Art. II of Spanish Constitution, given in despatch of Mr. Collier, American Minister, to Mr. Root, Secy. of State, Feb. 17, 1906, For. Rel. 1906, II, 1351; Law of Bolivia of Aug. 27, 1906, For. Rel. 1906, I, 106.

See, also, Art. IV of treaty between the United States and Spain of July 3, 1902, Malloy's

abridge completely the freedom of worship of a resident alien would now be regarded as contrary to a general practice.<sup>3</sup> The possession of an established church may incline the territorial sovereign to forbid the propagation of doctrines at variance with those of its own, as well as attempts to proselyte.<sup>4</sup> The same circumstance may cause it to restrict the adherents of other persuasions with respect to the location and forms of their places of worship, and also with regard to the scope of the functions of their clergy or representatives.<sup>5</sup>

A State may obviously forbid the teachings or practices of aliens in so far as they are deemed to be contrary to public morals or subversive of its political institutions; and it may also determine for itself whether the religious activities of aliens within its territory are of such a character. Recent treaties of the United States appear to take cognizance of this right of the territorial sovereign.<sup>6</sup>

The United States always demands for its own nationals abroad the enjoyment of as large privileges of religious freedom as are accorded the nationals of other States.<sup>7</sup> In all matters relating thereto it uniformly enjoins upon its diplomatic officers and upon its citizens, the duty to exercise a careful regard for the sensibilities of foreign native peoples.<sup>8</sup> However deeply interested in the cause of

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Treaties, II, 1702; Art. XIV of treaty between the United States and Colombia of Dec. 12, 1846, *id.*, I, 306; Art. XIV of treaty between the United States and China of Oct. 8, 1903, *id.*, I, 268.

<sup>3</sup> Mr. Buchanan, Secy. of State, to the Rev. Mr. Baird, Oct. 22, 1845, 35 MS. Dom. Let. 299, Moore, Dig., II, 171; Count D. Tolstoi, Russian Minister of the Interior, to Mr. Hunt, Mar. 3, 1883, 37 MS. Desp. Russia, Moore, Dig., II, 177; Mr. Blaine, Secy. of State, to Mr. Hicks, Minister to Peru, Dec. 5, 1890, MS. Inst. Peru, XVII, 440, Moore, Dig., II, 178; Note of Russian Foreign Office to the American Ambassador, Aug. 9 (21), 1895, For. Rel. 1895, II, 1078, Moore, Dig., IV, 111; correspondence between the United States and Germany in 1898 regarding certain Mormon Missionaries, For. Rel. 1898, 347-354, Moore, Dig., IV, 134; Case of Lewis T. Cannon and Jacob Müller, expelled from Prussia in 1900, referred to in Note of Mr. White, Ambassador to Germany, to Mr. Hay, Secy. of State, Feb. 14, 1901, For. Rel. 1901, 165, Moore, Dig., IV, 135.

<sup>4</sup> Mr. Fish, Secy. of State, to Mr. Delaplaine, Chargé at Vienna, June 2, 1875, MS. Inst. Austria, II, 352, Moore, Dig., II, 172; Mr. Frelinghuysen, Secy. of State, to Mr. Smith, Jan. 27, 1885, 154 MS. Dom. Let. 74, Moore, Dig., VI, 340; correspondence between the United States and Germany in 1898, For. Rel. 1898, 347-354, Moore, Dig., IV, 135.

Concerning the position of the United States in objecting to discrimination against missionaries of the Mormon Society after its abandonment of polygamy, see Mr. Adee, Acting Secy. of State, to Mr. Eustis, Ambassador to France, July 29, 1895, MS. Inst. France, XXIII, 139, Moore, Dig., II, 177; Mr. Uhl, Asst. Secy. of State, to Mr. Doty, U. S. Consul at Tahiti, June 25, 1895, For. Rel. 1897, 124, Moore, Dig., IV, 133.

<sup>5</sup> See despatch of Mr. Collier, Minister to Spain, to Mr. Root, Secy. of State, of Feb. 17, 1906, concerning the status of non-Catholic religious denominations in Spain, For. Rel. 1906, II, 1351; see, also, Mr. Day, Secy. of State, to the Rev. Mr. Strong, June 3, 1898, 229 MS. Dom. Let. 113, Moore, Dig., II, 178.

<sup>6</sup> Thus Art. V of the treaty between the United States and Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4193, acknowledged the privilege of freedom of worship of nationals of either party in the territory of the other, "provided their teachings or practices are not contrary to public morals"; also, for example, Art. V of treaty of Friendship, Commerce and Consular Rights between the United States and Norway of June 5, 1928, U. S. Treaty Vol. IV, 4527, 4529; Art. V of treaty of Friendship, Commerce and Consular Rights between the United States and Poland of June 15, 1931, U. S. Treaty Vol. IV, 4572, 4574.

See also Art. 4 of convention between the United States and Great Britain and Iraq of Jan. 9, 1930, U. S. Treaty Vol. IV, 4335, 4337.

<sup>7</sup> Mr. Root, Secy. of State, to Mr. Leishman, Minister to Turkey, Dec. 14, 1905, For. Rel. 1906, II, 1377.

<sup>8</sup> Mr. Hay, Secy. of State, to Mr. Bridgman, Minister to Bolivia, Sept. 1, 1899, For. Rel. 1899, 112, Moore, Dig., II, 179; Mr. Fish, Secy. of State, to Mr. Adee, Chargé at Madrid, Dec. 8, 1876, MS. Inst. Spain, XVIII, 52, Moore, Dig., II, 175; Mr. Frelinghuysen, Secy. of



religious liberty, and however disposed to express friendly suggestions in that regard to other powers,<sup>9</sup> the United States does not undertake to plead the cause of aliens within foreign lands,<sup>10</sup> save in cases where their religious persecution is conceived to be directly injurious to the rights of the nation or of its citizens.<sup>11</sup>

In 1914, the Department of State observed that American representations to foreign countries in behalf of religious freedom had never been put upon a basis of strict right, declaring that it surely would be appreciated "that this Government may not, as a matter of right, demand that another government shall grant to religionists of American nationality in the territory of that government the degree of freedom or privilege which it might desire to see extended to them."<sup>12</sup> This admission had much significance and is still relevant. Thus, the Department of State declared in 1935, that "while we are naturally solicitous of the right of American citizens to give expression in a proper manner to their religious beliefs wherever they may be, we, of course, can no more insist upon a privilege in this respect, if contrary to local law, than we can insist upon their right to practice a profession, or to carry on a business that is declared by that law to be contrary to the policy of the State."<sup>13</sup>

Declared President Roosevelt to Mr. Litvinov, People's Commissar for Foreign Affairs of the Union of Soviet Socialist Republics, on November 16, 1933, in relation to the establishment of normal relations between the United States and Russia:

As you well know, the Government of the United States, since the foundation of the Republic, has always striven to protect its nationals, at home and abroad, in the free exercise of liberty of conscience and religious worship, and from all disability or persecution on account of their religious faith or worship. And I need scarcely point out that the rights enumerated below are those enjoyed in the United States by all citizens and foreign nationals and by American nationals in all the major countries of the world.

The Government of the United States, therefore, will expect that nationals of the United States of America within the territory of the Union of Soviet Socialist Republics will be allowed to conduct without annoyance or molestation of any kind religious services and rites of a ceremonial nature, including baptismal, confirmation, communion, marriage and burial rites,

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State, to Mr. Wallace, Minister to Turkey, Jan. 9, 1884, MS. Inst. Turkey, IV, 77, Moore, Dig., VI, 336; Mr. Bayard, Secy. of State, to Mr. Jackson, July 17, 1885, MS. Inst. Mexico, XXI, 329, Moore, Dig., VI, 337.

<sup>9</sup> Mr. Seward, Secy. of State, to the Rt. Rev. Horatio Potter, Nov. 23, 1866, 74 MS. Dom. Let. 417, Moore, Dig., II, 172; Mr. Hay, Secy. of State, to Mr. Bridgman, Minister to Bolivia, Sept. 1, 1899, For. Rel. 1899, 112, Moore, Dig., II, 179.

<sup>10</sup> Mr. Cass, Secy. of State, to Mr. Williams, Oct. 22, 1860, MS. Inst. Turkey, II, 27, Moore, Dig., VI, 333; Mr. Frelinghuysen, Secy. of State, to Mr. Gifford, Dec. 19, 1884, 153 MS. Dom. Let. 470, Moore, Dig., VI, 339; Mr. Day, Secy. of State, to the Rev. Mr. Strong, June 3, 1898, 229 MS. Dom. Let. 113, Moore, Dig., II, 178.

<sup>11</sup> *Supra*, § 55. Compare, Mr. Hay, Secy. of State, to Mr. Wilson, Minister to Roumania, July 17, 1902, For. Rel. 1902, 910, Moore, Dig., VI, 362; Mr. Hay, Secy. of State, to American Representatives at London, Paris, Berlin, St. Petersburg, Vienna, Rome, and Constantinople, Aug. 11, 1902, For. Rel. 1902, 42, Moore, Dig., VI, 365.

<sup>12</sup> Mr. Wilson, Acting Secy. of State, to Mr. Northcott, American Minister to Venezuela, Feb. 27, 1912, For. Rel. 1914, 1100, 1101.

<sup>13</sup> Communication to Senator Pittman, Feb. 12, 1935, Hackworth, Dig., III, 647.

in the English language, or in any other language which is customarily used in the practice of the religious faith to which they belong, in churches, houses, or other buildings appropriate for such service, which they will be given the right and opportunity to lease, erect or maintain in convenient situations.

We will expect that nationals of the United States will have the right to collect from their co-religionists and to receive from abroad voluntary offerings for religious purposes; that they will be entitled without restriction to impart religious instruction to their children, either singly or in groups, or to have such instruction imparted by persons whom they may employ for such purpose; that they will be given and protected in the right to bury their dead according to their religious customs in suitable and convenient places established for that purpose, and given the right and opportunity to lease, lay out, occupy and maintain such burial grounds subject to reasonable sanitary laws and regulations.

We will expect that religious groups or congregations composed of nationals of the United States of America in the territory of the Union of Soviet Socialist Republics will be given the right to have their spiritual needs ministered to by clergymen, priests, rabbis or other ecclesiastical functionaries who are nationals of the United States of America, and that such clergymen, priests, rabbis or other ecclesiastical functionaries will be protected from all disability or persecution and will not be denied entry into the territory of the Soviet Union because of their ecclesiastical status.<sup>14</sup>

Mr. Litvinov on the same date assured President Roosevelt that his country "as a fixed policy" accorded the nationals of the United States within its territory the rights referred to by the President, and that "the rights specified in the above paragraphs will be granted to American nationals immediately upon the establishment of relations between our countries."<sup>15</sup>

Within recent years the Department of State, while continuing to avow interest in the matter of religious freedom abroad, has emphasized reluctance to take a stand that might be interpreted as betokening intervention in the domestic affairs of a foreign State, especially in situations where the practices of American nationals were not involved.<sup>16</sup>

<sup>14</sup> Establishment of Diplomatic Relations with Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1, 1933, p. 7.

<sup>15</sup> *Id.*, 10.

See assurances as to the exercise of liberty of conscience and freedom of worship expressed in Art. I of treaty between the United States and Liberia, of Aug. 8, 1938, U. S. Treaty Series, No. 956.

<sup>16</sup> Mr. Hull, Secy. of State, to Dr. Charles R. Hobrecht, April 13, 1933, Hackworth, Dig., III, 151; Mr. Carr, Assist. Secy. of State, to the State Secy. of the Knights of Columbus of Minnesota, June 23, 1936, Hackworth, Dig., III, 151; Mr. Welles, Acting Secy. of State, to Mr. W. J. King, April 28, 1938, Hackworth, Dig., III, 152.

See also *supra*, §§ 55 and 72.

It should be borne in mind that by the terms of the so-called Minorities Treaties concluded at the termination of the World War, 1914-1918, certain States agreed that all inhabitants of their territories should be entitled to the free exercise of any creed, religion or belief, of which the practice might not be inconsistent with public order or public morals. See, for example, Art. 2 of treaty between the Principal Allied and Associated Powers and Poland of June 28, 1919, *Brit. and For. St. Pap.*, CXII, 235, and in this connection, letter from M. Clemenceau, President of the Peace Conference, to M. Paderewski, of June 24, 1919,

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§ 216. **American Missionaries in Eastern Countries.** In the Turkish Empire, as a result of the first Capitulations, there occurred what Mr. Engelhardt described as "an abdication . . . of absolute autonomy in religious matters."<sup>1</sup> Nor were the Sultans ever able to regain complete control of what had been relinquished at a time before international law was established. As a result, the United States long denied the right of the Ottoman Government to restrict in various ways the activities of American missionaries there engaged in propagating Christianity. The United States protested, for example, against the closing of established places of worship found to be without an imperial permit, as required under existing, although obsolete laws; it insisted that the conversion of a dwelling house into a chapel or school without the sanction of such a permit did not justify local interference;<sup>2</sup> it complained of the rigor of the censorship of religious literature;<sup>3</sup> it objected to the persecution of Turkish subjects employed by or otherwise connected with American missionary institutions.<sup>4</sup>

The Republican régime in Turkey was able through the terms of the Treaty of Peace of Lausanne, of July 24, 1923,<sup>5</sup> to obtain easier terms in relation to alien missionary enterprises on Turkish soil than those which the Allied Powers had sought to exact from the Imperial Ottoman Government through the abortive Treaty of Sèvres of August 10, 1920.<sup>6</sup> While to all inhabitants of Turkey freedom to exercise religious beliefs not incompatible with public order and good morals was accorded,<sup>7</sup> there was no general concession recognizing and

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*id.*, 225; also, Art. 2 of treaty between the Principal Allied and Associated Powers and Roumania, of Dec. 9, 1919, *id.*, 538.

See in this connection, Advisory Opinion of April 6, 1935, of the Permanent Court of International Justice, concerning Minority Schools in Albania, Publications, Permanent Court of International Justice, Series A/B, No. 64.

See Protection of Minorities, *supra*, § 27.

§ 216.<sup>1</sup> Translated from an article entitled "*Le Droit d'Intervention et la Turquie*," *Rev. Droit Int.*, 1 ser., XII, 363, 373, 375, quoted in Moore, Dig., V, 813-814. See, also, Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, April 20, 1887, For. Rel. 1887, 1094, Moore, Dig., V, 802; Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Dec. 14, 1891, For. Rel. 1892, 527, Moore, Dig., V, 831. See, also, *infra*, § 259-261.

<sup>2</sup> Mr. Foster, Secy. of State, to Mr. Thompson, Minister to Turkey, Nov. 29, 1892, For. Rel. 1892, 609, 611-612, Moore, Dig., V, 822; Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Dec. 14, 1891, For. Rel. 1892, 527, Moore, Dig., V, 831; President Harrison, Annual Message, Dec. 6, 1892, For. Rel. 1892, xv, Moore, Dig., V, 823; Mr. Wharton, Acting Secy. of State, to Mr. MacNutt, No. 249, Oct. 1, 1891, For. Rel. 1891, 757, Moore, Dig., V, 832, note.

<sup>3</sup> See documents cited in Moore, Dig., V, 829-830; also correspondence concerning restrictions upon the sale of the Bible contained in For. Rel. 1905, 898-911, and *id.*, 1906, II, 1414-1416.

<sup>4</sup> Mr. Bayard, Secy. of State, to Mr. Straus, Minister to Turkey, April 20, 1887, For. Rel. 1887, 1094, Moore, Dig., V, 802; Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Dec. 14, 1891, For. Rel. 1892, 527, Moore, Dig., V, 831; Mr. Gresham, Secy. of State, to Mr. Newberry, Chargé d'Affaires *ad. int.*, May 15, 1893, 632, Moore, Dig., V, 825, note d; Mr. Adee, Acting Secy. of State, to Mr. Terrell, Minister to Turkey, Sept. 6, 1895, For. Rel. 1895, II, 1281-1282, Moore, Dig., V, 827. James Harry Scott, *The Law Affecting Foreigners in Egypt*, Edinburgh, 1907, Chap. VII, "Religious Protection."

<sup>5</sup> *Am. J.*, XVIII, documents, 1.

See Turkey, *supra*, § 28.

<sup>6</sup> For the text of the Treaty of Sèvres see Sen. Ex. Doc. No. 7, 67 Cong., 1 Sess., 320.

<sup>7</sup> See Arts. 38-45 of Treaty of Lausanne, between the Allied Powers and Turkey, of July 24,

respecting the ecclesiastical and scholastic autonomy of all racial minorities, and purporting to uphold and confirm the prerogatives and immunities of an ecclesiastical or scholastic character that had been granted by the Sultans to non-Moslem races in virtue of various orders or decrees.<sup>8</sup> Save for formal notes to the effect that there would be Turkish recognition of the existence of religious, scholastic and medical establishments and charitable institutions of British, French and Italian nationality, recognized as existing in Turkey before October 30, 1914, and a readiness favorably to examine the status of other institutions of similar character actually existing in that country on the date of the signature of the treaty of peace (July 24, 1923),<sup>9</sup> with a view to regularizing their position, the Turkish sovereign appeared to make few commitments.<sup>10</sup> It is understood now to take the stand that in general the religious instruction of nationals within its domain should be under Turkish rather than foreign auspices.

In China, the United States acquired, by treaty, rights of religious freedom for American citizens in the domain of that State. Discrimination against native Chinese converts to Christianity has been protested against; indemnification of those persecuted by reason of their faith has been urged; and finally, by treaty the United States has secured assurance of complete protection for such individuals.<sup>11</sup>

In May, 1928, the Persian Government informed that of the United States that in response to its request for such assurance, American missionaries would be authorized to carry on their charitable and educational work in Persia on condition that it contravened neither the public order nor the laws and regulations of that country.<sup>12</sup>

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1923. According to Art. 42, "the Turkish Government undertakes to grant full protection to the churches, synagogues, cemeteries, and other religious establishments of the above-mentioned [non-Moslem] minorities. All facilities and authorisation will be granted to the pious foundations, and to the religious and charitable institutions of the said minorities at present existing in Turkey, and the Turkish Government will not refuse, for the formation of new religious and charitable institutions, any of the necessary facilities which are guaranteed to other private institutions of that nature."

By the terms of Art. 44, Turkey agreed that "in so far as the preceding Articles of this Section affect non-Moslem nationals of Turkey, these provisions constitute obligations of international concern and shall be placed under the guarantee of the League of Nations." It will be observed that this "guarantee" was not made applicable to the religious activities of non-Moslem minorities of alien nationalities.

<sup>8</sup> Compare the provisions in this regard contained in Art. 149 of the Treaty of Sèvres of Aug. 10, 1920.

<sup>9</sup> See, for example, Ismet Pasha to Sir H. Rumbold, July 24, 1923, British Treaty Series, No. 16 (1923), Cmd. 1929, p. 231.

<sup>10</sup> See communication from Ismet Pasha to Mr. Grew, American Minister, of Aug. 4, 1923, printed as Appendix C to article by Edgar W. Turlington on "The American Treaty of Lausanne" (which failed to be consummated), World Peace Foundation Pamphlets, Vol. VII, 1924, 602.

<sup>11</sup> Art. XXIX treaty between the United States and China of June 18, 1858, Malloy's Treaties, I, 220; Art. IV treaty of July 28, 1868, *id.*, I, 235; Art. XIV treaty of Oct. 8, 1903, *id.*, I, 268. See, also, Mr. Denby, Minister to China, to the Tsung-li Yamèn, April 9, 1897, For. Rel. 1897, 83, Moore, Dig., V, 459; Mr. Hay, Secy. of State, to Mr. Conger, Minister to China, Oct. 30, 1900, For. Rel. 1900, 224, Moore, Dig., V, 460-461.

See also convention between the United States and France concerning Rights in Syria and the Lebanon, of April 4, 1924, U. S. Treaty Vol. IV, 4169; convention between the United States and Great Britain concerning Rights in Palestine, of Dec. 3, 1924, U. S. Treaty Vol. IV, 4227.

<sup>12</sup> See Mr. Pakrevan, Acting Persian Minister for Foreign Affairs, to Mr. Philip, American

## (v)

§ 217. **Freedom of Speech and of the Press.** A State may exercise a censorship over what is spoken or published or pictured within its territory.<sup>1</sup> Conversely, a State has little ground for complaint when its nationals within a foreign country are, pursuant to the local law, subjected to restraint through such action. As the Department of State declared in 1931: "No government may question the right of another government to prevent within its territory the exhibition of any picture which the government concerned considers contrary to its interests. The decision of this question is solely for the government concerned."<sup>2</sup> Ground for complaint may, however, be deemed to exist if or when the right of censorship is exercised in arbitrary fashion that serves to be definitely onerous to alien portrayors or publishers.<sup>3</sup>

In States where liberal forms of government prevail, freedom of speech and of the press may be regarded as something to be confided to the people and preserved against assault. The First Amendment of the Constitution of the United States declares that Congress shall make no law "abridging the freedom of speech or of the press." The Department of State has on appropriate occasions frequently denied the existence of any duty on the part of the nation to suppress public utterances regarded as hostile to other States with which amicable relations were had.<sup>4</sup> The constitutional guaranty does not, however, as the Department of State declared on March 5, 1937, "lessen the regret of the Government when utterances either by private citizens or by public officials speaking in an individual capacity give offense to a government with which we have official relations." Accordingly, on that date, following a complaint through the German Embassy at Washington on account of certain remarks made by Mayor Fiorello La Guardia of New York in a public address in that city, on March 3, 1937, the Department stated that it very earnestly deprecated the utterances that had given offense to the German Government, and that they did not represent the attitude of the American Government toward the German Government.<sup>5</sup>

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Minister at Teheran, May 14, 1928, appended to Provisional Agreement between the United States and Persia, effected by exchange of notes of May 14, 1928, U. S. Executive Agreement Series, No. 19.

§ 217.<sup>1</sup> Mr. Fish, Secy. of State, to Mr. Washburne, March 1, 1873, MS. Inst. France, XIX, 67, Moore, Dig., II, 166.

<sup>2</sup> Mr. Rogers, Assist. Secy. of State, to Motion Picture Producers and Distributors of America, Incorporated, March 20, 1931, Hackworth, Dig., II, 146.

<sup>3</sup> See Mr. Welles, Assist. Secy. of State, to Ambassador Caffery, March 25, 1935, Hackworth, Dig., II, 146.

<sup>4</sup> Mr. Seward, Secy. of State, to Blacque Bey, Turkish Minister, Jan. 20, 1869, MS. Notes to Turkey, I, 29, Moore, Dig., II, 164; Mr. Fish, Secy. of State, to Mr. Roberts, Spanish Minister, June 1, 1869, MS. Notes to Spanish Legation, VIII, 280, Moore, Dig., II, 165; Same to Mr. Robb, Feb. 25, 1873, 98 MS. Dom. Let. 12, Moore, Dig., II, 165; Mr. Blaine, Secy. of State, to Mr. Hirsch, Minister to Turkey, Jan. 7, 1891, MS. Inst. Turkey, V, 194, Moore, Dig., II, 167; Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, Dec. 4, 1883, MS. Inst. Great Britain, XXVII, 69; same to same, Nov. 24, 1884, *id.*, 349, Moore, Dig., II, 170.

See also Mr. Hull, Secy. of State, to Chargé White, March 30, 1934, Hackworth, Dig., II, 144.

<sup>5</sup> Dept. of State Press Releases, March 6, 1937, 133.

Declared Secy. Hull, in the course of a statement of Sept. 14, 1935: "Although in this

If the law of nations as revealed by the practice of States imposed upon members of the international society a duty to endeavor to restrain within their respective territorial limits utterances that might be critical of, and possibly injurious to, the welfare of foreign States or Governments, no declaration in the fundamental law of a particular State could lessen or impair that obligation. It is not apparent, however, that that law is deemed so to have burdened the members of that society.<sup>6</sup> Thus, it is not acknowledged that the provisions of the Constitution of the United States in relation to the freedom of speech or of the press render the nation impotent, in a domestic sense, to satisfy any requirement that international law as such lays down.<sup>7</sup>

The government of a State may in fact endeavor to cause the publication or utterance, within or outside of the national domain, of views designed to produce, and effective in producing, injury to a foreign country. In such case that country may fairly contend that it has been made the victim of internationally illegal conduct through the action of another.

In countries where governmental control is exercised over the press, foreign States are on occasion inclined to demand that effectual effort be made to repress or discourage the publication of views regarded as hostile to their governmental policies.<sup>8</sup> In its dealings with China, where the press has been controlled by a

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country the right of freedom of speech is well recognized by our fundamental law, it is to be regretted that an official having no responsibility for maintaining relations between the United States and other countries should, regardless of what he may personally think of the laws and policies of other governments, thus indulge in expressions offensive to another government with which we have official relations." (*Id.*, Sept. 14, 1935, 197.)

Declared Secretary Hull in the course of a communication to the Dominican Minister at Washington, July 15, 1936: "There is no one more than I who deprecates the publication of any article or the exhibition of any film which causes offense to any foreign government. . . . My Government, therefore, deplors any actions of private citizens that are in discord with this policy and that cause offense to the peoples of other countries. Such actions sometimes occur, however, for the reason that in this country, unlike many other countries, freedom of speech and of the press is deeply imbedded in our tradition; is cherished by every citizen as part of the national heritage; and is guaranteed under our Constitution. Although appreciating your desire to prevent any occurrences which might reflect upon your country's name I am sure you understand that for the reasons just expressed this Government is not in a position to prevent the matters complained of by you." (Dept. of State, Press Releases, July 18, 1936, 42-43.)

<sup>6</sup> Declared Secy. Knox in a communication to the Mexican Ambassador, June 7, 1911: "I have to repeat the statement already made a number of times to your excellency's predecessor, that the carrying on of a mere propaganda either by writing or speaking does not constitute an offense against the law of nations." (For. Rel. 1911, 501, 502.)

<sup>7</sup> Declares Mr. Hackworth: "In the United States freedom of speech and of the press is guaranteed by the Constitution, amendment 1 of which declares that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' This does not mean, however, that people in the United States are free to speak or write as they may choose. Remedies are afforded aggrieved persons through laws that have been enacted pertaining to expressions of a slanderous or libelous character." (Hackworth, Dig., II, 140.)

<sup>8</sup> According to a wireless communication to the *New York Times* from Vienna, Oct. 7, 1934, printed in that newspaper, Act. 8, 1934, the first fruits of the activities of Col. F. Franz von Papen, German Minister to Austria, were secret instructions issued by the Government to all newspaper entities to modify their hostile attitude towards Nazi Germany.

Thus, on account of statements in a German newspaper published in Berlin, on March 4 and 5, 1937, defamatory of the United States and of American women, the American Ambassador at Berlin was, it is understood, instructed to express to the German Foreign Office an "emphatic comment." See *New York Times*, March 12, 1937. The connection between the newspaper and those in control of German governmental affairs was seemingly regarded as sufficient to justify such action on the ground that the latter were inspirers of the offensive statements.

governmental censorship as a matter of public policy, and where at times publications in various forms have been circulated which have served to endanger the safety of the lives and property of foreign residents, the United States has frequently requested the suppression of anti-foreign publications.<sup>9</sup>

(m)

THE EXPROPRIATION OF IMMOVABLE PROPERTY BELONGING TO ALIENS

(i)

§ 217A. In General. The Expropriation by Mexico of agrarian properties owned by American citizens gave rise to a sharp controversy between the Governments of the United States and Mexico in 1938.<sup>1</sup> While an agreement concluded in 1938, provided for a method of evaluation of and payment for expropriated property,<sup>2</sup> the issue remained unsettled concerning the major question involved. That question was the following:

Is there a legal duty on the part of a State towards another not to take without full compensation or appropriate and immediate arrangement therefor, immovable property of nationals of that other, that has been validly acquired, when the taking is effected by general legislation impartially applied to all landowners, nationals and aliens alike? <sup>3</sup>

The American view was succinctly set forth by Secretary Hull in a note of July 21, 1938, when he said: "The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future"; <sup>4</sup> and when he declared in a note of August 22, 1938: "The fundamental issues raised by this communication from the Mexican Government are therefore, first, whether or not universally recognized principles of the law of nations require, in the

<sup>9</sup> Mr. Blaine, Secy. of State, to Mr. Denby, Minister to China, Dec. 3, 1889, MS. Inst. China, IV, 475, Moore, Dig., II, 166. See, also, correspondence with China in 1905, relative to an anti-American boycott in that country, For. Rel. 1905, 204-234, particularly Mr. Root, Secy. of State, to the Chinese Minister, Nov. 14, 1905, *id.*, 232.

§ 217. <sup>1</sup> See Compensation for American-Owned Lands Expropriated in Mexico (Full Text of Official Notes July 21, 1938, to November 12, 1938), Dept. of State Publication 1288, Inter-American Series 16.

<sup>2</sup> See note from the Secy. of State to the Ambassador of Mexico, Nov. 9, 1938, *id.*, 39; note from the Mexican Minister for Foreign Affairs to the American Ambassador, Nov. 12, 1938, *id.*, 43.

<sup>3</sup> The statement of the issue is taken from a Report on Expropriation of Immovable Property prepared in 1938, by a Subcommittee of the American Bar Association (embracing James W. Ryan, Gordon Auchincloss, Mitchell B. Carroll, Ralph M. Carson, J. Reuben Clark, Henry B. Crawford, John Foster Dulles, Sanford H. E. Freund, Arthur K. Kuhn, Garret W. McEnerney, Henry W. O'Melveny, Thomas W. Palmer, Robert T. Swaine, and Charles Cheney Hyde, chairman of the subcommittee). See American Bar Association Reports, 1939, Vol. LXIV, 527-528; *id.*, 396. As a co-author of the Report, the author is making full use of the same and of the notes appended thereto throughout this section of his book. The Report was printed in part in 1940, in American Bar Association, Section of International and Comparative Law, Selected Papers and Reports, 36.

<sup>4</sup> Dept. of State Publication 1288, 5. He also said: "The issue is whether in pursuing them the property of American nationals may be taken by the Mexican Government without making prompt payment of just compensation to the owner in accordance with the universally recognized rules of law and equity." (*Id.*, 1.)

exercise of the admitted right of all sovereign nations to expropriate private property, that such expropriation be accompanied by provision on the part of such government for adequate, effective, and prompt payment for the properties seized.”<sup>5</sup>

There are doubtless seasons when a State in the exercise of control over what is within its own domain is confronted with special exigencies or emergencies that cause it to assert the full measure of its legal rights. Thus in time of war, a belligerent sovereign may find cause to seize, and possibly destroy, immovable or other property within its domain, and to claim some latitude as to terms of reimbursement.<sup>6</sup> It is significant, however, that even in such situations, the taking or destruction of alien property, is acknowledged by claims commissions, as well as by governmental authorities, to beget a duty to compensate.<sup>7</sup> The Government of the United States has on occasion emphasized the point.<sup>8</sup> There is

<sup>5</sup> *Id.*, 18. Referring to the position of Mexico, Secy. Hull declared: “Reduced to its essential terms, the contention asserted by the Mexican Government as set forth in its reply and as evidenced by its practices in recent years, is plainly this: that any government may, on the ground that its municipal legislation so permits, or on the plea that its financial situation makes prompt and adequate compensation onerous or impossible, seize properties owned by foreigners within its jurisdiction, utilize them for whatever purpose it sees fit, and refrain from providing effective payment therefor, either at the time of seizure or at any assured time in the future.” (*Id.*, 17.)

“In 1924, when the Rumanian Government, without a special agreement on the subject, declined to give assurances that if property of American citizens in Bessarabia should be expropriated adequate compensation would be paid, the United States took the position that — ‘should property in Bessarabia belonging to American citizens be expropriated they would under the generally accepted principles of international law, be entitled to adequate compensation and that it is not necessary for this Government to resort to any special agreement in order to obtain for its nationals the treatment to which they are justly entitled under the law of nations.’” (Hackworth, Dig., I, 21, citing Secy. Hughes to the American Chargé d’Affaires *ad interim* at Bucharest, Feb. 21, 1924.)

<sup>6</sup> See, for example, Mr. Hughes, Secy. of State, to the Norwegian Minister at Washington, Feb. 26, 1923, in his criticism of the arbitral award of Oct. 13, 1922, in the case of the Norwegian Shipping Claims, where it was said: “The award recognizes the requisitioning power of a belligerent but would seem to apply a limitation on its exercise, where the property concerned is that of neutral aliens, by defining the extent of the emergency and its termination, and by enhancing damages accordingly, thus subjecting the Government to a different test and a heavier burden where the property is owned by neutral nationals than in the case where it is owned by nationals of the requisitioning state. No such duty to discriminate in favor of neutral aliens is believed to be imposed upon a state by international law, with respect to property such as is concerned in the present case.” (For. Rel. 1923, Vol. II, 626, 627.)

It should be noted, however, that Secy. Hughes added that the exercise of the belligerent right of requisition demanded that “just compensation be made” to the owners of what was taken.

<sup>7</sup> Among the numerous cases may be noted that of *Putegnats Heirs*, U. S.—Mexico, 1868, Moore, Arb., 3719; *Labrot’s Case*, France—U. S., 1880, *id.*, 3706; *Upton’s Case*, U. S.—Venezuela, 1903, Ralston’s Report, 172; *Selwyn’s Case*, *id.*, 322.

In numerous cases involving the requisition of neutral property adjudicated before tribunals and commissions passing on claims growing out of World War I, the obligation of the requisitioning State to give full compensation for what has been taken has been judicially laid down. See, for example, *Karmatzucas v. Germany*, German-Greek Mixed Arbitral Tribunal, 7 T.A.M. 17, interpretative of paragraph 4 of the Annex to Article 297 of the treaty of Versailles.

See also *Portugal v. Germany*, June 30, 1930, Lauterpacht, Annual Dig., 1929–1930, 150

See correspondence between the Government of the United States and that of Spain 1936 set forth in Dept. of State Press Releases, Aug. 8, 1936, 131–132, and Aug. 29, 1936, 187.

<sup>8</sup> Declared the Dept. of State in a Memorandum of Jan. 31, 1925, for the British Government, concerning the claim of the Standard Oil Company of New Jersey on account of the destruction of oil properties in Roumania in 1916, belonging to a subsidiary of that company: “In a word, the Roumanian corporate garb of the American interest did not free the



in fact much material which inspires the contention that when judicial opinion imposes payment of full compensation within a reasonable time, as a condition to be satisfied by a requisitioning State on account of its action in time of war, the expropriation of alien-owned property in time of peace cannot lawfully be effected on lighter terms.<sup>9</sup>

The alien acquirer of immovable property, as well as the State of which he is a national must be deemed to anticipate that the territorial sovereign may see fit to avail itself of its broad right to regulate and control the use of whatever is necessarily fixed within its domain and that in so doing it need not compensate the owner for some losses resulting from such action. This acknowledgment does not necessarily weaken the value of the objection to governmental conduct that robs the alien owner of title and permits governmental acquisition of the same without appropriate compensatory action.<sup>10</sup>

There are frequent instances where in time of peace, the expropriation or destruction of the immovable property of aliens has been deemed to require the payment of full compensation.<sup>11</sup> Even if they do not suffice to make exact response to the precise question noted above, they reveal evidence of a wide-

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British Government from any obligation to make reparation which it would normally have owed to any neutral national doing business in Roumania. To such a national there long engaged in profitable enterprise involving the use and development of immovable property, the foreign belligerent destroyer of that property owed a distinct obligation to make reparation for the loss which it occasioned. That obligation was imposed by the law of nations; and the neutral national assumed no risk that the belligerent destroyer would not fully respect it." (For. Rel. 1926, II, 316, 318.)

<sup>9</sup> Declared Count Bismarck to Count Bernstorff, Jan. 25, 1871, in relation to the sinking by German military forces of English ships in the Seine: "The report shows that a pressing danger was at hand, and every other means of averting it was wanting; the case was, therefore, one of necessity which, even in time of peace, may render the employment or destruction of foreign property admissible, under reservation of indemnification." (Brit. and For. St. Pap., LXI, 580.) Note the words "even in time of peace."

See also award in case of Norwegian-American Shipping Claims, Oct. 13, 1922, where it is said: "Here it must be remembered that in the exercise of eminent domain the right of friendly alien property must always be fully respected. Those who ought not to take property without making just compensation at the time or at least without due process of law must pay the penalty of their action." (Permanent Court of Arbitration, Proceedings of the Tribunal of Arbitration convened at The Hague under the Provisions of the Special Agreement between the United States of America and Norway concluded at Washington, June 30th, 1921, The Hague, 1922, p. 143.)

<sup>10</sup> There are to be distinguished, in an international sense, situations where the territorial sovereign forbids as contrary to its public policy, and possibly by modification of its fundamental law, the continuance of particular activities or occupations, such as the manufacture and sale of intoxicating liquors, or the retention of ownership of slaves, or the removal from its domain of certain forms of personal property. In connection with the emancipation of slaves by the United States in 1863, it may be noted that there was no acquisition of ownership by the State, but simply a remission of servitude, and that against this action no foreign government is known to have registered protest. See John P. Bullington, in *Am. J.*, XXI, 685, 704, footnote 90.

<sup>11</sup> See *de Garmendia Case*, *Ralston's Report*, 10; *Case of Armendariz, Mexico v. U. S.*, 1858, *Moore, Arb.*, 3722 (where Mexico as complainant obtained an award of \$14,200, on account of the expropriation by the United States of land owned by Mexican citizens).

See also case of expropriation for public purposes of the land owned by Rev. Jonas King by Greek authorities on account of which the United States was able to obtain from the Greek Government compensation that was satisfactory to the claimant, *Moore, Dig.*, VI, 262-264.

See views of Viscount Palmerston, expressed Aug. 7, 1846, in relation to claim of George Finlay, a British subject, against Greece, on account of the taking of his real property for governmental use, set forth in *Brit. and For. St. Pap.*, XXXIX, 431-432.

spread understanding as to the conditions to be satisfied before the territorial sovereign may properly divest the alien owner of his title.<sup>12</sup> They point to the existence of a common thought as to the burden resting upon a State when it proceeds in the course of a policy of agrarian reform to rid itself of the alien ownership of land within its domain. There are, for example, impressive instances of confiscatory breaches of concessions productive of, or accompanied by, the taking or transfer of private property and where the action of the territorial sovereign has been denounced.<sup>13</sup> There are also cases where a deprivation or interference with land has been likewise dealt with.<sup>14</sup> It is believed to be reasonable to claim that invalidation of a title acquired in accordance with the law during a preceding governmental administration, by a procedure that is without due legal process marks a spoliation that is violative of an international obligation towards the State of the title-holder.<sup>15</sup>

In the course of determining whether the conduct of Poland in seizing certain German properties in Polish Upper Silesia harmonized with requirements of a German-Polish Convention concluded at Geneva on May 15, 1922, the Permanent Court of International Justice made certain statements in 1926, and again in 1928, which, although dicta, revealed the mind of that tribunal. It said:

Further there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed . . .

It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention.<sup>16</sup>

The action of Poland which the Court has judged to be contrary to the

<sup>12</sup> It is needless to advert to instances where the presence of special factors exemplified by burdens undertaken by treaty account for foreign protests that were made. See, for example, the matter of the Sicilian Sulphur Monopoly, referred to in *Brit. and For. St. Pap.*, XXVIII, 1163-1242; *id.*, XXIX, 175-204; and *id.*, XXX, 111-120. Also in this connection, A. P. Fachiri, in *Brit. Y.B.*, 1925, 163-164.

Concerning the Italian law of 1912, instituting a life insurance monopoly, and the alleged damage to foreign property that was productive of foreign protests, see *Rev. Gén.*, XX, 5; also A. P. Fachiri, in *Brit. Y.B.*, 1925, 106; and Sir John Fischer Williams in *Brit. Y.B.*, 1928, 3.

<sup>13</sup> See *El Triunfo* case, award, *For. Rel.* 1902, 859; also *id.*, 838; *Delagoa Bay Railway* case, *Moore, Arb.*, 1865-1899.

<sup>14</sup> See *de Sabla* case, *American and Panamanian Claims Arbitration*, *Hunt's Report*, 379, 447; *Portuguese Religious Properties* case, *Scott, Hague Court Reports*, second series, iv-v, Fachiri, in *Brit. Y.B.*, 1925, 167-169, where it appears that Portugal, the respondent State, was far from contesting the legal principles upon which the governments of the three complainant States—Great Britain, France and Spain—based their contentions.

<sup>15</sup> See documents in *Moore, Dig.*, VI, 253-255, concerning the action of the Cacaes government of Peru in annulling the acts of the previous administrations of Pierola and Iglesias, and in connection with which Secy. Bayard declared on Jan. 19, 1888: "These investments have been made under concessions from the government of Peru which no subsequent revolutions in that state can invalidate, and which can only be cancelled by judicial action sustainable on the principles of international law applicable to such cases." (254.)

<sup>16</sup> Judgment No. 7, Case concerning certain German interests in Polish Upper Silesia (the merits), Publications, Permanent Court of International Justice, Series A, No. 7, 22.

Geneva Convention is not an expropriation — to render which lawful only the payment of fair compensation would have been wanting; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention . . .

It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated . . .<sup>17</sup>

From the foregoing it is apparent that the Court thought that expropriation, when permissible, demanded the payment of compensation for the property taken.

Deference for the rights of alien owners of immovable and other property has frequently found expression in treaties to which the United States and other States, including Mexico, have been parties. They are significant not merely as registering contractual obligations between State and State, but also as tokens of the common thought of the contracting parties concerning the general obligation of a territorial sovereign towards the alien holder of a title to property within its domain. They may perhaps be regarded as revealing what those parties supposed to be the requirements of international law, rather than special concessions or undertakings involving commitments which that law did not call for.<sup>18</sup>

In his note to the Mexican Government of August 22, 1938, Secretary Hull declared that the "doctrine of just compensation for property taken . . . is today embodied in the constitutions of most countries of the world, and of every republic of the American continent."<sup>19</sup> This fact, thus proclaimed, is in itself illustrative of the widespread respect for the relationship between property and the alien owner thereof that results from valid acquisition with the consent of the territorial sovereign. It is part of the testimony which reveals the mind of civilization that has been responsible for the character of the law of nations as it is today.

The contention was made by the Mexican Government in 1938, that expropriation, if impersonal and applied to nationals and aliens alike in the execution of a program of agrarian reform, freed the State from an obligation to make or

<sup>17</sup> Judgment No. 13, Case concerning the factory at Chorzów (claim for indemnity) (the merits), Publications, Permanent Court of International Justice, Series A, No. 17, 46-47.

<sup>18</sup> See Art. I of treaty between the United States and Germany, of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191.

According to Art. XIV of a treaty between the United States and Mexico, of April 5, 1831: "Both the contracting parties promise and engage to give their special protection to the persons and property of the citizens of each other, of all occupations, who may be in their territories, subject to the jurisdiction of the one or of the other, transient or dwelling therein." (Malloy's Treaties, I, 1089.) These provisions were duplicated in the terms of numerous other agreements to which the United States became a party in the nineteenth century. See, for example, Art. XII, Convention with Central America, Dec. 5, 1825, Malloy's Treaties, I, 163.

<sup>19</sup> Dept. of State Document 1288, 15, 16.

arrange for prompt or full compensation for the owner.<sup>20</sup> Here was substantial denial that international law imposed an obstacle as by demanding respect for an international standard or test of the propriety of such conduct. This attitude has been frequently challenged by international tribunals when passing upon the character of the acts of a State in the treatment of aliens or their property.<sup>21</sup> It has at times, however, found support in the views of domestic tribunals,<sup>22</sup> and in those of at least one international court.<sup>23</sup> It is believed that Secretary Hull was on strong ground and in good company when he denounced it in his note of August 22, 1938.<sup>24</sup>

In point of fact States generally deny that when a territorial sovereign is guilty of seemingly arbitrary or tortious conduct in its treatment of an alien, as exemplified in the expropriation of his property, and in a fashion that is violative of the minimum requirements of the international society, a solid defense is found in the allegation that the aggrieved national has fared no worse than the national who has been subjected to like treatment. It will be contended, however, that when the conduct complained of is stripped of arbitrary or capricious or tortious features, and is applied to all alike, the so-called international standard becomes inapplicable or is nonexistent. By way of response, it may be said that the practice of States has so intimately woven into the web of their international law a common deference for the right of the alien holder of property lawfully acquired as to make any weakening of that deference an exception to a general rule to be explained and established on precise grounds and fortified by abundant evidence, and that the materials which are probative of the will of the international society in that regard, fail to reveal general acquiescence in such an exception. Nevertheless, the tendency of Mexico and of a few other States within recent years to act on an opposing theory accentuates the importance of probing the character of every defense that may be offered in support of the endeavor to expropriate immovable property of aliens and nationals

<sup>20</sup> See Mexican note of Aug. 3, 1938, Dept. of State Publication 1288, 8, 11-12.

<sup>21</sup> See Roberts case, Opinions of Commissioners, General Claims Commission, United States and Mexico, Convention of Sept. 8, 1923, 1927 Vol., 100, 105; George W. Hopkins case, *id.*, 42, 50-51. Cf., however, Dickson Car Wheel Company, *id.*, 1930-1931 Vol., 175, with dissenting opinion of Commissioner Nielsen, *id.*, 193.

See also case of French Claims against Peru before a tribunal from the Permanent Court of Arbitration at The Hague, *Am. J.*, XVI, 480; *Bureau International de la Cour Permanente d'Arbitrage: Compromis, Protocoles des Séances et Sentence du Tribunal d'Arbitrage constitué en vertu du compromis signé à Lima le 2 Février, 1914, entre La France et Le Pérou (Differend au sujet de Diverses Reclamations de Citoyens Français contre Le Pérou)*, La Haye, 1921, 13.

In accepting the legal principles invoked by Great Britain, France and Spain in the so-called Portuguese Religious Properties case, the Portuguese Government appeared to accept the soundness of their reliance upon an international standard as set forth in "*Observations Générales*," presented by the British Government. For an English translation see A. P. Fachiri, in *Brit. Y.B.*, 1925, 168.

<sup>22</sup> See, for example, Czechoslovak Agrarian Reform (Expropriation) Case, Czechoslovakia, 1926, McNair and Lauterpacht, *Annual Dig.*, 1925-1926, Case No. 99; also Czechoslovak Agrarian Reform (Swiss Subjects) Case, Czechoslovakia, 1927, *id.*, *Annual Dig.*, 1927-1928, Case No. 94.

<sup>23</sup> See award in Arbitration between the Reparation Commission and the Government of the United States of America, agreement of June 7, 1920, *Brit. Y.B.*, 1927, 156, 168-169.

<sup>24</sup> Dept. of State Publication 1288, 15, 26-27.

See discussion under Duties of Jurisdiction, An International Standard, *infra*, §§ 266 and 267.

alike on terms that do not necessitate appropriate arrangement fully to compensate the owner, and in so doing not to rely solely upon precedents that may in fact be challenged as indecisive of the precise issue involved.<sup>25</sup> In that effort a sub-committee of the American Bar Association<sup>26</sup> has thus expressed itself:

It is to be expected that States advocating the right of expropriation on most convenient terms, when incidental to a program of agrarian reform, will contend that those who oppose obstacles in behalf of the alien land-owner, are in reality pleading for an exception to a general principle which confers upon a territorial sovereign complete freedom to determine the character and scope of alien privileges pertaining to whatever is fixed within the national domain; that, accordingly, the alien acquirer of land therein must be deemed to anticipate that such sovereign may not improperly exercise the full measure of its rights, embracing the privilege of taking whatever is immovable on terms of its own devising; that the absence of previous efforts to expropriate without provision for immediate or full compensation implies no lack of a legal right so to expropriate; that there are instances where the territorial sovereign has gone to great lengths in curtailing the enjoyment of land or other property without being obliged to compensate alien owners thereby adversely affected; and that it has not been affirmatively shown that in the particular effort to expropriate land without prompt and full compensation to the alien owners, international law as such opposes a barrier. If this contention can be successfully challenged, it is believed that the instrument of achievement must be sought in the realm of principle, and the answer drawn from the domain of logic.

It is reasonable to affirm that an alien acquirer of land must be assumed to anticipate that the territorial sovereign will exercise its full rights in respect to expropriation, whatever be their scope, even though such exercise embraces acts that have not previously been committed by that sovereign. It ought to be clear that the bare circumstance that a State has not exhausted its rights in relation to what is within its own territory, is not decisive of what their full scope may be. Thus the fact of novelty in the matter of assertion does not necessarily betoken abuse of power or illegal conduct. When, however, the new act or course of action calls for conduct which the acquirer of title could not have had any reason to anticipate, or which, had it been brought to his attention at the time of prospective acquisition would have deterred him from making his investment as a prudent man, it cannot

<sup>25</sup> In an extended note of Sept. 1, 1938, responsive to that from Secretary Hull of Aug. 22, 1938, the Mexican Minister for Foreign Affairs declared: "This attitude of Mexico is not, as Your Excellency's Government affirms, either unusual or subversive. Numerous nations, in reorganizing their economy, have been under the necessity of modifying their legislation in such manner that the expropriation of individual interests does not call for immediate compensation and, in many cases, not even subsequent compensation; because such acts were inspired by legitimate causes and the aspirations of social justice, they have not been considered unusual or contrary to international law. As my Government stated to that of Your Excellency in my note of August 3, it is indispensable, in speaking of expropriations, to distinguish between those which are the result of a modification of the juridical organization and which affect equally all the inhabitants of the country, and those others decreed in specific cases and which affect interests known in advance and individually determined." (Dept. of State Publication 1288, 31, 33.)

<sup>26</sup> The Report is that which was referred to in a footnote at the beginning of this section.

well be maintained that recourse to that conduct is honorable. It is idle to contend that international law stamps with its approval, or attaches a legal value to, an act which is tainted with bad faith. If, therefore, expropriation without arrangement for prompt or otherwise adequate compensation is so tainted, it finds no place in the field of international law. This points to the great importance of establishing convincingly that expropriation on such a basis is a breach of good faith. It is believed that the evidence in support of that allegation is abundant. It comes from two distinct places, and is of two distinct kinds. It is revealed in the first place in general assurances of deference for private property proclaimed in constitutions, treaties and domestic laws, as well as in diplomatic correspondence and in common practices which not only give to the alien acquirer of land and to his country no reason to assume that a taking of property without compensation is to be anticipated, but also assure him that no such action will be forthcoming. It is needless here to point to the details of the mass of testimony in the form of reasonable assurances upon which an investor in Mexico or elsewhere might (until perhaps very recent years in particular countries) confidently rely.

The second ground for the charge of bad faith is of a different kind. It grows out of the simple fact that no prudent man can be fairly charged with acting directly against his interest, and that accordingly he cannot be deemed to act on the theory that he will so invest his substance that it can be taken from him without compensation. It is inconceivable that any reasonable individual would do so. Hence, it is impossible to impute to an alien investor in land such a design. If, therefore, a State contends that it may, in an international sense, not improperly deprive an alien of his lawfully acquired land within its domain without full compensation when he has had no reason to anticipate such a deprivation, and when he would not have made his acquisition had he been apprised of such a contingency, its action is utterly lacking in the essentials of good faith. For that reason, it places itself outside the domain of international law when it endeavors to vindicate such a course.

Accordingly, therefore, for two general reasons, first, the deference to be found in the law for the relationship between the alien owner and immovable property which he has been permitted validly to acquire, and secondly, the lack of good faith attributable to a territorial sovereign as manifested in attempts to expropriate without arrangement for compensation, it is felt that the United States was and remains in a position to make affirmative answer to the question propounded at the outset of this discussion.

(ii)

**§ 217B. The Agreement with Mexico for Compensation on account of the Expropriation of Agrarian Properties.** Notwithstanding their controversy as to the main issue involved, the Governments of the United States and Mexico reached an agreement in November, 1938, arranging for the evaluation of, and payment for, American owned agrarian properties that had been

expropriated by Mexico subsequent to August 30, 1927.<sup>1</sup> The values of those properties were to be determined by a commission composed of one representative of each Government, and in case of disagreement, by a third person selected by the Permanent Commission with seat at Washington, as established by the so-called Gondra Treaty of 1923. The Mexican Government was to pay the sum of \$1,000,000 United States currency as first payment of the indemnities to be determined by the Commission on or before May 31, 1939, and subsequent to that year, annual payments of not less than that sum.<sup>2</sup>

In a note of August 22, 1938, Secretary Hull stated that compensation must be "adequate, effective and prompt."<sup>3</sup> If compensation is to be "adequate," it must counterbalance the full loss sustained by the owner in consequence of the taking of the property concerned.<sup>4</sup> In the particular case a variety of factors may present themselves, each of which needs to be considered in order to compute the proper scope or measure of reimbursement.<sup>5</sup> The matter of time of payment is among the factors that must always be considered because, if payment is to be deferred, the total amount will fail to be fully compensatory if it does not make provision, among other things, for interest on the investment or for loss or benefits to the owner after the property was taken and prior to payment. Thus the adequacy of compensation is to be tested in cases where deferred payments are contemplated, by the respect which the arrangement pays for the consequences of postponement. It should be clear that a deferred payment, or series of deferred payments, is not truly compensatory if the loss sustained by the owner in consequence of postponement be unrequited. In his correspondence with the Mexican Government, Secretary Hull did not intimate that arrangements for deferred payments which would make requisite provision for the

§ 217B.<sup>1</sup> See Compensation for American-Owned Lands Expropriated in Mexico (Full Text of Official Notes July, 1938, to November 12, 1938), Dept. of State Publication 1288, Inter-American Series 16, pp. 39 and 43.

This section of the text reproduces in part an editorial by the author entitled "Compensation for Expropriations" in *Am. J.*, XXXIII, 108, and is also based upon a Report on Expropriation of Immovable Property prepared by a sub-committee of the American Bar Association, and presented to that body in July, 1939. The author participated in the preparation of that Report.

<sup>2</sup> Dept. of State Publication 1288, 39. In his note of Nov. 9, 1938, Secretary Hull described at length the plan that was accepted. *Id.*, 39, 41-42.

See Agrarian Claims Commission, United States and Mexico. Report to accompany H. J. Res. 114, Feb. 2, 1938. House Report, 19, 76 Cong., 1 Sess.

The time for filing agrarian claims was extended by agreement until July 31, 1939. See Dept. of State Press Release, May 31, 1939, No. 218.

<sup>3</sup> Dept. of State Publication 1288, 15, 18.

<sup>4</sup> The word "compensation" is, in view of its derivation from the Latin verb, *compensare*, properly defined as "counterbalance, rendering of an equivalent, requital, recompense." (Murray's New English Dictionary, Pt. VI, 717.) The etymologist may, therefore, object to the use of any adjective for the purpose of accentuating or describing the fullness or sufficiency of the return to be made by the compensator.

<sup>5</sup> Declared the Supreme Court of the United States in 1934, in an unanimous opinion, through Mr. Justice Butler: "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." (*Olson v. United States*, 292 U. S. 246, 255.)

period of delay would be inadequate. There is hardly room to impute to him the thought that the fiscal equivalent of prompt payment, if duly arranged for at the outset, would violate any requirement of international law. His scheme of payment proposed in November, 1938, was not inconsistent with his previous demands in this regard, and contained no modification of what he had declared to be the proper basis of compensation. His plan, in which Mexico acquiesced, contained the following statement:

The adequate and effective measure of compensation to be paid in each case shall be determined in the usual manner by taking into consideration, among other pertinent factors, the establishment of the nationality of the claimant, the legitimacy of his title, the just value of the property expropriated, the fair return from the property of which claimant has been deprived between the time of expropriation and the time of receiving compensation, as well as such other facts as in the opinion of the commissioners should be taken into account in reaching a determination as to compensation.<sup>6</sup>

According to the theory of this plan Mexico was not to be permitted to make deferred payments for as low amounts *in toto* as would be allowed were the expropriator to make immediate cash payment. Otherwise there would have been a modification of a condition embraced within the American proposal. In a word, the Mexican Government, as a consequence of the test of adequacy enunciated by Secretary Hull, and which that Government announced a readiness to accept, seemingly obligated itself to pay a price for deferred payments. The privilege of making them may have been deemed to be highly beneficial by the expropriator.

The practical value of the arrangement was due to the fact that the burden of making full compensation for what was expropriated even as it might be enhanced through the postponement of payments did not too heavily tax the capacity of the expropriator.<sup>7</sup> The arrangement suggests the inquiry whether a like plan would be feasible were a State to expropriate immovable property of very great value, and for which it had no visible means of compensating the owners even through a series of deferred payments extended over a protracted period of time. It raises the question whether a State may rightfully expropriate alien owned immovable property under circumstances when it can not give reasonable assurance of ultimate and complete reimbursement to the titleholders.

<sup>6</sup> Dept. of State Publication 1288, 39, 42.

On June 16, 1939, an expert of the Department of State wrote to the author that when Secretary Hull included in his note of Nov. 9, 1938, "the fair return from the property of which claimant has been deprived between the time of expropriation and the time of receiving compensation" as one of the factors to be considered in the determination of the measure of compensation, he might be regarded as having used words sufficiently broad to cover interest.

<sup>7</sup> In the note of Nov. 12, 1938, it was declared: "The Government of Mexico deems necessary to have it understood that the decisions reached by the representatives designated, shall in no case extend beyond evaluation of the lands expropriated and the modalities of payment of the amount determined; that they shall not constitute a precedent, in any case nor for any reason; neither shall they decide the juridical principles maintained by the two Governments and applicable to the matter in question." (*Id.*, 45.)



It suffices to note that it has been suggested that if Secretary Hull's theory of compensation be duly respected, a territorial sovereign may find its very right to expropriate conditioned upon its power to pay, and that if it be sought to exercise that right when evidence of the possession of such power and the disposition to use it are not evident, there is reason to demand that there be restored to the owners what may have been taken from them.

(iii)

§ 217C. **Mexican Expropriation of Properties of American-owned Oil Companies.** "On March 18, 1938, the Mexican Government by decree undertook to expropriate the properties in Mexico of certain foreign-owned oil companies operating there, including a number of American-owned companies. In a statement to the press on March 30, 1938, the Secretary of State (Hull) said that this expropriation was 'but one incident in a long series of incidents of this character' and accordingly raised 'no new question.' He said that the subject under consideration between the two Governments was 'the matter of compensation for various properties of American citizens expropriated in the past few years' and that it was his earnest hope that a fair and equitable solution of the problem might soon be found. In a note of March 31, addressed to the American Ambassador in Mexico, the President of Mexico declared that his Government would 'know how to honor its obligations of today and its obligations of yesterday.'"<sup>1</sup>

On April 3, 1940, Secretary Hull, declaring that his Government readily recognized the right of a sovereign State to expropriate property for public purposes, informed the Mexican Ambassador in Washington that in discussions with him during the previous two years, the former had on each occasion "stated with equal emphasis that the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation," and that "the legality of an expropriation is in fact dependent upon the observance of this requirement."<sup>2</sup> The Secretary took exception to statements in a memorandum from the Ambassador of March 16, 1940, to the effect that "the right of expropriation is beyond discussion" and that "there exists no divergence of opinion between the Government of the United States and that of Mexico" in this respect. In adverting to a statement in the Mexican memorandum that "since the Governments of Mexico and of the United States have not expressed their respective points of view as to what should constitute a prompt, equitable and adequate indemnity to compensate the American oil companies — it would be premature to propose the possibility of arbitration," and that the Mexican Government felt that "in order to determine the amount of the indemnity, the decision of the Mexican courts should be awaited," Secretary Hull made a definite rejoinder. He declared that it was difficult to imagine in what

§ 217C.<sup>1</sup> Hackworth, Dig., III, 661.

See also statement by Mr. Welles, Acting Secy. of State, Aug. 14, 1939, Dept. of State Bulletin, Aug. 19, 1939, 131, Hackworth, Dig., III, 661.

<sup>2</sup> Hackworth, Dig., III, 662-664.

way his Government could have made plainer its point of view as to the compensation owing the American petroleum companies.<sup>3</sup> He went on to say:

During the last twenty-five years, one American interest in Mexico after another has suffered at the hands of the Mexican Government. It is recognized that the Mexican Government is making payments on the Special Claims which have to do solely with damages caused by revolutionary disturbances between 1910 and 1920, and has started payments for farm lands expropriated since August 30, 1927. But the Mexican Government has made no compensation for the large number of General Claims of long standing which include an extensive group of claims for the expropriation of farm lands prior to August 30, 1927. It has made no adjustment either of the foreign debt or of the railroad debt both long in default and in both of which American citizens hold important investments. Moreover, the question of the railroad debt was further complicated by the expropriation of the Mexican National Railways on June 23, 1937. Finally, on March 18, 1938, the Mexican Government took over American-owned petroleum property to the value of many millions of dollars, and although two years have elapsed, not one cent of compensation has been paid.

This treatment of American citizens, wholly unjustifiable under any principle of equity or international law, is a matter of grave concern to this Government. These long-standing matters must of necessity be adjusted if the relations between our two countries are to be conducted on a sound and mutually coöperative basis of respect and helpfulness.<sup>4</sup>

Secretary Hull proposed an adjustment of the issue by recourse to arbitration, suggesting that all the questions involved in the oil controversy be submitted to a tribunal clothed with authority not only to determine the amount to be paid to American nationals who had been deprived of their properties, but also the means by which its decision should be executed in order to make certain that adequate and effective compensation be promptly paid.<sup>5</sup>

In a note of May 1, 1940, Mr. Hay, the Mexican Minister for Foreign Affairs, declared that his Government considered that arbitration "must not be admitted except when the nation has put into practice in full its rights of sovereignty through the action of its courts and the existence of a denial of justice can be proved," and, accordingly, declined to agree to the American offer of arbitration in the instant case, adding that the Mexican Government considered arbitration incompatible with the principles to which it had always been faithful since

<sup>3</sup> In this connection he observed: "Our records show that the obligation of the Mexican Government to make compensation has been kept before the Mexican Government constantly since the taking of the property. No stone has been left unturned by this Government to bring about a satisfactory arrangement for compensation. Moreover, the statement of your Government is not in the nature of things an adequate answer to the suggestion that arbitration would be an appropriate method of settling the differences between our two countries; nor is the statement that the decision of the Mexican courts should be awaited by any means reassuring." (*Id.*, 663.)

<sup>4</sup> *Id.*, III, 663.

<sup>5</sup> In this connection he also suggested that there be either submitted to an umpire, as contemplated by the General Claims Protocol of 1934, the unadjudicated claims falling under the Convention of 1923, or that the parties proceed immediately to the negotiation of an *en bloc* settlement in accordance with that Protocol. (*Id.*)

the matter in dispute was domestic in nature and was near solution by the authorities of Mexico.<sup>6</sup>

If Secretary Hull had, in the course of his discussions, correctly enunciated the conditions under which recourse to expropriation could lawfully be had, the duty of evaluating, or of arranging for the evaluation of, property that was taken over rested upon the expropriator when making its seizure, as a means of determining the extent of the instantly accruing obligation to compensate, or arrange to compensate, the owners. Accordingly, the Mexican Government might well have hesitated to allow the existence or character of that duty to be passed upon by an international tribunal. Hence it was zealous to have the amount of what it owed to the American owners ascertained in a different way, regardless of whatever relevant data it might itself possess.<sup>7</sup>

(n)

§ 217D. The Restraint of Activities Injurious to a Foreign State. The reasonableness of the claim of a State that respect be paid to its supremacy within its own domain, as well as to its political independence, depends upon its success in satisfying the full measure of its obligations growing out of activities within its territory which are productive of a direct effect upon foreign States and their nationals. It will be seen that in relation to foreign life and property within that territory there has grown up a body of law imposing upon a State standards of conduct which it is not free to disregard and which establish tests of the propriety of its conduct.<sup>1</sup>

The question presents itself whether and to what extent the law of nations also imposes upon a territorial sovereign the duty, within places under its control, to endeavor to restrain activities, which, if unrestrained, are bound to produce damage to foreign States within their own territories or elsewhere outside of the country where such activities are initiated.<sup>2</sup> The solution of it is

<sup>6</sup> Dept. of State Bulletin, May 4, 1940, 465. The Minister in the course of his extended note declared: "With respect to this, my Government sees itself obliged, once more, to insist upon what it has repeated continually and in all forms, that is to say, its determination to pay the indemnity which is proper, it appearing to be unjust to maintain that Mexico has not complied with the obligation involved in that principle, only because it requires, as is obvious, that the total of the amount which it must pay be previously fixed. The frequent settlements in daily transactions between private individuals; the decisions on the multiple controversies which are taken before the local courts, in the judgments on compensation, among which there can be pointed out some very important ones rendered, for example, by the courts of the United States and the arbitral decisions on differences between States, prove overwhelmingly that the obligation to pay cannot be exacted until after, by some means, the total of the amount which must be paid may be learned and established.

"The fact that the said obligation has not been liquidated is to be attributed to the companies themselves which have systematically refused to allow the value of their properties to be determined, whether in the friendly manner proposed by Mexico through private negotiations or before the competent courts, to which my Government, more desirous than the other interested parties to terminate this matter, has entrusted, in compliance with the law, the task of determining through experts the value of the said properties." (*Id.*, 467.)

<sup>7</sup> Thus, the method of determining the amount due to the American owners had to await further negotiations between the two Governments.

§ 217D. <sup>1</sup> See Aspects of the Responsibility of States, *infra*, § 269A; also *infra*, § 270.

<sup>2</sup> This question is the converse of that concerning the right of a State to endeavor, by any appropriate process, to shield itself from acts committed abroad that are calculated to be directly injurious to itself or its nationals, especially within its own domain. See *The Case of The Caroline*, *supra*, § 66.

not necessarily determined by the mere fact that what takes place within the territory of a State is the proximate cause of a detriment sustained by another within its own domain. For example, as is noted elsewhere, the diversion by a State of interior waters tributary to an international stream, however detrimental to the welfare or interests of a foreign riparian proprietor, is not, according to American opinion, necessarily indicative of a violation of a legal duty by the diverter towards that proprietor.<sup>3</sup> Thus, in seeking to determine whether a territorial sovereign is burdened with an obligation to repress particular acts within its domain which are directly productive of adverse effects upon a foreign State or persons within its limits, it is necessary, first of all, to ascertain whether the character of those acts is such that they could not properly be committed by the government of the State within whose territory they took place. If they could not, failure to endeavor to repress them betokens a connivance or unconcern that in theory robs the territorial sovereign of the privilege of denying responsibility for what takes place. The underlying principle would seem to be that what a State claims the right exclusively to control, such as its own territory, it must possess the power and accept the obligation to endeavor so to control as to prevent occurrences therein from becoming by any process the immediate cause of such injury to a foreign State as the latter, in consequence of the propriety of its own conduct, should not be subjected to at the hands of a neighbor.<sup>4</sup> The practices of States fail, however, to reveal complete deference for that principle. Duties of prevention are not conceived to be as broad as, or identical with, duties of abstention. Thus, when war ensues, neutral States appear to be as yet far from acknowledging an obligation to endeavor to prevent, in a variety of situations, persons or things within their territories from ministering directly to the military needs of a belligerent for direct use against its foe.<sup>5</sup>

There are, however, some activities or forms of conduct which a State is likely to feel, and should feel, an obligation to endeavor to repress when the direct objective is a foreign State or persons or things within its territory, or when such State or such persons or things are necessarily, although without design, subjected to interference or injury from which they should be free. Thus, for example, the Council of the League of Nations declared in a resolution of December 10, 1934, that it was "the duty of every State neither to encourage nor tolerate on its territory any terrorist activity with a political purpose; that every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to Governments which request it."<sup>6</sup> In 1887, the Supreme Court of the United States through Chief

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In this connection it may be noted that a State is obviously free to thwart by appropriate means within its own domain the operations therein of foreign governmental agencies of economic or commercial character that may be deemed to be violative of the local law. See illustrative documents in Hackworth, Dig., II, § 158.

<sup>3</sup> See *Diversion of Water, the Principles Involved*, *supra*, § 183.

<sup>4</sup> See *infra*, § 889.

<sup>5</sup> See *Neutrality, Duties of Prevention*, §§ 849-866; *Belligerent Acquisition from Neutral Territory of Aid which the Territorial Sovereign is not Obligated to Check*, *infra*, §§ 867-874.

<sup>6</sup> League of Nations, *Official Journal* (July-Dec., 1934) 1759. This statement was inspired by the assassination of the King of Yugoslavia in Marseilles in 1934, by terrorists who, it

Justice Waite, declared that "the law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized."<sup>7</sup> It will be recalled that the failure on the part of Spain in 1898 to abate conditions existing in the island of Cuba that were so injurious to the United States "that they could no longer be endured" by the latter, caused it to intervene.<sup>8</sup>

In 1907, Mr. Root, Secretary of State, in a communication to the Attorney General, in connection with complaints from the Mexican Embassy at Washington in reference to "certain alleged plots which, it was thought, were being fomented along the border between the United States and Mexico on Mexican territory, having for their purpose the launching of attacks in Mexican territory,"<sup>9</sup> found occasion to say: "to have its territory used as a base of operations for men plotting not only revolution but assassination against President Diaz is a serious injury to this country which should be prevented if it is practicable to take legal proceedings against the offenders."<sup>10</sup> It should be clear that when a State itself undertakes in fact to control particular agencies or instrumentalities within its limits it cannot well avoid responsibility for such of their activities as are subversive of the political independence of a foreign State.<sup>11</sup>

At the present time there is a marked tendency on the part of interested States to conclude arrangements burdening the contracting parties with a duty to un-

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was asserted, had been active on Hungarian soil. See in this connection, Lauterpacht's 5 ed. of Oppenheim, I, § 127a, and documents there cited.

<sup>7</sup> *United States v. Arjona*, 120 U. S. 479, 484, invoked by Judge Moore, in his dissenting opinion in the case of the *S.S. Lotus*, Publications, Permanent Court of International Justice, Series A, No. 10, Judgment No. 9, p. 88, in support of his statement that "it is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people."

For the provisions of the statutory law of the United States concerning the counterfeiting of, or the uttering of counterfeit, foreign securities, and kindred acts that are penalized, see 18 U.S.C.A. §§ 270-279. See also Hackworth, Dig., II, § 159.

<sup>8</sup> See Instances of Intervention, Cuba, *supra*, § 81, and particularly the views of Professor Moore, there quoted.

<sup>9</sup> The words quoted are from a statement in Hackworth, Dig., II, 337.

<sup>10</sup> Mr. Root, Secy. of State, to the Attorney General, April 11, 1907, Hackworth, Dig., II, 337-338; and also other documents there cited.

Declared Mr. Knox, Secy. of State, to the Mexican Ambassador at Washington, June 7, 1911: "In this connection I must again repeat to your excellency that not only is there no rule of international law requiring, and no local Federal statute that would permit, the Federal officials of this Government to prevent the passage into foreign territory of unarmed and unorganized men either singly or in groups; but, on the contrary, it is an express provision of international law that the responsibility of a neutral power is not engaged even in time of recognized war by the fact of persons crossing the frontier separately to offer their services to one of the belligerents; and as to the mandates of municipal law, the courts of the United States have repeatedly declared that our neutrality statutes do not forbid one or more individuals singly or in unarmed, unorganized groups from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country." (For. Rel. 1911, 501, 502.)

<sup>11</sup> This seems to have been acknowledged in the terms of the agreement concluded in the notes exchanged between President Roosevelt and Mr. Litvinoff, People's Commissar for Foreign Affairs of Russia, on Nov. 16, 1933. See Recognition of the Russian Government in 1933, *supra*, § 45B.

See Freedom of Speech and of the Press, *supra*, § 217.

dertake to restrict various activities within their limits which are regarded as subversive of the welfare of foreign and contracting parties.<sup>12</sup> Again, the laws of a State may, as an expression of domestic policy, penalize the commission of particular acts which the territorial sovereign should seemingly endeavor to repress, and so simplify its task in the performance of international obligations growing out of conduct within its limits that is subversive of the welfare of foreign States within theirs.<sup>13</sup> Nevertheless, the test of those obligations is not always apparent in the form of the statutory law and may not be obvious from the character of its terms.

It is believed that a State is obliged to make reasonable and constant endeavor to prevent uses of domestic areas in such a way as to pollute the air or water within adjacent foreign territory.<sup>14</sup> Thus, the Trail Smelter Arbitral Tribunal in its decision of March 11, 1941, declared that "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."<sup>15</sup>

<sup>12</sup> See, for example, Art. 1 of the Convention on Duties and Rights of States in the Event of Civil Strife, concluded at the Sixth International Conference of American States, at Habana, Feb. 20, 1928, in which the contracting States bound themselves to observe specified rules with regard to civil strife "in another one of them," and that embraced broad duties of prevention. U. S. Treaty Vol. IV, 4725, 4727.

See also Art. II of convention between the United States and Great Britain (in respect of the Dominion of Canada), of June 6, 1924, for the suppression of smuggling, U. S. Treaty Vol. IV, 3985; Art. II of convention between the United States and Cuba, of March 11, 1926, to suppress smuggling, *id.*, 4046.

<sup>13</sup> See Hostile Military Expeditions, *infra*, § 856; *infra*, § 868 (in special relation to certain provisions of the Neutrality Act of May 1, 1937); Legislative Action, *infra*, § 877; The Question of Belligerency, *infra*, § 884.

<sup>14</sup> See Clyde Eagleton, *The Responsibility of States in International Law*, New York, 1928, 80.

<sup>15</sup> See Trail Smelter Arbitration between the United States and Canada, under Convention of April 15, 1935, Decision of the Tribunal Reported March 11, 1941, Dept. of State Publication 1649, Arbitration Series 8, 36.

Declared the court in this connection: "No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found.

"There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States." (*Id.*, 34.)

Concerning earlier aspects of the so-called Trail Smelter Case which grew out of damage produced in the State of Washington in consequence of the operation of a smelter at Trail, British Columbia, by a Canadian corporation, and the reference of the matter to an arbitral tribunal, under an agreement with Canada, of April 15, 1935 (U. S. Treaty Vol. IV, 4009), see documents in Hackworth, *Dig.*, I, § 157.

See Art. 4 of Convention Concerning the Boundary Waters Between the United States and Canada, of Jan. 11, 1909, where it was agreed that "the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." (U. S. Treaty Vol. III, 2609.)

See also *infra*, § 565.

# TITLE C

## RIGHTS AND DUTIES OF JURISDICTION

### 1

## RIGHTS OF JURISDICTION

### a

§ 218. **In General.** The exercise of jurisdiction, that is, of the right of doing justice, requires a decision by a State first, as to the lawfulness or unlawfulness of acts; and secondly, as to the effect to be given to lawful or unlawful acts. These decisions are distinct in kind. The object of the former is to attach a legal quality to an act, and so to establish its character. The object of the latter is to fix the degree of respect to be paid to the legal character already impressed upon an act.

The right to pass upon the lawfulness of an act must necessarily be the exclusive possession of a single sovereign.<sup>1</sup> Otherwise, as has oftentimes been observed, differing legal consequences might be annexed to the same act, rendering it both lawful and unlawful.<sup>2</sup> The right must also, therefore, in every case, belong to that sovereign or political power which exercises control over the place where the particular act is committed.<sup>3</sup> Thus it is that a State may determine the lawfulness of acts committed throughout the national domain, whether land or water or air, or upon its vessels, whenever by reason of their character or position they are regarded as subject to its control. Conversely, a State cannot deter-

§ 218. <sup>1</sup> Declared Mr. Jefferson, Secy. of State, in the course of a communication to Mr. Morris, Minister to France, Aug. 16, 1793: "Every nation has, of natural right, entirely and exclusively, all the jurisdiction which may be rightfully exercised in the territory it occupies. If it cedes any portion of that jurisdiction to judges appointed by another nation, the limits of their power must depend on the instrument of cession." Am. State Pap., For. Rel., I, 167, 169. Also *id.*, I, 147-148. See, also, Marshall, C. J., in *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 136; *Papayanni v. Russian Steam Navigation Co.*, 2 Moore's Privy Council Cases, n. s., 161; Beale, *Cases on Conflict of Laws*, I, 87.

<sup>2</sup> Grosscup, J., in *Swift v. Philadelphia & R. R. Co.*, 64 Fed. 59, 65; Beale, *Cases on Conflict of Laws*, III, Summary, § 11.

<sup>3</sup> Holmes, J., in *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 355-357.

Also statement in Hackworth, Dig., III, 552.

"It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied (*Schooner Exchange v. McFaddon*, 7 Cranch 116, 136). The benefit of this principle equally enures to all independent and sovereign States, and is attended with a corresponding responsibility for what takes place within the national territory." Dissenting opinion of Moore, J., in *The case of the S.S. "Lotus,"* Publications, Permanent Court of International Justice (Judgment No. 9, Series A, No. 10, 68.)

mine the lawfulness of occurrences in places outside of, or not assigned constructively to, its control.<sup>4</sup>

A State may be called upon to determine the effect of the lawfulness or unlawfulness of an act when it has been committed abroad, and a legal or illegal character impressed upon it by a foreign power. In determining the respect to be paid to that character by its own tribunals, the territorial sovereign may not unreasonably exercise wide discretion.<sup>5</sup> A State may, for example, command its national not to commit a particular act in a foreign country. He who in defiance of the prohibition disobeys the command therein, violating no law of that country by so doing, and thereupon returns to his own State, may doubtless be subjected to punishment. In imposing upon him a penalty for disobedience, the aggrieved sovereign does not pass judgment upon the lawfulness of his conduct abroad — which is a foreign fact, but simply declines for reasons of policy to recognize that lawfulness by permitting it to shield the actor from prosecution. On the other hand, the lawful character impressed upon an act by the State within whose territory it occurred, not infrequently receives complete recognition in a foreign country, even though to a similar act there committed a different legal quality would be attached. This is true when, for example, that country has not endeavored to forbid the commission of the particular act in the place where it was committed, and no adverse local policy presents an obstacle.

The law of nations does not always permit a State to disregard the legal or illegal quality of acts committed abroad. This is made obvious when it attempts to question the propriety of conduct committed by an alien in foreign territory, and notably when it endeavors to punish him on account of acts there committed which are not in any way directed against its own safety.<sup>6</sup> The according of recognition to the legal character impressed upon acts by the foreign State within whose territory they were committed tends to check abuses of jurisdiction.

The scope of the operation of a domestic statute, in a geographical sense, or with respect to the nationality of the individuals or the character of ships to which it is applicable, is determined by the will of the legislator. In the endeavor to ascertain its design, there may be reason to impute to the legislative body knowledge of the law of nations and the absence of a deliberate attempt to defy its injunctions.<sup>7</sup> Those injunctions are not, however, the ultimate test of legislative design which is a mere fact to be ascertained as such in the light of avail-

<sup>4</sup> *Rose v. Himely*, 4 Cranch, 241; *The Apollon*, 9 Wheat. 362; *Le Roy v. Crowninshield*, 2 Mason, 151; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 355-357. See, also, Mr. Marcy, Secy. of State, to Mr. Hülsemann, Austrian Chargé d'Affaires, Sept. 26, 1853, H. Ex. Doc. 1, 33 Cong., 1 Sess., 33, Moore, Dig., II, 213.

<sup>5</sup> When the national of a State goes abroad and commits an act in a land where civilization does not prevail, and where there is no territorial sovereign regarded as having the right or power to demand obedience to its will or to impress a legal or illegal quality upon acts, the individual may be said to be subject to the laws of his own State in so far as they are applicable to his conduct. Upon his return to its domain, if it tests the propriety of his conduct by those laws, the question does not arise whether heed should be paid to any foreign local effort to attach a legal quality to his act, because there existed no political power regarded as capable of doing so.

<sup>6</sup> See *Extraterritorial Crime*, *infra*, § 243.

<sup>7</sup> See *supra*, § 5; also *MacLeod v. United States*, 229 U. S. 416, 434.



able probative materials.<sup>8</sup> Whether a State by legislative enactment abuses its privileges, in the course, for example, of an attempt to pass upon the lawfulness of acts committed by aliens abroad, or attributable to foreign vessels on the high seas, is obviously to be determined by the requirements of international law.<sup>9</sup>

b

§ 219. **The Establishment of a Judicial System.** The exercise of jurisdiction requires the establishment of courts of justice as well as of a system of judicial procedure by means of which the general decision of the territorial sovereign concerning both the lawfulness and unlawfulness of acts committed within places subject to its control, and the respect to be paid to lawful or unlawful acts committed abroad, may be enforced. In the establishment and maintenance of its judicial system it will be seen that a State enjoys large freedom. Subject to a few exceptions fixed by the law of nations, it will be found that aliens within the national domain are subject to the jurisdiction of the territorial sovereign and amenable to its laws.<sup>1</sup>

The extent of the jurisdiction of a particular tribunal must always in one sense be a matter of domestic law, and fixed according to the will of the territorial sovereign.<sup>2</sup> The society of nations is unconcerned save when a State attempts to clothe its courts with a power in excess of that which it itself, according to the principles of international law, is permitted to exercise. The tribunal upon which excessive jurisdiction is locally conferred will doubtless not refrain from exercising on occasion the full measure of what is definitely given it, regarding as political any question as to the international wrong attributable to its conduct, and as one for solution solely through the diplomatic channel.<sup>3</sup>

<sup>8</sup> Nevertheless, Lockwood, C. J., declared in the case of *Southern Pac. R. R. Co. v. Gonzalez*, in 1936: "It is a general rule of international law that no law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived." (48 *Ariz.* 260, 273.)

Concerning certain domestic questions pertaining to the applicability of the Constitution and laws of the United States to the various territories and possessions under its sovereignty, see Hackworth, *Dig.*, II, § 134, and documents there cited.

<sup>9</sup> See *Extraterritorial Crime*, *infra*, § 238.

§ 219. <sup>1</sup> Mr. Bayard, Secy. of State, to Mr. Brook, Jan. 7, 1887, *citing* Mr. Marcy, Secy. of State, to Mr. Fay, Nov. 16, 1855, 162 *MS. Dom. Let.* 508, Moore, *Dig.*, II, 92; Opinion of Dr. Wharton, Solicitor to Dept. of State, in case of *William A. Davis v. Great Britain*, 1885, *cited* by Mr. Day, Acting Secy. of State, April 6, 1898, 227 *MS. Dom. Let.* 228, Moore, *Dig.*, VI, 699; Mr. Bayard, Secy. of State, to Mr. Copeland, Feb. 23, 1886, 159 *MS. Dom. Let.* 138, Moore, *Dig.*, VI, 699. See, also, *State v. Neighbaker*, 184 *Mo.* 211, 221-222, *citing* *McDonald v. State*, 80 *Wis.* 407, *People v. McLeod*, 1 *Hill, N. Y.* 377, *S. C.* 25 *Wend.* 483, *Campbell v. Hall*, *Cowp.* 208, *Vattel*, bk. 2, ch. 8, secs. 101, 102, *Story on Conflict of Laws*, 518; *Luke v. Calhoun County*, 52 *Ala.* 115, 121; *Carlisle v. United States*, 16 *Wall.* 147.

<sup>2</sup> Declared Cockburn, C. J., in *Reg. v. Keyn*: "No concurrent assent of nations . . . can of itself without the authority of Parliament, . . . give to the courts of this country, independently of legislation, a jurisdiction over the foreigner where they had it not before." 2 *Ex. D.* 63, 198, Beale, *Cases on Conflict of Laws*, I, 1, 9. See, also, Holland, *Studies in International Law*, 199.

<sup>3</sup> Cockburn, C. J., in *Regina v. Keyn*, 2 *Ex. D.* 63, 160, quoted in Holland, *Studies in International Law*, 199, note; *Mortensen v. Peters*, *Am. J.*, I, 526; Simeon E. Baldwin: "The Part Taken by Courts of Justice in the Development of International Law," *Yale Law J.*, X, 1; John C. Gray, *The Nature and Sources of the Law*, 122.

Should, however, the extent of the assertion of jurisdiction of a State through the medium of its own judicial agency become with its consent the subject of adjudication before an international tribunal, the decision would necessarily rest upon the requirements of the law of nations.

A State may make clear the extent to which its tribunals are permitted to apply and enforce what they conceive to be the principles of international law; and it may even empower its courts to test by their understanding of the requirements of that law the propriety of the conduct of their own sovereign, and denounce that conduct as internationally illegal when it is judicially deemed to fail to satisfy such a test.<sup>4</sup> When a domestic court exercises such a power, it bears witness to what it conceives to be the requirements of the law of nations, and in so doing becomes in fact an instrument of international justice. The extent, therefore, to which a domestic court is an expositor or witness of the requirements of conventional or customary international law, or an enforcer rather than an obstructor of either, depends upon the will in that regard of the sovereign whose agency it is and in behalf of which it acts.<sup>5</sup>

It should constantly be borne in mind, however, that that sovereign, or the political entity controlling a particular geographical area, may, and oftentimes does, elect to deny to domestic tribunals competence to test the propriety of its conduct by the requirements of international law.<sup>6</sup>

Save for the general obligation to conform to the practices of civilization, a State is unfettered in its choice of forms of procedure or in the adoption of a particular code. As the Legal Adviser of the Department of State has recently observed: "When the nationals of one State enter the territory of another State, whether for business or pleasure, they subject themselves to the laws of the latter State and although those laws and the rules of procedure in the courts may be wholly different from those which obtain in their home State, so long as such laws and rules are not below the standard generally obtaining in well-ordered States and are administered fairly and impartially, neither the aliens

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See, also, *Marshall, C. J., in Foster and Elam v. Neilson*, 2 Pet. 253, 307, 309; *Jones v. United States*, 137 U. S. 202; *In re Cooper*, 143 U. S. 472, 502-505; *Pearcy v. Stranahan*, 205 U. S. 257.

<sup>4</sup> See *Royal Holland Lloyd v. The United States*, 73 Ct. Cl. 722.

<sup>5</sup> The enforcement of foreign acquired rights of private individuals through the medium of the domestic courts of a State is governed by and depends upon the will of the territorial sovereign which determines both the competency of its tribunals and the law which they are to apply. In the exercise of this right no requirement of international law opposes a barrier. The courts in the United States in applying, in the course of adjudications, what they conceive to be the local law, look to the principles of conflict of laws for guidance, on the assumption that, in the absence of statute, they may properly regard them as a part of the local law. A State may, of course, by treaty, agree to restrict its own freedom, as by accepting a particular code of private international law such as the Bustamante Code which was annexed to the Convention on Private International Law adopted by the Sixth International Conference of American States at Habana in 1928. (See Report of Delegates of the United States to the Sixth International Conference of American States, held at Habana, Cuba, Jan. 16-Feb. 20, 1928, Washington, Government Printing Office, 1928, 99.)

<sup>6</sup> Thus in an Associated Press despatch from Oslo (via Berlin), of Feb. 11, 1941, as printed in the *New York World Telegram* of that date, p. 1: "The newly appointed Norwegian Supreme Court has ruled unanimously that no Norwegian court is competent to test, with respect to international law, the decrees issued by the German Reichs Commissar."

nor their governments have a right to complain.”<sup>7</sup> No right of supervision or dictation is lodged in a foreign State.<sup>8</sup> Moreover, the action of the courts in interpreting the local law and in applying rules of procedure is not regarded as subject to revision by any external authority.<sup>9</sup> Thus a State may in fact decline to permit the correctness of the decision of its own tribunals, or the reasonableness of the judicial enforcement of a particular rule to become the subject of diplomatic discussion.<sup>10</sup> It must be clear, however, that the courts may prove to be the instrumentality through which a State perpetrates injustice upon foreign powers or their nationals.<sup>11</sup> Under such circumstances, the nature of what takes place is not disguised or altered by reason of the judicial agency which commits the wrong. In States where the courts are independent of the political department of the government, there is strongest reason to withhold diplomatic discussion of questions which have become the subject of judicial inquiry, until at least there has been a final adjudication resulting in a decision deemed by a foreign State to be at variance with international law or the terms of a treaty.<sup>12</sup>

Although a resident alien be prosecuted criminally according to a system pos-

<sup>7</sup> Hackworth, Dig., II, 84. See also Mr. Carr, Acting Secy. of State, to Governor Nice, Dec. 21, 1935, *id.*; Mr. Hull, Secy. of State, to the Legation in Greece, March 11 and 22, 1935, *id.*

<sup>8</sup> Mr. Webster, Secy. of State, to the President, Dec. 23, 1851, on Thrasher's case, 6 Webster's Works, 521, 528, Moore, Dig., II, 88; Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé d'Affaires, Jan. 10, 1854, MS. Inst. Austria, I, 89, Moore, Dig., II, 88; Mr. Marcy, Secy. of State, to Mr. Starkweather, Minister to Chile, Aug. 24, 1855, MS. Inst. Chile, XV, 124, Moore, Dig., II, 90; Mr. Seward, Secy. of State, to Mr. Burton, Minister to Colombia, No. 137, April 27, 1866, Dip. Cor. 1866, III, 522, 523, Moore, Dig., VI, 660; Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, April 25, 1882, For. Rel. 1882, 230, 232-234, Moore, Dig., II, 97.

<sup>9</sup> “It cannot be expected that any government would go so far as to yield to a pretension of a foreign power to revise and review the proceedings of its courts under the claim of an international right to correct errors therein, either in respect to the application of principles of law, or the application of facts as evidence in cases where the citizens of such foreign power have been convicted. It certainly could not be expected that such a claim would be allowed before the party making it had first presented a clear case *prima facie* of willful denial of justice or a deliberate perversion of judicial forms for the purpose of oppression.” Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., II, 90. See, also, Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, April 25, 1882, For. Rel. 1882, 230, 232-234, Moore, Dig., II, 97; Mr. Bayard, Secy. of State, to Mr. Brook, Jan. 7, 1887, 162 MS. Dom. Let. 508, Moore, Dig., II, 92; Mr. Olney, Secy. of State, to Mr. Chilton, M. C., June 5, 1896, 210 MS. Dom. Let. 496, Moore, Dig., II, 94.

<sup>10</sup> See the position of Germany respecting the attitude of Mr. Olney, Secy. of State, in 1895, relative to the prosecution of Louis Stern at Kissingen, For. Rel. 1895, I, 454-488, especially Mr. Olney, Secy. of State, to Baron Thielmann, German Ambassador, Sept. 26, 1895, *id.*, 469, and Baron Thielmann, German Ambassador, to Mr. Olney, Secy. of State, Oct. 1, 1895, *id.*, 479. For an abstract of the correspondence, see Moore, Dig., II, 93-94.

<sup>11</sup> See Margaret Roper Case, Opinions of Commissioners under convention of Sept. 8, 1923, between the United States and Mexico, 1927, 205; Chattin Case, opinion of Nielsen, Commissioner, *id.*, 440-450. See Acts of Judicial Officers, *infra*, § 287.

<sup>12</sup> Mr. Adee, Acting Secy. of State, to the Italian Ambassador, No. 891, Oct. 1, 1910, For. Rel. 1910, 664, 670; Mr. Lansing, Secy. of State, to the German Ambassador, No. 2217, April 7, 1916, with reference to the case of the Appam, For. Rel. 1916, Supp., 735, 736.

“A denial of justice can be predicated upon the decisions of judicial tribunals, even courts of last resort. But attempts to establish a charge that a court of last resort has acted fraudulently or in an obviously arbitrary or erroneous manner are very infrequently made.” (Dissenting opinion of Nielsen, Commissioner, in Garcia and Garza Case, Opinions of Commissioners under Convention of Sept. 8, 1923, United States and Mexico, 1927 Vol., 163, 169, 174.) See also opinion of same Commissioner in Kennedy Case, *id.*, 289, 299.

See also Joost A. Van Hamel, “The ‘Van Der Lubbe’ Case and Diplomatic Protection of Citizens Abroad,” *Iowa Law Rev.*, XIX, 1934, 237.

sessing certain "harsh features" and deficient in many safeguards for the security of the accused,<sup>13</sup> without trial by jury or the privilege of the writ of habeas corpus, and although the judicial proceedings be brief and summary,<sup>14</sup> and instigated upon suspicion rather than upon proper cause alleged under oath, there may still be, in the particular case, no solid ground for complaint on the part of his government.<sup>15</sup> A State must, therefore, be normally reluctant to interpose in an endeavor to interfere with the administration of justice as applied impartially to its nationals in a foreign country.<sup>16</sup> On the other hand, a State will be quick to protest if the judicial system of another works palpable injustice to such individuals, either as a natural incident of procedure, or as a direct effect of adjudications.<sup>17</sup>

Instances are frequent and varied. The application to an alien of local laws sharply at variance with treaty stipulations contracted for his benefit, will arouse complaint;<sup>18</sup> likewise any discrimination against him on account of his nationality, especially if he is subjected to criminal prosecution.<sup>19</sup> A perversion of the judicial system,<sup>20</sup> manifested by the institution of criminal proceedings in order to oppress an alien, is not likely to be tolerated by the State to which he belongs.<sup>21</sup> If his trial is conducted with gross injustice,<sup>22</sup> if the local law be violated,<sup>23</sup> if while in custody he be accorded treatment harsh beyond meas-

<sup>13</sup> Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé d'Affaires, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., II, 89.

<sup>14</sup> Report of Mr. Webster, Secy. of State, to the President, Dec. 23, 1851, on Thrasher's case, 6 Webster's Works, 521, 528, Moore, Dig., II, 88.

<sup>15</sup> Mr. Marcy, Secy. of State, to Mr. Richter, Feb. 21, 1854, 42 MS. Dom. Let. 231, Moore, Dig., II, 90.

<sup>16</sup> Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé d'Affaires, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., II, 89; Mr. Forsyth, Secy. of State, to Mr. Davee, Feb. 7, 1838, 29 MS. Dom. Let. 330, Moore, Dig., VI, 652.

<sup>17</sup> Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, April 25, 1882, For. Rel. 1882, 230, 232-234, Moore, Dig., II, 97.

<sup>18</sup> Mr. Marcy, Secy. of State, to Mr. Fay, Nov. 16, 1855, MS. Inst. Switzerland, I, 39, Moore, Dig., VI, 655; Case of Dr. M. A. Cheek against Siam, Moore, Arbitrations, II, 1899-1908; Mr. Bayard, Secy. of State, to Mr. Brook, Jan. 7, 1887, 162 MS. Dom. Let. 508, Moore, Dig., II, 92; Mr. Blaine, Secy. of State, to Mr. O'Connor, Nov. 25, 1881, 139 MS. Dom. Let. 663, Moore, Dig., II, 96.

<sup>19</sup> Report on Thrasher's Case by Mr. Webster, Secy. of State, to the President, Dec. 23, 1851, 6 Webster's Works, 530, Moore, Dig., VI, 698; Opinion of Dr. Francis Wharton, Solicitor of the Dept. of State, in the case of William A. Davis v. Great Britain, 1885, cited in note of Mr. Day, Acting Secy. of State, to Messrs. Lauterbach, Dittenhoefer & Limburger, April 6, 1898, 227 MS. Dom. Let. 228, Moore, Dig., VI, 699; Mr. Bayard, Secy. of State, to Mr. Copeland, Feb. 23, 1886, 159 MS. Dom. Let. 138, Moore, Dig., VI, 699; Case of C. A. Van Bokkelen, Moore, Arbitrations, II, 1807-1853, Moore, Dig., VI, 690.

<sup>20</sup> Mr. Marcy, Secy. of State, to Mr. Jackson, Chargé at Vienna, April 6, 1855, MS. Inst. Austria, I, 105, Moore, Dig., II, 90.

<sup>21</sup> Mr. Frelinghuysen, Secy. of State, to Mr. Lowell, April 25, 1882, For. Rel. 1882, 230, 232-234, Moore, Dig., II, 97; Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, No. 30, May 24, 1855, MS. Inst. Peru, XV, 159, Moore, Dig., VI, 659; Mr. Bayard, Secy. of State, to Mr. Jackson, Minister to Mexico, Sept. 7, 1886, MS. Inst. Mexico, XXI, 574, Moore, Dig., VI, 680; Mr. Evarts, Secy. of State, to Mr. Fairchild, Minister to Spain, Jan. 17, 1881, MS. Inst. Spain, XVIII, 591, Moore, Dig., VI, 656.

<sup>22</sup> Mr. Evarts, Secy. of State, to Mr. Langston, Minister to Haiti, No. 23, April 12, 1878, MS. Inst. Hayti, II, 136, Moore, Dig., VI, 656; Mr. Evarts, Secy. of State, to Mr. Foster, Minister to Mexico, April 19, 1879, MS. Inst. Mexico, XIX, 570, Moore, Dig., VI, 696; Mr. Forsyth, Secy. of State, to Mr. Welsh, March 14, 1835, 27 MS. Dom. Let. 261, Moore, Dig., VI, 696.

<sup>23</sup> Case of Dr. M. A. Cheek v. Siam, Moore, Arbitrations, II, 1899-1908, Moore, Dig., VI, 656.

ure,<sup>24</sup> or if he is held or imprisoned on account of the commission of an act not forbidden as a crime by the local law, interposition is to be anticipated, unless local remedies afford a complete means of redress and are within the reach of the victim.<sup>25</sup> Whenever the government of his own State has solid reason to believe from evidence before it that a violation of international law in relation to him has taken place, it is justified in denying the pretension of the foreign prosecuting State that it may set up the judgment of its own tribunals as a bar to an international claim.<sup>26</sup>

The proper administration of justice may cause the tribunals of a State to seek or request the service of documents on persons within foreign territory, or the obtaining of evidence therein. The need may be apparent in both criminal and civil proceedings.<sup>27</sup> According to American opinion no legal duty rests upon a State, in the absence of agreement, to authorize judicial or other agencies within its domain to satisfy, upon request, such requirements of the tribunals of other countries.<sup>28</sup> The frequency with which the courts issue letters rogatory for execution abroad and the character of responses thereto fail to reveal a practice that is illustrative of a sense of legal obligation on the part of States to whose agencies requests are addressed and which permit or yield desired aid, to render judicial assistance.<sup>29</sup> The absence of an applicable rule of international law serves to accentuate the need of conventional arrangements designed to facilitate the administration of justice in the course of domestic adjudica-

<sup>24</sup> See payment by Panama of indemnity in 1915, for death of William T. Harrington, an American citizen, due to torture in prison, as described in For. Rel. 1915, 1240-1262. Also Mr. Root, Secy. of State, to the Minister in Haiti, Feb. 1, 1907, For. Rel. 1907, II, 744.

<sup>25</sup> See, for example, Case of C. A. Van Bokkelen, Moore, Arbitrations, II, 1807-1853, Moore, Dig., VI, 699; also Claims, *infra*, § 281-282.

See case of imprisonment of Robert B. Jones, an American citizen in Ecuador, For. Rel. 1914, 281-286; also, case of imprisonment of M. D. Strong, an American citizen, in Ecuador, For. Rel. 1915, 373-379.

<sup>26</sup> Note of Dr. Francis Wharton, Wharton, Dig., II, 672, Moore, Dig., VI, 694; Report of Mr. Bayard, Secy. of State, to the President, Feb. 26, 1887, S. Ex. Doc. 109, 49 Cong., 2 Sess., Moore, Dig., VI, 667; also, Claims, Grounds of Interposition, When Local Remedies Need Not be Exhausted, *infra*, §§ 283-285.

Illustrative of the vigor with which a State may, under certain circumstances, watch the prosecution of its nationals by another, see Correspondence Relating to the Arrest of Employees of the Metropolitan-Vickers Company at Moscow, Russia No. 1 (1933), Cmd. 4286, especially revealed in telegram from Sir R. Vansittart to Sir E. Ovey, British Ambassador at Moscow, March 16, 1933, p. 17; also Further Correspondence relating to the same matter, Russia No. 2 (1933), Cmd. 4290.

<sup>27</sup> The need may be equally apparent in an international proceeding before an international tribunal.

<sup>28</sup> "This Government has no treaty rights with Italy, which entitle citizens of this country to use the Italian courts for the purpose of having letters rogatory executed. The practice is based on reciprocity. This situation obviously leaves wide discretion with the courts in each country as to the treatment which will be given to interrogatories by the respective courts in each country." (Memorandum of the Legal Adviser of the Dept. of State, Dec. 16, 1931, Hackworth, Dig., II, 103.)

See Rugg, C. J., in Martinelli, Petitioner, 219 Mass. 58, 59.

<sup>29</sup> See documents in Hackworth, Dig., II, § 125, concerning Letters Rogatory.

"The Department of State has on repeated occasions stated that it could not undertake to have served upon or delivered to persons in the United States legal documents emanating from courts in foreign countries with respect to litigation pending in those courts. To this general rule an exception has occasionally been made with respect to documents forwarded from the Mixed Courts in Egypt. In such instances the documents have been merely transmitted to the addressees for their information." (Statement in Hackworth, Dig., II, 117.)

tions.<sup>80</sup> The United States has entered into a few agreements in relation to the matter.<sup>81</sup>

The view has been expressed that the courts of the United States are not competent to direct the taking of testimony of witnesses by letters rogatory where the testimony is to be used in a criminal case in a foreign country.<sup>82</sup> Again it has been declared that while the district courts of the United States are given express jurisdiction to execute letters rogatory in cases where a foreign government is a party or has an interest, it is doubtful whether their power extends to private cases.<sup>83</sup>

## c

## The Exercise of Jurisdiction within the National Domain

### (1)

§ 220. **On Land.** On land, the territorial sovereign exercises exclusive jurisdiction throughout its domain.<sup>1</sup> By no process issuing from any other authority may individuals there be lawfully held in restraint,<sup>2</sup> save under exceptional circumstances which will be later observed. By no command emanating from a foreign power may acts which contravene the local law be rendered lawful. Thus the alien who in obedience to instructions from his own State violates that law, is not exempt from prosecution.<sup>3</sup> The deserter from a foreign ship,<sup>4</sup> as well as

<sup>80</sup> See Harvard Draft Convention on Judicial Assistance, with Comment, Messrs. James Grafton Rogers and A. H. Feller, Reporters, *Am. J.*, XXXIII, *Supplement Section*, I, June, 1939.

See Title V (Letters Requisitorial or Letters Rogatory), Arts. 388–393, of Bustamante Code, annexed to Convention on Private International Law of Feb. 20, 1928, Report of Delegates of the United States to the Sixth International Conference of American States held at Habana, Cuba, Jan. 16–Feb. 20, 1928, Washington, Government Printing Office, 156.

<sup>81</sup> See exchange of notes between the United States and the Union of Soviet Socialist Republics concerning the Execution of Letters Rogatory, Nov. 22, 1935, U. S. Executive Agreement Series, No. 83.

See Art. V of Convention to Suppress Smuggling, between the United States and Great Britain, in respect of the Dominion of Canada, of June 6, 1924, U. S. Treaty Vol. IV, 3985; Art. VII of Convention to Suppress Smuggling, between the United States and Cuba, of March 11, 1926, U. S. Treaty Vol. IV, 4048.

<sup>82</sup> See Judge William W. Morrow to Mr. Knox, Secy. of State, April 12, 1909, Hackworth, Dig., II, 110; Mr. Stimson, Secy. of State, to Mr. Wilson, April 18, 1929, Hackworth, Dig., *id.*

<sup>83</sup> See Mr. Whitaker, Assist. Atty. Gen., to Mr. Hull, Secy. of State, April 11, 1938, Hackworth, Dig., II, 111. See also *In re* Letters Rogatory of Republic of Colombia, 4 F. Supp., 165. § 220. <sup>1</sup> Marshall, C. J., in *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 136.

See dissenting opinion of Moore, J., in the case of the S.S. *Lotus*, Publications, Permanent Court of International Justice, Judgment No. 9, Series A, No. 10, 68. Also United States v. Sisal Sales Corporation, 274 U. S. 268, 276.

<sup>2</sup> Mr. Calhoun, Secy. of State, to Mr. Everett, Aug. 7, 1844, and Sept. 25, 1844, MS. Inst. Great Britain, XV, 211 and 23, respectively, Moore, Dig., II, 225. See *Colunje Case*, 1933, American and Panamanian General Claims Arbitration, Hunt's Report, 1934, 733, 748; also kidnapping of Samuel Cantú, a Mexican citizen, on American territory by Mexican officers, in 1914, For. Rel. 1914, 900–904.

<sup>3</sup> Compare *dicta* in *Horn v. Mitchell*, 223 Fed. 549, 552; also Mr. Webster, Secy. of State, to Lord Ashburton, Aug. 6, 1842, in relation to McLeod's Case, Webster's Works, VI, 301, 302–303, Moore, Dig., II, 29. But see statement of Senator Calhoun, in the Senate, June 11, 1841, Calhoun's Works, III, 618, Moore, Dig., II, 26.

See Exemptions from Territorial Jurisdiction, Foreign Military Forces, *infra*, § 247–248. "No command of a foreign sovereign to its subject can legalize a wrong committed elsewhere." Learned Hand, J., in *Earn Line S.S. Co. v. Sutherland S.S. Co.*, 254 Fed. 126, 130.

<sup>4</sup> Mr. Seward, Secy. of State, to Mr. Stanton, Secy. of War, April 15, 1863, 60 MS. Dom. Let. 231, Moore, Dig., II, 370.

the fugitive from the justice of a foreign country,<sup>5</sup> find themselves safe from the strong arm of the pursuer unless by treaty or otherwise the State consents to the exercise of foreign authority within its limits. Again, the officer or seaman of a foreign vessel is, when ashore, subject to the local law.<sup>6</sup>

It should be observed that the courts of a State, and notably those of the United States, will not sit in judgment upon the acts of the government of another State committed within its own territory. It is declared that "redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."<sup>7</sup>

In 1937, the Supreme Court of the United States reiterated a view which it had expressed in earlier years,<sup>8</sup> in the following language:

The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.<sup>9</sup>

The foregoing words reveal the reluctance of the courts to assume that they are clothed by their sovereign with authority to exercise a jurisdiction which if exercised would be regarded by the foreign States concerned as an abuse of the judicial function.

<sup>5</sup> Mr. Rush, Secy. of State, to Mr. Hyde de Neuville, April 9, 1817, MS. Notes to Foreign Legations, II, 218, Moore, Dig., IV, 245; Mr. Webster, Secy. of State, to Mr. d'Argaiz, June 21, 1842, Webster's Works, VI, 399, 405, Moore, Dig., IV, 246; Mr. Buchanan, Secy. of State, to Mr. Wise, Sept. 27, 1845, MS. Inst. Brazil, XV, 119, Moore, Dig., IV, 246; United States v. Rauscher, 119 U. S. 407, 411.

<sup>6</sup> Mr. Randolph, Secy. of State, to Mr. Hammond, July 23, 1794, 7 MS. Dom. Let. 55, Moore, Dig., II, 585. See, also, United States v. Thierichens, 243 Fed. 419, where the commander of an interned German war vessel who was charged with having smuggled from the vessel property into the United States (when the United States was a neutral), and with having violated the so-called Mann Act of June 25, 1910, was held to be subject to criminal prosecution.

<sup>7</sup> Underhill v. Hernandez, 168 U. S. 250, 252. In that case it appeared that in 1892 the defendant General Hernandez had been a commander of certain revolutionary forces in Venezuela which achieved success, and became formally recognized by the United States as the legitimate government of Venezuela. The plaintiff, an American citizen, who had been engaged in the construction of a waterworks system for the city of Bolivar, had been denied a passport to leave that city, by General Hernandez, who had assumed command thereof. This action was brought against the latter in New York to recover damages for the detention caused by reason of his refusal to grant the passport, for alleged confinement of Underhill to his own house, and for certain alleged acts by the soldiers of Hernandez' army. The Supreme Court of the United States agreed with the conclusion of the Circuit Court of Appeals that "the acts of the defendant were the acts of the Government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."

See, also, the opinion of Mr. Justice Holmes, in the case of American Banana Co. v. United Fruit Co., 213 U. S. 347, 357-358; opinion of Mr. Justice Clarke, in Oetjen v. Central Leather Co., 246 U. S. 297; Hewitt v. Speyer, 248 Fed. 590, s.c. 250 Fed. 367; Terrazas v. Holmes, 115 Tex. 32, 46; Princess Paley Olga v. Weisz, L.R. 1929 1 K.B. 718; Salimoff & Co. v. Standard Oil Co. (July 11, 1933), 262 N.Y. 220. Also, in this connection, J. B. Moore, "The New Isolation," *Am. J.*, XXVII, 607, 613-614.

<sup>8</sup> Oetjen v. Central Leather Co., 246 U. S. 297, 303. See also Ricaud v. American Metal Co., 246 U. S. 304, 308-309, 310.

<sup>9</sup> United States v. Belmont, 301 U. S. 324, 328.

## (2)

## PORTS AND BAYS. FOREIGN MERCHANT VESSELS

## (a)

§ 221. **Application of the Local Law.** The exercise by a State of jurisdiction over its ports and bays becomes a matter of international concern in so far as it is applied to foreign merchant vessels. Over such ships and their occupants the territorial sovereign may assert jurisdiction.<sup>1</sup> It may in general pass upon the lawfulness of acts committed by such individuals thereon.<sup>2</sup> Although in certain situations practice encourages respect for some limitations upon the exercise of the right, it will be found that the territorial sovereign enjoys great latitude in determining whether, in a particular case, there is room for their application.<sup>3</sup> "In every case it is for the authorities of the State to judge whether or not to intervene."<sup>4</sup> The United States has within recent years frequently acknowledged the applicability of the general principle.<sup>5</sup>

See also *Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, 28 F. Supp. 279.

§ 221. <sup>1</sup> Mr. Buchanan, Secy. of State, to Mr. Wise, Minister to Brazil, Sept. 27, 1845, MS. Inst. Brazil, XV, 119, Moore, Dig., II, 272; Mr. Everett, Secy. of State, to Mr. Ingersoll, Feb. 17, 1853, MS. Inst. Great Britain, XVI, 192, Moore, Dig., II, 273; Mr. Marcy, Secy. of State, to Mr. Keenan, Consul at Hong Kong, April 14, 1856, 21 Disp. to Consuls, 567, Moore, Dig., II, 288; Mr. Seward, Secy. of State, to Sir F. Bruce, British Minister, March 16, 1866, Dip. Cor. 1866, I, 231, Moore, Dig., II, 292; Opinion of Mr. Taft, Atty.-Gen., 15 Ops. Atty.-Gen., 178; Mr. Frelinghuysen, Secy. of State, to Mr. Randall, M. C., March 14, 1884, 150 MS. Dom. Let. 276, Moore, Dig., II, 278; Mr. Bayard, Secy. of State, to Mr. Hall, Minister to Central America, March 12, 1885, For. Rel. 1885, 82, 83, Moore, Dig., II, 278. See, also, *Wildenhuis' Case*, 120 U. S. 1. See, also, Gilbert Gidel, *Le Droit International Public de La Mer, Le Temps de Paix, Tome II, Les Eaux Intérieures*, Chateauroux, 1932. C. N. Gregory, "Jurisdiction over Foreign Ships in Territorial Waters," *Mich. Law Rev.*, II, 333; P. Fedozzi, "*Des délits à bord des navires marchands dans les eaux territoriales étrangères*," *Rev. Gén. IV*, 202; Note, *Harv. Law R.*, XXIV, 489; *United States v. Bull*, *Am. J.*, V, 242 (*Phil. Is. Sup. Ct.* Jan. 15, 1910); A. H. Charteris, "The Legal Position of Merchantmen in Foreign Ports and Waters," *Brit. Y.B.*, 1920-1921, 45.

Also Chap. III of Regulations concerning the Régime of Ships and their Crews in Foreign Ports in Time of Peace, adopted by The Institute of International Law at Stockholm, 1928, *Annuaire*, XXXIV, 736, 746.

<sup>2</sup> See Mr. Lansing, for the Secy. of State, to the British Ambassador, May 19, 1914, For. Rel. 1914, 308, 312.

Also, *Cunard S.S. Co. v. Mellon*, 262 U. S. 100, 124, where it was declared by Mr. Justice Van Devanter, in the opinion of the Court: "A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them. Of course, the local sovereign may out of considerations of public policy choose to forego the exertion of its jurisdiction or to exert the same in only a limited way, but this is a matter resting solely in its discretion."

See Art. 18, Harvard Research Draft Convention on The Law of Territorial Waters, and comment thereon, *Am. J., Special Supplement*, XXIII (April, 1929), 307.

<sup>3</sup> See *Matters of Internal Order and Discipline, infra*, § 222; *Civil Disputes of Seamen Arising from Their Connection with the Ship, infra*, § 223.

<sup>4</sup> Communication from the British Government, to Preparatory Committee, Conference for Codification of International Law, Dec. 8, 1928, *Bases of Discussion*, 1929, Vol. II, *Territorial Waters*, League of Nations Doc. No. C.74.M 39.1929.V, 162, 166.

See *People v. Wong Cheng*, 46 Philippine Islands 729, where it was declared that to smoke opium on board a foreign vessel at anchor in the port of Manila amounted to a breach of the public order there established and was in contravention of the purpose of the existing statutory law.

See Jessup, *Territorial Waters*, 191-194.

<sup>5</sup> See Mr. Bliss, Third Asst. Secy. of State, to Mrs. Moller, May 28, 1921, *Hackworth, Dig.*, II, 213; Mr. Stimson, Secy. of State, to the Consul at Charlottetown, May 28, 1930, *Hack-*



Local authorities may go on board and arrest persons charged with the commission of offenses within the territorial limits of the State, whether on such vessels,<sup>6</sup> or elsewhere.<sup>7</sup> It is reasonable, however, to demand that an arrest should be in pursuance of the local law and based upon the issuance of a proper warrant. Thus in 1921, the Department of State declared that the principle which rendered a foreign merchant vessel amenable to the jurisdiction of the country whose port it visited did "not, of course, mean that the local authorities are warranted in making an arbitrary, unlawful, or forcible invasion of a foreign vessel or taking any action against any one on board that is not authorized by provisions of the local law."<sup>8</sup>

To arrest an alien inmate of a foreign ship at the request of a third State within whose territory he may have violated the local law,<sup>9</sup> or by reason of the circumstance that he is charged with the commission of an offense when the ship was on the high seas, has, under certain conditions, been regarded as an abuse of power.<sup>10</sup> It is not unreasonable, however, for a State to apprehend on a foreign vessel within a local port an alien fugitive from the justice of another State within whose territory he is charged with having committed an offense,

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worth, Dig., II, 214; Mr. Adee, Acting Secy. of State, to Señor Crespo, Oct. 26, 1911, Hackworth, Dig., II, 219; Mr. Carr, Director of the Consular Service, to Vice Consul Aguirre, June 19, 1923, Hackworth, Dig., II, 220.

See also statement in Hackworth, Dig., II, 216-217, and documents there cited, concerning the exercise of criminal jurisdiction by the Italian Government with respect to one Martin De Mott, chief engineer of an American vessel, who, while the ship was in an Italian port, was reported to have killed the chief officer of the vessel.

<sup>6</sup> See Mr. Carr, Director of the Consular Service to Consul Johnson, Jan. 24, 1911, Hackworth, Dig., II, 224.

Declared the Dept. of State in 1922: "Since there appears to be no existing treaty provision between the United States and Greece exempting American merchant vessels from the local jurisdiction while in Greek territorial waters, the Department believes that you should avoid raising the question of the right of the Greek authorities to remove from an American merchant vessel, while it is in a Greek port, seamen of Greek nationality who may be liable for military service under the Greek Government." (Mr. Hengstler, Chief of the Consular Bureau, to Consul General Lowrie, Sept. 20, 1922, Hackworth, Dig., II, 229.)

See also Mr. Buchanan, Secy. of State, to Mr. Jordan, Jan. 23, 1849, 37 MS. Dom. Let. 98, Moore, Dig., II, 272; Same to Mr. Campbell, Consul at Havana, Nov. 1, 1848, 10 MS. Disp. to Consuls, 493, Moore, Dig., II, 272; Mr. Fish, Secy. of State, to Mr. Marsh, Minister to Italy, No. 517, May 2, 1876, MS. Inst. Italy, I, 527, Moore, Dig., II, 276; Opinion of the Attorney-General quoted by Mr. Evarts, Secy. of State, in note to Mr. Mendez, Dec. 27, 1879, MS. Notes to Spain, X, 60, Moore, Dig., II, 277; Mr. Frelinghuysen, Secy. of State, to Mr. Randall, M. C., March 14, 1884, 150 MS. Dom. Let. 276, Moore, Dig., II, 278.

<sup>7</sup> Mr. Bayard, Secy. of State, to Mr. Hall, Minister to Central America, March 12, 1885, MS. Inst. Cent. Am., XVIII, 488, Moore, Dig., II, 867; Mr. Gresham, Secy. of State, to Mr. Huntington, Dec. 30, 1893, For. Rel. 1894, 296, Moore, Dig., II, 880.

<sup>8</sup> Mr. Adee, Assist. Secy. of State, to Mr. Hall, Nov. 7, 1921, Hackworth, Dig., II, 226, where it was added: "Where in the proper case the local authorities desire to apprehend a person on board a foreign vessel and request permission of the Consul of the country whose flag the vessel flies to board the vessel and make the arrest, the Consul is justified in satisfying himself that all due forms of arrest according to the local law have been observed before granting such permission. Otherwise there would be no protection for foreign vessels against arbitrary action by individual local officials acting outside of their authority without warrant of law."

<sup>9</sup> Mr. Marcy, Secy. of State, to Mr. Bromberg, Consul at Hamburg, Sept. 1, 1853, 17 MS. Desp. to Consuls, 70, Moore, Dig., II, 274; Mr. Fish, Secy. of State, to Mr. Marsh, Minister to Italy, No. 516, May 2, 1876, MS. Inst. Italy, I, 526, Moore, Dig., II, 277.

<sup>10</sup> Mr. Cushing, Atty.-Gen., Sept. 6, 1856, 8 Ops. Attys.-Gen., 73, Moore, Dig., II, 290; Mr. Fish, Secy. of State, to Mr. Schenck, Nov. 8, 1873, MS. Inst. Great Britain, XVIII, 431, For. Rel. 1874, 490, Moore, Dig., II, 293.

with a view to surrendering him to such State for prosecution in pursuance of a demand for his extradition. Turkey followed such a course in causing the arrest in 1934, of one Samuel Insull on board a Greek vessel in Turkish waters at the request of the United States, to which he was duly surrendered.<sup>11</sup> A State that may itself be unable to prosecute, by reason of the precepts of international law, is not for that reason necessarily precluded from becoming an instrument to enable another State to do so, when the latter has unimpeachable grounds of jurisdiction. When an arrest is made for the purpose of enabling the State effecting it to prosecute an alien inmate of a foreign ship on account of an act committed by him abroad, whether on board the vessel or elsewhere, the propriety of such action must depend upon whether the case falls within the rather narrow class of situations where a territorial sovereign is permitted by international law to punish an alien on account of the commission of acts outside of its domain.<sup>12</sup>

In the process of exercising jurisdiction over foreign ships the territorial sovereign is doubtless obliged to exercise care. Thus the firing of a solid shot at a passenger vessel for the sole purpose of compelling her to show her flag,<sup>13</sup> or the attempt to arrest an occupant by means of a force imperiling the lives of innocent persons on board or the safety of the property of a friendly State, has been regarded by the United States as arbitrary action calling for disavowal by the State whose authorities had recourse to it.<sup>14</sup> Again, the hauling down of the flag of a merchant vessel, detained on account of the violation of local customs regulations, has been deemed to be improper conduct justifying the demand for an expression of regret.<sup>15</sup> In 1907 Secretary Root commended the action of the Commander of an American naval vessel stationed off El Salvador in remonstrating against the forcible boarding of an American ship in the harbor of Acapulco by an armed force in order to institute a search for a passenger supposed to be an offender against the territorial sovereign, "not alone because of the grave peril in which innocent passengers were placed, but because of the apparent absence of the regular and orderly processes of law in seeking to effect the arrest."<sup>16</sup>

<sup>11</sup> Dept. of State Press Releases, April 7, 1934, 186; *id.*, April 14, 1934, 200.

<sup>12</sup> See Extraterritorial Crime, *infra*, §§ 238-243.

<sup>13</sup> Mr. Sherman, Secy. of State, to Mr. Dupuy de Lôme, Spanish Minister, June 21, 1897, For. Rel. 1897, 504, Moore, Dig., II, 280.

<sup>14</sup> Mr. Gresham, Secy. of State, to Mr. Huntington, Dec. 30, 1893, For. Rel. 1894, 296, Moore, Dig., II, 880.

<sup>15</sup> Mr. Bayard, Secy. of State, to Mr. Phelps, Minister to England, Nov. 6, 1886, relative to the case of the *Marion Grimes*, For. Rel. 1886, 362, 370, Moore, Dig., II, 280; Same to Same, Dec. 13, 1886, For. Rel. 1887, 451, Moore, Dig., I, 864.

Concerning complaint made in 1873, of onerous fines imposed on American vessels by Spanish authorities in Cuba for technical violation of customs regulations, see Mr. Fish, Secy. of State, to Gen. Sickles, Minister to Spain, March 21, 1873, For. Rel. 1873, II, 932, Moore, Dig., II, 319, also documents there cited. See, also, award of Baron Blanc, Arbitrator in the case of the American ship *Masonic*, Moore, Arbitrations, II, 1055-1069. Relative to irregular and arbitrary proceedings directed against American vessels by Mexican customs officers, see Mr. Frelinghuysen, Secy. of State, to Mr. Morgan, Minister to Mexico, Jan. 31, 1883, MS. Inst. Mexico, XX, 568, Moore, Dig., II, 323; Same to Same, Feb. 20, 1883, concerning the arrest and treatment accorded the master of an American vessel who was charged with smuggling, For. Rel. 1883, 625, Moore, Dig., II, 324.

<sup>16</sup> Communication to the Secy. of the Navy, Nov. 13, 1907, Hackworth, Dig., II, 228.

A foreign merchant vessel and its occupants are, upon entering port, subject to the operation of the civil as well as criminal laws of the State.<sup>17</sup> Thus the ship may be obliged to conform to local regulations, prohibiting, for example, arrival at certain seasons with a deck cargo.<sup>18</sup> The master, in the hiring of seamen,<sup>19</sup> or in contracting for the carriage of freight to foreign countries, may find himself reasonably subjected to strict limitations imposed by local statute.<sup>20</sup>

In response to an inquiry from the British Ambassador in 1936, the Department of State on April 15th of that year made the following statement:

The procedure followed in this country in regard to the administration of the law preventing the overloading of vessels leaving United States ports in the foreign trade, is similar to that followed in Great Britain. The control of this Government is exercised through the officers of the marine divisions of the respective custom houses. In the case of all vessels of the United States this Government applies the provisions of the Load Line Act of March 2, 1929, 45 Statutes at Large of the United States 1492, which involves a system of penalties for failure to have load lines, the submerging of such load lines and violations of other provisions of that law. With respect to vessels under foreign flags belonging to countries which are signatory to the International Load Line Convention, this Government exercises the provisions of the Act of March 2, 1929, and the authority of detention contained in the International Convention.<sup>21</sup>

<sup>17</sup> "Matters concerning the ship herself, as the proprietary title to her, damage done by her, salvage due from her, or her seizure in satisfaction of a debt, will belong to the local courts whenever referred to them by the accepted rules of national jurisdiction applied to her actual situation or to the persons of her owners or others interested in her." (Westlake, 2 ed., I, 269-270.)

<sup>18</sup> Correspondence between the United States and Great Britain relative to the English Merchant Shipping Act of 1876, abstracted and cited in Moore, Dig., II, 282-283.

"And the court are of opinion that the rights of property and exclusive use granted to a patentee does not extend to a foreign vessel lawfully entering one of our ports; and that the use of such improvement, in the construction, fitting out, or equipment of such vessel, while she is coming into or going out of a port of the United States, is not an infringement of the rights of an American patentee, provided it was placed upon her in a foreign port, and authorized by the laws of the country to which she belongs." Taney, C. J., in *Brown v. Duchesne*, 19 How. 183, 198-199. Compare *Caldwell v. Van Vlissingen*, 9 Hare, 415.

<sup>19</sup> *Patterson v. Bark Eudora*, 190 U. S. 169, sustaining the application to foreign vessels of the Act of Dec. 21, 1898, 30 Stat. 755, 763, forbidding the payment of seamen's wages in advance, in the case of a seaman shipped on a foreign vessel from an American port; *Chambers v. Steamship Kestor*, 110 Fed. 432, Moore, Dig., II, 338; also, *Strathearn S.S. Co. v. Dillon*, 252 U. S. 348, at 356.

See *The Ixion*, 237 Fed. 142, holding that the Seamen's Act of March 4, 1915, Chap. 153, § 4, 38 Stat. 1165, was applicable to foreign vessels while in harbors of the United States.

*Cf.* Mr. Bayard, Secy. of State, to Mr. Roustau, French Minister, Aug. 26, 1885, relative to the Shipping Act of the United States of June 26, 1884, For. Rel. 1885, 386, Moore, Dig., II, 307. While a State may, for the protection of seamen generally, limit the freedom of a foreign master as to the terms of a shipping contract with a foreign sailor, concluded within its territory, it has been doubted whether the territorial sovereign may also justly demand that shipping articles be signed before a local shipping-master rather than before the consular officer of the country to which the foreign vessel may belong. Mr. Bayard, Secy. of State, to Mr. White, Chargé at London, March 1, 1889, For. Rel. 1889, 447, Moore, Dig., II, 334; also documents cited *id.*, II, 336-338.

<sup>20</sup> See, for example, the provisions of the so-called Harter Act of Feb. 13, 1893, 27 Stat. 445, forbidding clauses in bills of lading relieving from liability for negligence, and from exercise of due diligence in equipping vessels, and from liability for errors of navigation, etc.

<sup>21</sup> Mr. Moore, Assist. Secy. of State, to Sir Ronald Lindsay, April 15, 1936, Hackworth, Dig., II, 263.

In subjecting foreign vessels and their occupants to the operation of the local law a State is not deterred by any requirement of international law from disregarding the lawful character of acts committed abroad, as in a foreign port, when they are the proximate cause of others committed within the national domain and contrary to a statutory prohibition. No undertaking lawfully entered into abroad and contemplating performance in that domain, as by the carriage of goods thereto, will be deemed to be entitled to respect if it defies the will of the sovereign thereof. The applicability of this principle to vessels engaged in foreign commerce must be obvious.<sup>22</sup>

When a question as to the propriety of the conduct of a foreign ship arising out of the acts of those controlling it in relation to a collision within the territorial waters of a State becomes a matter for adjudication, the applicable law is, by the law of nations, the domestic law of that State.<sup>23</sup>

(b)

§ 222. **Matters of Internal Order and Discipline.** Solid grounds of policy have long rendered it inexpedient for States to assert jurisdiction in matters relating to the internal order and discipline of a foreign merchant vessel, and affecting solely the ship and its occupants. Of such a character are disputes between masters and seamen, involving petty criminal offenses committed by members of a crew. Jurisdiction has in such cases generally been yielded to the authorities of the State to which the vessel belongs, and notably to consular officers.<sup>1</sup> Opinion is divided whether the existing practice indicates the general relinquishment of a right normally possessed by the territorial sovereign, or is to be ascribed in each case to the terms of a particular agreement by which local jurisdiction is specifically surrendered.<sup>2</sup> The United States has protested against

<sup>22</sup> See, for example, the application of the Harter Act of Feb. 13, 1893, in *Knott v. Botany Mills*, 179 U. S. 69; *The Germanic*, 196 U. S. 589, 598.

<sup>23</sup> See award in *The Canadienne*, American and British Claims Arbitration, under special agreement of Aug. 18, 1910, Nielsen's Report, 427, 430; award in *The Sidra*, *id.*, 452, 457, where it was said: "According to the well settled rule of international law, the collision having occurred in the territorial waters of the United States, the law applicable to the liability is the law of the United States, according to which when both ships are to blame the damage suffered by each of them must be supported by moiety by the other."

See also case of George W. Johnson, Arthur P. White, executor, and Martha J. McFadden, Administratrix, General Claims Commission, United States and Mexico, convention of Sept. 8, 1923, Opinions of Commissioners, 1927 Vol., 241, and especially concurring opinion of Commissioner Nielsen, *id.*, 248, 249-250.

§ 222. <sup>1</sup> See, for example, *Wildenhuis' Case*, 120 U. S. 1; *Ex parte Anderson*, 184 Fed. 114.

<sup>2</sup> In *Wildenhuis' Case*, 120 U. S. 1, the Court inclined to the view that Art. XI of the treaty between the United States and Belgium of March 9, 1880, was a mere recognition of the existing practice of nations. See, also, opinion of Mr. Cushing, Atty.-Gen., 8 Ops. Attys.-Gen., 73; Mr. Fish, Secy. of State, to Mr. Schenck, March 12, 1875, *For. Rel.* 1875, I, 592, Moore, Dig., II, 295; Mr. Frelinghuysen, Secy. of State, to Baron Schaeffer, Austrian Minister, Nov. 13, 1883, *For. Rel.* 1883, 30, Moore, Dig., II, 302. *Compare* Mr. Marcy, Secy. of State, to Mr. Keenan, Consul at Hong Kong, April 14, 1856, 21 *Disp.* to Consuls, 567, Moore, Dig., II, 288; Opinion of Mr. Berrien, Atty.-Gen., 2 Ops. Attys.-Gen., 381, Moore, Dig., II, 286; Mr. Bayard, Secy. of State, to Mr. Thompson, Minister to Haiti, July 31, 1885, MS. *Inst. Haiti*, II, 511, Moore, Dig., II, 300.

See, also, *The Gloria de Larrinaga*, 196 Fed. Rep. 590, where an American court of admiralty declined to take jurisdiction in the case of a claim under a British Shipping Act for short allowance, made by a British seaman on a foreign ship and arising in foreign waters. See dictum in *United States v. Flores*, 289 U. S. 137, at 158.

the assertion of jurisdiction over controversies of the class described, by local magistrates in the territory of a foreign State with which no adequate agreements had been concluded.<sup>3</sup>

The Department of State, in 1914, declared that according to the views which the Government had found frequent occasion to express, it was "by comity" that "matters of discipline and all things done on board which affect only the vessel or those belonging to her and do not involve the peace or dignity of the country or the tranquillity of the port" should be left to the authorities of the State to which the ship belonged.<sup>4</sup> In 1919, the American Government sought and secured the surrender to itself of one in the custody of a foreign territorial sovereign whose offense on an American ship within its territorial waters might well have justified that sovereign in both exercising and retaining the right of jurisdiction.<sup>5</sup> The United States, has, moreover, not hesitated to object to the exercise of jurisdiction by foreign local authorities when, in its judgment, there appeared to be no serious disturbance to the tranquillity of the State within whose domain occurred the offensive action of the occupant of an American ship.<sup>6</sup>

The treaties of the United States, prior to those concluded after the World War, 1914–1918, frequently provided that disorders on board of a vessel which were of a character to disturb the tranquillity and public order on shore, or concerned a person not a member of the crew, might be dealt with by the local authorities.<sup>7</sup> The local courts were, therefore, called upon, in cases confronting them, to pass upon the preliminary question whether the offense charged against a wrong-doer was of such a character.<sup>8</sup> In *Wildenhuis' Case* the Supreme Court

<sup>3</sup> Mr. Fish, Secy. of State, to Mr. Schenck, Nov. 8, 1873, For. Rel. 1874, 490, Moore, Dig., II, 293; Same to Same, March 12, 1875, For. Rel. 1875, I, 592, Moore, Dig., II, 295.

<sup>4</sup> Mr. Lansing, for the Secy. of State, to the British Ambassador at Washington, May 19, 1914, For. Rel. 1914, 308, 312, cited in communication from the Government of the United States to Preparatory Committee, Conference for Codification of International Law, March 16, 1929, Bases of Discussion, 1929, Vol. II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 128, 154.

It has been noted elsewhere that in discussions in 1923 with the governments of certain foreign States touching the exclusion from American territorial waters of vessels laden with intoxicating liquors for beverage purposes, the United States asserted the right to forbid the entrance into its waters of such vessels when so laden. Therefore, from an American point of view, the foreign references to limits upon the jurisdiction of a State over foreign vessels permitted to enter domestic waters were inept. See Bays, *supra*, § 185.

<sup>5</sup> "On April 21, 1919, a member of the crew of the American schooner *Jean L. Sommerville* shot and seriously wounded the master thereof, on board the vessel in the port of Fort de France, a quarter of a mile from the shore. The Department of State instructed the Consul in Martinique that the Department of Justice desired if possible that the jurisdiction of the United States be exercised in the case, unless the offense was of such a nature as to disturb the peace of the local community. The local authorities granted the request of the Consul to deliver custody of the accused to the United States authorities, and he was delivered to the master of the schooner to be conveyed to Gulfport." (Hackworth, Dig., II, 212, citing Mr. Polk, Acting Secy. of State, to Consul Wallace, May 8, 1919; Consul Wallace to Mr. Lansing, Secy. of State, June 19, 1919.)

<sup>6</sup> See, for example, Mr. Wilson, Acting Secy. of State, to Ambassador Dudley, Nov. 4, 1909, For. Rel. 1909, 41, Hackworth, Dig., II, 218.

<sup>7</sup> For example, Article XI of the treaty with Belgium, of March 9, 1880, declared that "The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore, or in the port, or when a person of the country or not belonging to the crew shall be concerned therein." Malloy's Treaties, I, 97.

<sup>8</sup> Mr. Marcy, Secy. of State, to Mr. Clay, Minister to Peru, July 18, 1855, MS. Inst. Peru, XV, 171, Moore, Dig., II, 313; Mr. Frelinghuysen, Secy. of State, to Baron Schaeffer, Austrian

of the United States declared that a disorder was of a kind to disturb the peace of a port, if the offense were of such gravity that it would awaken public interest on shore when it became known there, and especially if it were of a character such that its commission within the territory of any civilized State would result in the severe punishment of the offender. In that case, the stabbing and killing of a Belgian seaman by another member of the crew, himself also a Belgian, on board of a Belgian steamship moored at a dock in New Jersey was regarded as furnishing just cause for local prosecution.<sup>9</sup>

In its more recent treaties, the United States has sought to clarify the statement of conditions when the jurisdiction of a territorial sovereign should not be exercised, and conversely, when that of an alien authority, such as a consular officer of the State to which a vessel may belong, is acknowledged. Thus, according to Article XXIII of the treaty of Friendship, Commerce and Consular Rights between the United States and Germany of Dec. 8, 1923,<sup>10</sup> there is yielded to a consular officer exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and also in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrong-doing shall have entered a port within the consular district. To such an officer there is also given jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto "provided the local laws so permit." When an act committed on board constitutes a crime according to the laws of the territorial sovereign, subjecting the person guilty thereof to punishment as a criminal, consular jurisdiction is withheld, except in so far as it may be yielded by the local law.<sup>11</sup>

(c)

§ 223. **Civil Disputes of Seamen Arising from Their Connection with the Ship.** There has been a tendency on the part of maritime powers, such as the United States, to conclude conventions withholding from domestic courts jurisdiction in civil controversies between seamen and the masters of ships on which the former served, particularly in reference to the adjustment of wages

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Minister, Nov. 13, 1883, For. Rel. 1883, 30, Moore, Dig., II, 302; Mr. Evarts, Secy. of State, to Count Lewenhaupt, Swedish and Norwegian Minister, July 30, 1880, MS. Notes to Sweden and Norway, VII, 204, Moore, Dig., II, 315.

<sup>9</sup> 120 U. S. 1. See, also, Mr. Hay, Secy. of State, to Baron Fava, Italian Ambassador, July 19, 1900, MS. Notes to Italian Legation, IX, 440, Moore, Dig., II, 314; *Commonwealth v. Luckness*, 14 Philadelphia, 363, Moore, Dig., II, 315; Case of the German steamer, *Tom G. Corpi*, at Brest, 1908, *Rev. Gén.* XV, 439.

<sup>10</sup> U. S. Treaty Vol. IV, 4191, 4200. The provisions of this treaty have since been incorporated in numerous others to which the United States is a party. See, for example, Art. XXII of treaty between the United States and Norway, of June 5, 1928 and Feb. 25, 1929, U. S. Treaty Vol. IV, 4527, 4536; Art. XXV of treaty between the United States and Poland, of June 15, 1931, U. S. Treaty Vol. IV, 4572, 4584; *Compare* Art. XII of Consular Convention between the United States and Cuba, of April 22, 1926, U. S. Treaty Vol. IV, 4048, 4051.

See *The Roseville*, 11 F. Supp. 151.

<sup>11</sup> It is further provided that "a consular officer may freely invoke the assistance of the local police authorities in any matter pertaining to the maintenance of internal order on board of a vessel under the flag of his country within the territorial waters of the State to which he is appointed, and upon such a request the requisite assistance shall be given."

and the execution of contracts.<sup>1</sup> The scope of certain of these agreements to which the United States has become a party has been the subject of frequent adjudications in American courts.<sup>2</sup> Question has arisen whether a stipulation excluding local jurisdiction should be applied when it would entail great hardship on account of the absence of a consular officer;<sup>3</sup> and whether also an appropriate treaty should be deemed, for constitutional reasons, to embrace the case of an American citizen.<sup>4</sup> In numerous cases the terms of a convention have been acknowledged to be applicable to the circumstances of the case, and jurisdiction has been withheld.<sup>5</sup> It has been observed, however, that in relevant treaties to which the United States is a party, which have been concluded since World War I, the jurisdiction of a consular officer over issues concerning the adjustment of wages and the execution of contracts relating thereto has been conditioned upon the requirement that the local laws of the contracting parties so permit.<sup>6</sup>

It may be doubted whether in the absence of a concession by treaty, the territorial sovereign is deterred by the operation of any rule of international law from exercising through its local courts jurisdiction over civil controversies between masters and members of a crew, when the judicial aid of its tribunals is invoked by the latter, and notably when a libel *in rem* is filed against the ship.<sup>7</sup> It is to be observed, however, that American courts exercise discretion in taking or withholding jurisdiction according to the circumstances of the particular case.<sup>8</sup>

§ 223.<sup>1</sup> See, for example, Art. XI of consular convention with Sweden, of June 1, 1910, U. S. Treaty Vol. III, 2846; Art. XXIII of treaty with Spain of July 3, 1902, Malloy's Treaties, II, 1708.

<sup>2</sup> See *The Ester*, 190 Fed. 216, where the decision of Smith, J., embraces a thorough discussion of previous cases; also *The Rindjani*, 254 Fed. 913, concerning consular jurisdiction over a wage dispute under convention with the Netherlands, of May 23, 1878. The Seamen's Act of 1915, 38 Stat. 1164, 1165, was here deemed not to apply to a contract made in Holland to be performed on a Dutch vessel, both parties being Dutch.

<sup>3</sup> *The Salomoni*, 29 Fed. 534.

<sup>4</sup> See, for example, *The Neck*, 138 Fed. 144, where the libellant, a seaman on a foreign vessel, was an American citizen, and was, for that reason, deemed to have a constitutional right to invoke the jurisdiction of a court of admiralty within the United States, under the facts of the case. The Court appeared, moreover, to doubt the applicability of the treaty (that with Germany of Dec. 11, 1871) to the case.

<sup>5</sup> See, for example, *The Bound Brook*, 146 Fed. 160; *Tellefsen v. Fee*, 168 Mass. 188; *The Koenigin Luise*, 184 Fed. 170.

<sup>6</sup> See, for example, Art. XXIII of treaty between the United States and Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4200. See *supra*, § 222.

<sup>7</sup> *The Ester*, 190 Fed. 216, 221, 223; also *The Belgenland*, 114 U. S. 355, where Mr. Justice Bradley declared in the course of the opinion of the Court (363): "Circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of ill treatment, are often in this category; and the consent of their consul or minister is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended, or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul."

See also *Heredia v. Davies*, 12 F. (2d) 500; *The Oriskany*, 3 F. Supp. 805. See Hackworth, Dig., II, §§ 142 and 143, and numerous cases there cited.

<sup>8</sup> "The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts. The question has most frequently been presented in suits by foreign

Their action in so doing is not to be regarded as indicative of any requirement of public international law.<sup>9</sup>

## (d)

§ 224. **Involuntary Entrance.** A foreign vessel forced into port by stress of weather, or by inevitable necessity, is not regarded as subject to the local jurisdiction. The involuntary entrance furnishes a ground of exemption.<sup>1</sup> Thus the imposition of a fine upon a foreign ship compelled to put into port for such a reason is believed to lack justification.<sup>2</sup> Likewise, goods on board of a vessel so circumstanced are not regarded as subject to the payment of duties.<sup>3</sup> Exemption from payment depends, however, upon proof of the fact of the urgency of the distress. The necessity must be grave<sup>4</sup> and the proof convincing.<sup>5</sup>

seamen against masters or owners of foreign vessels relating to claims for wages and like differences, or to claims of personal injury. Although such cases are ordinarily decided according to the foreign law, they often concern causes of action arising within the territorial jurisdiction of the United States, compare *Patterson v. The Eudora*, 190 U. S. 169; *The Kestor*, 110 Fed. 432, 450. Neither in these, nor in other cases, has the bare circumstance of where the cause of action arose been treated as determinative of the power of the court to exercise discretion whether to take jurisdiction." (Brandeis, J., in opinion of the Court, in *Canada Malting Co. v. Paterson Co.*, 285 U. S. 413, 421-422.)

See also *The Sonderborg*, 47 F. (2) 723; *The Eir*, 60 F. (2) 125.

It may be observed that the Supreme Court of the United States has construed the Seamen's Act of 1915, chap. 153, 38 Stat. 1164, as indicating no design on the part of the Congress to render inefficacious the contracts of foreign seamen so far as advance payment of wages was concerned, when the contract and payment were made in a foreign country where the law sanctioned such contract and payment. See *Sandberg v. McDonald*, 248 U. S. 185, Justices McKenna, Holmes, Brandeis and Clarke dissenting. See also *Neilson v. Rhine Shipping Company*, 248 U. S. 205. Cf. *Strathearn S.S. Co. v. Dillon*, 252 U. S. 348.

<sup>9</sup> See Jessup, *Territorial Waters*, 189.

§ 224. <sup>1</sup> *Hallet & Browne v. Jenks*, 3 Cranch, 210, 219; *The Short Staple v. United States*, 9 Cranch, 55; *The Nuestra Señora de Regla*, 17 Wall. 29. See, also, Mr. Seward, Secy. of State, to Mr. Stoeckl, Russian Minister, June 4 and June 13, 1864, MS. Notes to Russian Legation, VI, 156, 157, Moore, Dig., II, 343; Mr. Bayard, Secy. of State, to Mr. Phelps, Nov. 6, 1886, For. Rel. 1886, 362, 364-365; Moore, Dig., II, 343.

<sup>2</sup> Mr. Uhl, Acting Secy. of State, to Mr. Smythe, Minister to Haiti, May 3, 1894, MS. Inst. Haiti, III, 398, Moore, Dig., II, 349; Report of Mr. Davis, Committee on Foreign Relations, July 14, 1897, on case of Alfredo Laborde and others, *Competitor* prisoners, Senate Rep. 377, 55 Cong., 1 Sess., 5, Moore, Dig., II, 349; Mr. Bayard, Secy. of State, to Mr. Phelps, Nov. 6, 1886, For. Rel. 1886, 362, 364-365, Moore, Dig., II, 343.

<sup>3</sup> *The Brig Concord*, 9 Cranch, 387; *The New York*, 3 Wheat. 59, 68; Opinion of Mr. Wirt, Atty.-Gen., 1 Ops. Attys.-Gen., 509; Mr. Bayard, Secy. of State, in Case of the *Rebecca*, Feb. 26, 1887, Senate Ex. Doc. 109, 49 Cong., 2 Sess., Moore, Dig., II, 345.

<sup>4</sup> Declares Wheaton: "The danger must be such as to cause apprehension in the mind of an honest and firm man. I do not mean to say that there must be an actual physical necessity existing at the moment; a moral necessity would justify the act; where, for instance, the ship had sustained previous damage, so as to render it dangerous to the lives of the persons on board to prosecute the voyage: such a case, though there might be no existing storm, would be viewed with tenderness; but there must be at least a moral necessity. Then, again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage; for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place, the distress must be proved by the claimant in a clear and satisfactory manner. It is evidence which comes from himself, and from persons subject to his power, and probably involved in the fraud, if any fraud there be, and is, therefore, liable to be rigidly examined." Note on Case of *The New York*, 3 Wheat. 59, quoting from opinion of Sir William Scott in the case of *The Eleanor*, Edwards, 159, 160, Moore, Dig., II, 340-341.

<sup>5</sup> *The Æolus*, 3 Wheat. 392, where the court was of opinion that the coming in of the ship was voluntary. Mr. Justice Johnson dissented.

See Jessup, *Law of Territorial Waters*, 194-208.



Declared the Commission under convention between the United States and Mexico of September 8, 1923, as extended by that of August 16, 1927, through Commissioner Nielsen: "It seems possible to formulate certain reasonably concrete criteria applicable and controlling in the instant case. Assuredly a ship floundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf. The fact that it may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea is unjustifiable. If a captain delayed seeking refuge until his ship was wrecked, obviously he would not be using his best judgment with a view to the preservation of the ship, the cargo and the lives of people on board. Clearly an important consideration may be the determination of the question whether there is any evidence in a given case of a fraudulent attempt to circumvent local laws. And even in the absence of any such attempt, it can probably be correctly said that a mere matter of convenience in making repairs or in avoiding a measure of difficulty in navigation can not justify a disregard of local laws."<sup>6</sup> It has also been wisely said that "a vessel entering territorial waters in distress may not wholly ignore the local jurisdiction. For example, if the ship has required salvage assistance, the salvor may sue for his compensation. Also, if the vessel or those on board commit an offense against the local law subsequent to the entry in distress, the littoral State's power to punish is undiminished."<sup>7</sup>

Between 1831 and 1841, there arose a series of cases where slaves on board of American merchant vessels, wrecked upon British coasts, or forced, by stress of weather or mutiny, into British ports, were liberated.<sup>8</sup> The involuntary pres-

<sup>6</sup> Case of *Kate A. Hoff*, Administratrix, opinion rendered April 2, 1929, Opinions of Commissioners, 1929, 174, 178; also, F. K. Nielsen, *International Law Applied to Reclamations*, 1933, 47.

Cf. Art. 17, Harvard Research Draft Convention on The Law of Territorial Waters, *Am. J., Special Supplement*, XXIII (April, 1929), 299.

<sup>7</sup> Comment by the Reporter, George G. Wilson, on Art. 17, Harvard Research Draft Convention on The Law of Territorial Waters, *id.*

"Under the Tariff Act of September 21, 1922 (42 Stat. 858, 952) vessels arriving in ports of the United States in distress or for the purpose of taking on necessary ship stores or sea stores are not required to make entry at a customhouse if they depart within 24 hours after arrival without having landed or taken on board any merchandise other than stores, but they are required to report to the collector of customs the dates of arrival and departure and the quantity of stores taken on board. (A similar provision is found in art. 441 of the Tariff Act approved June 17, 1930, as amended August 14, 1937, 46 Stat. 590, 712, 50 Stat. 638.) In order to relieve a vessel clearing from a foreign port of the penalty provided in the act of Congress approved February 15, 1893, as amended August 18, 1894 and February 27, 1921, for failure to present a bill of health upon arrival in the United States, the master is required to furnish evidence that he did not know that he would enter or was likely to enter a port of the United States, its possessions, or dependencies at the time of clearing from the foreign port. 27 Stat. 449; 28 Stat. 372; 41 Stat. 1149. Where vessels are forced to enter a port of the United States through stress of weather or because of accident, it is customary to waive any fines because of failure to furnish proper manifest with respect to alien seamen or passengers, provided that the vessel had no orders to enter the port of the United States at the time of its departure from the last foreign port or place. Any aliens on board at such time must be detained pending authority for their removal." (Hackworth, *Dig.*, II, 277, citing Mr. Hughes, Secy. of State, to the British Ambassador, April 16, 1923.)

<sup>8</sup> These were the cases of the *Comet*, 1831; the *Encomium*, 1835; the *Hermosa*, 1840; and the *Creole*, 1841. For a brief statement of facts of the several cases, see Moore, *Dig.*, II, 350-352.

ence of a foreign vessel in a local port might not suffice to dissolve the existing relations between persons on board,<sup>9</sup> or to justify the local authorities in taking affirmative steps to put an end to the existing relationship, unless the continuance thereof became a source of real disturbance to the peace of the country.<sup>10</sup> It might, however, well be doubted whether, as Mr. Dana pointed out in relation to the foregoing cases:

The local authorities must give active aid to the master against persons on board his vessel who are doing no more than peacefully and quietly dissolving, or refusing to recognize, a relation which exists only by force of the law of the nation to which the vessel belongs, if the law is peculiar to that nation, and one which the law of the other country regards as against common right and public morals.<sup>11</sup>

In all of the cases Great Britain paid an indemnity, in those of the *Comet* and the *Encomium*, as a result of diplomacy;<sup>12</sup> in those of the *Enterprise*, *Hermosa* and the *Creole*, in pursuance of the award of Mr. Joshua Bates, umpire of the mixed commission under the Convention of February 8, 1853.<sup>13</sup>

It may be noted that from early days of the Republic<sup>14</sup> the United States has in numerous treaties made provision in varying form for privileges and immunities to be accorded the vessels of a contracting party compelled by distress to take shelter within the ports of another, and in so doing has manifested general approval of the principle reflected in the customary law.<sup>15</sup> Again, the safeguarding and immunity of shipwrecked cargoes has been the subject of frequent agreement.<sup>16</sup>

<sup>9</sup> Mr. Webster, Secy. of State, to Mr. Everett, June 28, 1842, Curtis' Life of Webster, II, 106, quoted in Moore, Dig., II, 352; Mr. Webster, Secy. of State, to Lord Ashburton, British Plenipotentiary, Aug. 1, 1842, Webster's Works, VI, 303, 306, Moore, Dig., II, 353.

<sup>10</sup> See opinion of Mr. Bates, umpire, in the case of the *Enterprise*, and in the case of the *Hermosa*, Moore, Arbitrations, IV, 4372 and 4374 respectively, Moore, Dig., II, 355 and 357, respectively.

<sup>11</sup> Dana's Wheaton, note No. 62. See, also, Hall, Higgins' 8 ed., 253, note (1). Compare opinion of Mr. Bates, umpire, in the case of the *Creole*, Moore, Arbitrations, IV, 4375, Moore, Dig., II, 358.

<sup>12</sup> Mr. Webster, Secy. of State, to Mr. Fillmore, M. C., May 6, 1842, House Ex. Doc. No. 242, 27 Cong., 2 Sess., p. 1.

<sup>13</sup> For the texts of the awards of the umpire, see Moore, Arbitrations, IV, 4374-4378, Moore, Dig., II, 355-361.

<sup>14</sup> See Art. 19, treaty of Amity and Commerce with France, Feb. 6, 1778, Malloy's Treaties, I, 475, Miller's Treaties, II, 17.

<sup>15</sup> See, for example, Art. XVII, convention with Panama, of Nov. 18, 1903, Malloy's Treaties, II, 1354; Art. X, treaty and protocol between the United States and Siam, of Dec. 16, 1920, U. S. Treaty Series, No. 655, U. S. Treaty Vol. III, 2832.

According to Art. 3 of the International Convention for the safety of Life at Sea, concluded at London, May 31, 1929: "*Cases of 'Force Majeure.'*" No ship, which is not subject to the provisions of the present Convention at the time of its departure on any voyage, shall become subject to the provisions of the present Convention on account of any deviation from its intended voyage due to stress of weather or any other cause of *force majeure*.

"Persons who are on board a ship by reason of *force majeure* or in consequence of the obligation laid upon the master to carry shipwrecked or other persons shall not be taken into account for the purpose of ascertaining the application to a ship of any provisions of the present Convention." (U. S. Treaty Vol. IV, 5138.) See also Art. 4 of International Load Line Convention concluded at London, July 5, 1930, U. S. Treaty Vol. IV, 5291.

<sup>16</sup> See, for example, Art. XXVIII, treaty between the United States and Germany of Dec. 8, 1923, U. S. Treaty Vol. IV, 4191, 4202; Art. XXVII, treaty between the United States and Poland of June 15, 1931, U. S. Treaty Vol. IV, 4572, 4580.

## (e)

§ 225. **Asylum on Merchant Vessels.** The case of the individual who, after having committed an offense within the territory of a State, escapes therefrom, takes passage abroad on a foreign merchant vessel, and is sought to be arrested thereon when the ship enters a local port, presents on principle no difficulties. The fugitive has no connection with the ship save as a passenger. His violation of the local law within the national domain, and its necessary effect upon the public mind, justify, and in a sense compel, the territorial sovereign to apprehend and prosecute the wrongdoer when he enters its domain. The circumstance that he is a passenger in transit to another country on board of a vessel entering territorial waters merely in order to make a port of call, seems to be immaterial. The ship itself is not exempt from local jurisdiction and cannot grant asylum.<sup>1</sup>

The views of the Department of State with respect to the matter did not, at least before the close of the last century, appear to be harmonious. Mr. Bayard, Secretary of State, referring, in 1885, to the case of one Gámez, declared it to have been the duty of the captain of an American ship to surrender to the local authorities of Nicaragua, upon their request, a political fugitive from that country who had voluntarily taken passage at San José de Guatemala, for Costa Rica, knowing that the vessel would enter *en route* a Nicaraguan port.<sup>2</sup>

In 1890, Mr. Blaine, as Secretary of State, in a communication to Mr. Mizner, Minister to Central America, asserted that in Spanish-American countries it was the habit of the territorial sovereign before making an arrest, to apply to the diplomatic or consular officer of the State to which the vessel belonged for his consent, and to furnish such officer with proof of the nature of the crime alleged; that the arrest was never made when the representative of the United States withheld his consent or the demand wore a political aspect; that powerful causes operated in favor of the exception that had arisen, exempting political offenders from local jurisdiction.<sup>3</sup> Mr. Blaine rebuked the Minister for having intervened, by authorizing, in compliance with demands of Guatemala, the seizure on an American vessel, at a Guatemalan port, of General Barrundia, a passenger in transit from Mexico to Panama, who had been charged with the

§ 225. <sup>1</sup> Mr. Buchanan, Secy. of State, to Mr. Jordan, Jan. 23, 1849, 37 MS. Dom. Let. 98, Moore, Dig., II, 856; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, May 27, 1876, MS. Inst. Haiti, II, 79, Moore, Dig., II, 857; Mr. Bayard, Secy. of State, to Mr. Thompson, Minister to Haiti, Nov. 3, 1885, For. Rel. 1885, 542, Moore, Dig., II, 857. See J. B. Moore, "Asylum in Legations and Consulates and in Vessels," *Pol. Sc. Quar.*, VII, 1, 197, 397.

<sup>2</sup> Instruction to Mr. Hall, Minister to Central America, March 12, 1885, MS. Inst. Cent. Am., XVIII, 488, Moore, Dig., II, 867.

It appears that the captain of the ship, having declined to surrender Gámez, set sail without proper clearance papers. Criminal proceedings, instituted against the master in his absence resulted in a decision ultimately affirmed by the Supreme Court of Nicaragua, announcing the exemption of foreign merchant vessels from the local jurisdiction with respect to persons on board accused of political offenses. See Mr. Shannon, Minister to Central America, to Mr. Foster, Secy. of State, Oct. 13, 1892, For. Rel. 1892, 45-49, Moore, Dig., II, 868-870.

<sup>3</sup> Communication of Nov. 18, 1890, For. Rel. 1890, 123, 133-141, Moore, Dig., II, 859-862, and 872-876. *Cf.*, also, Mr. Rockhill, Third Assist. Secy. of State, to Mr. Williams, Consul-General at Havana, Sept. 5, 1895, 149 MS. Inst. Consuls, 433, Moore, Dig., II, 862.

commission of political offenses against Guatemala.<sup>4</sup> General Barrundia had resisted capture, and had been killed. By reason of his intervention, the Minister was recalled.<sup>5</sup>

In 1893, one Bonilla, a native of Honduras, boarded an American steamer in Nicaragua bound for Guatemala. Upon the arrival of the vessel at Amapala, Honduras, his surrender was duly demanded of the captain, on the ground that Bonilla had been "sentenced by the Courts of the Republic." The captain, after consultation with Mr. Baker, the American Minister to Nicaragua, who was himself a passenger on the vessel, refused to comply. The captain was later warned that if he attempted to leave port before delivering Bonilla, the vessel would be fired upon. The vessel, having previously received her clearance papers, and still retaining custody of the fugitive, proceeded to leave port and was fired upon, but without effect. The United States vigorously protested against this action. The Government of Honduras promptly gave assurances of disavowal and regret.<sup>6</sup>

Mr. Gresham, Secretary of State, on Dec. 30, 1893, enunciated the general principles which he believed to be applicable in such cases. He declared that a merchant vessel in a foreign port was within the local jurisdiction with respect to offenses and offenders against the local laws; that as the doctrine of asylum had "no recognized application" to such a vessel, the master was without discretion as to the character of the offense charged; that permitting the arrest of a passenger was not analogous to proceedings in extradition; that the master was not competent to determine whether the evidence was sufficient to warrant arrest and commitment for trial, or to impose conditions upon arrest; that his function was merely passive, being confined to permitting the regular agents of the law, on exhibition of lawful warrant, to make the arrest; that American diplomatic and consular officers were incompetent to order surrender by way of quasi-extradition. While the Secretary declared that arbitrary attempts to capture a passenger by force, without regular judicial process, might call for disavowal when the resort to violence endangered the lives of innocent men and the property of a friendly nation, he was far from asserting that there was a limitation of the right of jurisdiction over political refugees peculiar to Spanish American States.<sup>7</sup> It is believed that Mr. Gresham correctly stated the require-

<sup>4</sup> Relative to the impropriety of consular intervention, see Mr. Bayard, Secy. of State, to Mr. Thompson, Minister to Haiti, Nov. 7, 1885, MS. Inst. Haiti, II, 523, Moore, Dig., II, 858.

<sup>5</sup> President Harrison, Annual Message, Dec. 1, 1890, For. Rel. 1890, iii, Moore, Dig., II, 871. In that document it is stated that General Barrundia had failed in a revolutionary attempt to invade Guatemala from Mexican territory, and that his seizure was attempted in order that he might be tried "under what is described as martial law."

See Mr. Mizner's defense in For. Rel. 1890, 144, contained in part in Moore, Dig., II, 876.

<sup>6</sup> For. Rel. 1893, 154 *et seq.*, Moore, Dig., II, 880-881.

<sup>7</sup> Communication to Mr. Huntington, For. Rel. 1894, 296, Moore, Dig., II, 880. "The letter to Mr. Huntington was communicated by Mr. Gresham, Secy. of State, to Mr. Baker, United States Minister to Nicaragua, Jan. 31, 1894. March 22, 1898, Mr. Sherman, Secy. of State, instructed Mr. Merry, Mr. Baker's successor, that he was to be guided by it." Moore, Dig., II, 882, citing MS. Inst. Cent. Am., XXI, 290.

Relative to the unwillingness of the United States "to acquiesce in the arbitrary and forcible violation of its flag by a merely military power, without due and regular warrant

ments of the law. It must be clear that the attempt to prevent a State, whether of Spanish America or Europe, from exercising as complete jurisdiction over foreign vessels and their occupants within local ports as is commonly and properly enjoyed by maritime powers generally, betokens disrespect for the territorial sovereign, imputing to it inability to administer justice, and breeding contempt for its legitimate authority.<sup>8</sup>

It should be observed, however, that according to the General Treaty of Peace and Amity concluded by the Central American Republics at Washington, February 7, 1923, it was declared that:

The Governments of the Contracting Republics bind themselves to respect the inviolability of the right of asylum aboard the merchant vessels of whatsoever nationality anchored in their waters. Only persons accused of common law crimes can be taken from said vessels, by order of a competent judge and after due legal procedure. Fugitives from justice accused of political crimes or of common law crimes of a political nature can in no case be removed from the vessel.<sup>9</sup>

It is unnecessary to comment on the willingness of a group of States to agree formally to provide convenient places of refuge for political offenders who may be fugitives from the justice of any member thereof. It may be noted that the Institute of International Law, at its session at Stockholm, in 1928, acknowledged in its Regulations on The Régime of Seagoing Vessels and Their Crews in Foreign Ports in Time of Peace, that if the master of a ship should receive political refugees on board, it should be clearly established that they were such, and that he should admit them under such conditions that the act did not constitute on his part assistance given to one of the parties in dispute to the prejudice of the other. It was declared that he should not land such refugees in another part of the country of the State within the waters of which he had taken them on board, nor so near to that country that they might easily return thither.<sup>10</sup>

Over the fugitive from the justice of a foreign State who is arrested within the territory of a third State and brought into a local port in the custody of foreign agents on a foreign merchant vessel in transit to the place of trial,

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of law and not in conformity with the ordinary course of justice," see Mr. Foster, Secy. of State, to Mr. Scruggs, Minister to Venezuela, Sept. 8, 1892, For. Rel. 1892, 623, Moore, Dig., II, 864.

<sup>8</sup> Declared Mr. Knox, Secy. of State, to Minister Beaupré, on June 18, 1912: "While it appears that a custom of notifying American consular officers and obtaining their consent before arrests are made on American vessels has grown up in Latin American countries, such custom apparently is not based on any principle of international law, and the Department therefore would not be in a position to insist on its observance by the Cuban authorities. Such being the case, in the absence of any treaty provisions between this Government and Cuba governing the matter, the rights of the Cuban authorities of course must be determined in accordance with the general principles of international law relating to jurisdiction over merchant vessels in foreign ports." (Hackworth, Dig., II, 229.)

<sup>9</sup> Conference on Central American Affairs, Washington, Dec. 4, 1922-Feb. 7, 1923, Washington, Government Printing Office, 1923, 291, Hudson, Int. Legislation, No. 78.

<sup>10</sup> Art. 21, *Annuaire*, XXXIV, 736, 743. Cf. Art. 19 of Regulations on the Status of Ships and Their Crews in Foreign Ports in Time of Peace and in Time of War, adopted by The Institute at The Hague, in 1898, *Annuaire*, XVII, 273, 278, J. B. Scott, Resolutions, 143, 148.

the territorial sovereign may doubtless assert control and justly demand that the individual be set at liberty. It may not, however, elect to do so.<sup>11</sup>

## (3)

§ 226. **The Marginal Sea. Foreign Merchant Vessels.** The extent of the jurisdiction of a State over foreign merchant vessels within territorial waters constituting the maritime belt or marginal sea, appears to be proportional to the degree of interest with which the territorial sovereign regards the conduct of such ships or of their occupants.<sup>1</sup> When in the course of innocent passage, the acts attributable to either arouse the concern of the territorial sovereign because of their adverse effect upon itself or its nationals within its domain, and constitute also a violation of its laws, it may stretch forth its arm and vindicate itself.<sup>2</sup> Thus it may manifest a concern requisite to justify the exercise of a criminal jurisdiction when an act committed on board constitutes, according to the local law, a crime, and the consequences thereof are deemed by themselves to disturb the peace or order of the country.<sup>3</sup> Nor is it without the right to assert a civil jurisdiction when acts attributable to the ship or to its occupants, in contravention of the local law, serve also to produce effects deemed to be adverse to the State or its nationals within its domain.<sup>4</sup>

No instance has been observed where a State has asserted the right to remove from a foreign vessel in transit through the marginal sea an occupant who, prior

<sup>11</sup> See Extradition, *infra*, § 341.

§ 226. <sup>1</sup> See Westlake, 2 ed., I, 266-267.

<sup>2</sup> Statements purporting to be indicative of the relevant law oftentimes, as a possible means of accentuating the importance of the privilege of innocent passage, refer to the jurisdictional right of the territorial sovereign as an exception to an obligation to yield an exemption. See, for example, Art. 7 of Regulations Relative to the Territorial Sea in Time of Peace, adopted by The Institute of International Law at Stockholm in 1928, *Annuaire*, XXXIV, 757; also Art. 8 of proposed convention on The Legal Status of The Territorial Sea, Annex I to Report of the Second Committee (Territorial Sea), The Hague Conference for the Codification of International Law, 1930, League of Nations Doc. No. C.230.M.117. 1930.V, 8, *Am. J.*, XXIV, *Official Documents*, 243.

The privilege of innocent passage marks an obvious restriction upon the freedom of a State to exert exclusive control over what is acknowledged to constitute a part of its territory. The jurisdiction which a State may lawfully exercise over a foreign vessel passing through the waters of the marginal sea may, therefore, be fairly looked upon as indicative of a condition under which the privilege of innocent passage may be properly enjoyed. It reveals a limitation upon that privilege rather than an exception to a restriction which the territorial sovereign is obliged to respect.

See, in this connection, communications from the several governments to the Preparatory Committee for the Codification Conference of 1930 at The Hague, concerning Point XII, Bases of Discussion, 1929, Vol. II, Territorial Waters, League of Nations Doc. No. C.74. M.39.1929.V., 78-85.

<sup>3</sup> See Basis of Discussion No. 22, submitted by Preparatory Committee for the Codification Conference of 1930, Bases of Discussion, 1929, Vol. II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 86; Art. 7 of Regulations Relative to the Territorial Sea in Time of Peace, adopted by The Institute of International Law at Stockholm in 1928, *Annuaire*, XXXIV, 757; Art. 15, Harvard Research Draft Convention on The Law of Territorial Waters, *Am. J.*, *Special Supplement*, XXIII (April, 1929), 254.

<sup>4</sup> "There is no clear preponderance of authority to the effect that such vessels when passing through territorial waters are exempt from civil arrest. In the absence of such authority, the Commission cannot say that a country may not, under the rules of international law, assert the right to arrest on civil process merchant ships passing through its territorial waters." (Case of Campaña de Navegación Nacional, American and Panamanian General Claims Arbitration, June 29, 1933, Hunt's Report, 765, 812, 815.)

to boarding the vessel abroad, had committed a crime within its territory and was a fugitive from its justice. It may be doubted whether, in such a situation, international law would necessarily oppose an obstacle to such action.<sup>5</sup> Moreover, it would be difficult also to establish that that law necessarily forbids a territorial sovereign to exercise jurisdiction in a civil case where the illegal conduct chargeable to the ship or an occupant thereof occurred at a time other than during the period of transit in the course of which jurisdiction was asserted.<sup>6</sup>

It should be noted that in relation to what occurs on a passing ship, especially when not ultimately bound for a local port, the territorial sovereign has normally little concern. It has been aptly observed by the British Government that States do not in practice exercise jurisdictional rights over foreign vessels which are merely passing through their territorial waters; that there would be no advantage to themselves in doing so, and that the exercise of jurisdiction would be burdensome to the foreign vessels; that rights of jurisdiction are, in practice, only exercised where it is necessary to do so in the interests of good government, and that the State itself must be the judge whether or not the interests of good government require it.<sup>7</sup>

It is believed that over a foreign vessel at anchor within the marginal sea, a State may on principle exercise as broad a jurisdiction as if the ship were in a local port.<sup>8</sup> The territorial sovereign may not, however, find occasion to assert its rights. The position of the anchored vessel in relation to the adjacent land, as well as its contemplated movements may impel that sovereign to ignore an

<sup>5</sup> Declared the Japanese Government in a communication to the Preparatory Committee for the Codification Conference of 1930 at The Hague, of Nov. 29, 1928: "The same right of arrest may be recognised in respect of a person who is accused of a serious contravention of criminal law, on account of an act committed, not during passage, but prior thereto." (Bases of Discussion, 1929, Vol. II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 167, 170.)

See *contra*, comment on Art. 8 of proposed convention on The Legal Status of the Territorial Sea, Annex I to Report of the Second Committee (Territorial Sea), The Hague Conference for the Codification of International Law, 1930, *Am. J.*, XXIV, *Official Documents*, 244.

<sup>6</sup> See Case of Campaña de Navegación Nacional, American and Panamanian General Claims Arbitration, Hunt's Report, 765, 812, where a Panamanian ship in the course of innocent passage off the Panama Canal Zone was libelled and arrested in September, 1925, on account of having been in collision with an American ship "off the coast of Panama, between Punta Mariato and Morro de Puercos," in May, 1923. The Commission held that the arrest "was not in excess of jurisdiction." See dissenting opinion of Commissioner Alfaro, *id.*, 816, *cf.* comment of Mr. Hunt, American Agent, *id.*, 819; also P. C. Jessup, "Civil Jurisdiction Over Ships in Innocent Passage," *Am. J.*, XXVII, 747.

See *contra*, Art. 16 of Harvard Research Draft Convention on the Law of Territorial Waters, *Am. J.*, *Special Supplement*, XXIII (April, 1929), 244; also comment thereon, *id.*, 298.

See also statement of Judge Moore in the course of his dissenting opinion in the case of the S.S. "Lotus," Publications, Permanent Court of International Justice, Series A, No. 10, 88.

<sup>7</sup> Communication from British Foreign Office to the Preparatory Committee for the Codification Conference of 1930 at The Hague, of Dec. 6, 1928, Bases of Discussion, 1929, Vol. II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 162, 165.

<sup>8</sup> "If a foreign vessel passes through territorial waters for the purpose of entering a port, or if it anchors or hovers in such waters, it can no longer be considered as exercising the right of innocent passage. Its aims are not in accord with the basis of that right. Such vessels do not therefore enjoy even the qualified immunity granted to ships in passage." (Jessup, Territorial Waters, 123.)

*Cf.* Art. 10 of Regulations relative to the Territorial Sea in Time of Peace, adopted by the Institute of International Law at Stockholm in 1928, *Annuaire*, XXXIV, 758.

act the commission of which on board of a vessel in port would be calculated to awaken local interest and lead to the instigation of criminal proceedings.

Whether the statutes of the littoral State are applicable to occurrences taking place within the marginal sea, and especially to acts committed on foreign passing ships, and whether also the local tribunals are clothed with requisite jurisdiction for purposes of adjudication, present questions of domestic rather than international law. They involve inquiry as to the extent to which the territorial sovereign has seen fit to exercise its legislative power.<sup>9</sup> Inasmuch as the marginal sea is a part of the territory of the adjacent State, the application of local laws to acts committed within such waters would not seem to be dependent upon a specific declaration of legislative intention. The rule of construction actually observed would, however, be one attributable to the domestic law.

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## The High Seas

(1)

§ 227. **In General.** The term "high seas" may be said to refer, in international law, to those waters which are outside of the exclusive control of any State or group of States, and hence not regarded as belonging to the territory of any of them.<sup>1</sup> The ocean, until it envelops the shores of a maritime State and constitutes its maritime belt, is not a part of the domain of any territorial sovereign. Important consequences follow. On the high seas broadest rights of unmolested navigation are asserted and enjoyed by ships of every flag in time of peace. As the Permanent Court of International Justice declared in the course of its judgment in the Case of the S.S. "Lotus," September 7, 1927: "It is certainly true that — apart from certain special cases which are defined by international law — vessels on the high seas are subject to no authority except that of the State whose flag they fly."<sup>2</sup>

<sup>9</sup> In the case of *Reg. v. Keyn*, L. R. 2 Ex. Div. 63, the precise question was whether a particular tribunal (the Central Criminal Court) had jurisdiction in a case of homicide committed by a foreign master on a foreign ship passing within three miles of the British coast. It was held that the Central Criminal Court lacked jurisdiction. While it was declared in certain *dicta* that in the absence of Parliamentary action the open seas adjacent to the coast were not to be regarded as a part of Her Majesty's dominions, it was not suggested that if the sovereign had seen fit to treat such waters as a part of the national domain, persons on foreign merchant vessels therein would not be amenable to the local laws. As a result of the decision the British Territorial Waters Jurisdiction Act was passed in 1878.

§ 227. <sup>1</sup> See Second Court of Commissioners of Alabama Claims, *Stetson v. United States*, No. 3993, class 1, Moore, *Arbitrations*, IV, 4335, Moore, *Dig.*, II, 885.

*Compare* the special signification attached to the term "high seas" within § 5346 of the Revised Statutes, in the case of *United States v. Rodgers*, 150 U. S. 249. See, also, Dana's *Wheaton*, 169-170; Woolsey, 6 ed., 72-76; J. B. Moore, *Principles of American Diplomacy*, 1918, Chap. III.

<sup>2</sup> Publications, Permanent Court of International Justice, Series A, No. 10, 25.

"The high seas are free and *res nullius*, and, apart from certain exceptions or restrictions imposed in the interest of the common safety of States, they are subject to no territorial authority." (Dissenting opinion by Judge Weiss, *id.*, 40, 45.)

"4. In conformity with the principle of the equality of independent States, all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation, and no State is authorized to interfere with the navigation of other States on the high seas in the time of peace except in the case of piracy by law of nations or in



Again, no State possesses the right to impose penalties upon aliens on account of acts committed by them on board of a foreign vessel on the high seas unless those acts are denounced by the law of nations itself as internationally illegal, or unless they are the proximate cause of injurious consequences which take immediate effect within a place subject to the control of such State, such as its own territory or a place assimilated thereunto such as one of its own ships.<sup>3</sup> As the offensive acts appear in the latter situations to be regarded as having been committed in the place where they took effect, the corporeal absence therefrom of the actor as an occupant of a foreign ship on the ocean when he initiated them, does not serve to forbid prosecution.<sup>4</sup> That international law imposes no obstacle is not, however, indicative of any theoretical restriction in respect to the freedom of the high seas or of a rule peculiarly applicable to occurrences initiated thereon. It is simply a manifestation of deference for the principle that a State enjoys the right to determine the lawfulness of what occurs within places deemed to be within its actual or constructive control. Other instances of such deference are as frequently seen in cases where the initial forces are set in motion on foreign soil within the domain of a foreign State.<sup>5</sup>

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extraordinary cases of self-defence (Le Louis (1817), 2 Dodson, 210, 243-244).” (Dissenting opinion by Judge Moore, *id.*, 65, 69.)

Cf. The Vines, 20 Fed. (2d) 164, 172.

“It is a fundamental principle of international maritime law that, except by special convention or in time of war, interference by a cruiser with a foreign vessel pursuing a lawful avocation on the high seas is unwarranted and illegal, and constitutes a violation of the sovereignty of the country whose flag the vessel flies.” (Case of The Jessie, Thomas F. Bayard, and Pescawha, American and British Claims Arbitration under special agreement between the United States and Great Britain, Aug. 18, 1910, Nielsen’s Report, 478, 480, *Am. J.*, XVI, 114, 115.)

<sup>3</sup> Judgment in the Case of the S.S. “Lotus,” Publications, Permanent Court of International Justice, Series A, No. 10.

See also, Mr. Blaine, Secy. of State, to Mr. Ryan, Minister to Mexico, Nov. 27, 1889, For. Rel. 1889, 614, Moore, Dig., I, 931; Award of Dr. F. de Martens, Arbitrator, in the case of the Costa Rica Packet, Moore, Arbitrations, V, 4952.

A State not infrequently punishes its own nationals on account of acts committed on foreign vessels on the high seas. In so doing, the sovereign merely imposes a penalty for disobedience to its own command, declining to respect the legal quality, whether lawful or unlawful, which the State of the vessel attached to the act, and, at the same time, without denying the right of that State to exercise jurisdiction should the actor enter its domain. See Mr. Bayard, Secy. of State, to Mr. Connerly, Chargé at Mexico, Nov. 1, 1887, For. Rel. 1887, 751, 754, Moore, Dig., I, 933, note; Earl Granville, Secy. of Foreign Affairs, to Mr. Lowell, American Minister to Great Britain, June 8, 1880, For. Rel. 1880, 481, Moore, Dig., I, 934.

<sup>4</sup> “But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory; but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.” (Judgment in the case of the S.S. “Lotus,” Publications, Permanent Court of International Justice, Series A, No. 10, 25.)

<sup>5</sup> Declared Judge Moore in the course of his dissenting opinion in the Case of the S.S.

The society of nations may be agreed in denouncing and prohibiting the commission of particular acts on the high seas as internationally illegal, and in authorizing the individual State to punish in behalf of the society those persons who defy the prohibition regardless of the nationality of the ship on board of which such acts take place.<sup>6</sup> It is significant, however, that that society, except with respect to the matter of piracy, has generally been reluctant to agree to such denunciations. Conversely, there happily remains widespread acceptance of the principle that the free and uninterrupted use of the high seas in seasons of peace is the privilege of the ships under the flags of every State.<sup>7</sup>

In examining, therefore, the nature and scope of rights of jurisdiction, with respect to occurrences on the high seas, it becomes necessary in each particular case to observe with care the exact relationship of the offended State to the place where the act productive of an adjudication was initiated or completed or took effect. Moreover, if consummated on board of a foreign vessel, there must be the collateral inquiry whether the act was impressed with an illegal quality by the law of nations, or whether the right to impose a penalty upon the actor was conferred by treaty, or whether, owing to the presence of extraordinary circumstances, the requirements of self-defense excused a disregard of normal obligations of restraint.<sup>8</sup>

The relationship between a vessel and the State to which it belongs is deemed sufficiently close to justify the latter in exercising jurisdiction with respect to occurrences on board.<sup>9</sup>

## (2)

§ 227A. The Exploitation of Riches of the Sea. Some acts committed on, or in special relation to, waters or to forms of animal or other life therein, may be regarded as detrimental to the interests of maritime or other States. When committed within territorial waters the sovereign thereof may encounter no difficulty, at least in principle, in enacting prohibitions and enforcing pen-

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"Lotus": "But it appears to be now universally admitted that, where a crime is committed in the territorial jurisdiction of one State as the direct result of the act of a person at the time corporeally present in another State, international law, by reason of the principle of constructive presence of the offender at the place where his act took effect, does not forbid the prosecution of the offender by the former State, should he come within its territorial jurisdiction." (*Id.*, 73.)

<sup>6</sup> See Piracy, *infra*, § 231.

<sup>7</sup> See President Grant, Annual Message, Dec. 1, 1873, Richardson's Messages, VII, 241, Moore, Dig., II, 897.

<sup>8</sup> While the exercise of jurisdiction occasioned by the action of the occupants of a foreign ship on the high seas may not in the particular case exceed the limits of legislative or judicial power fixed by international law or by treaty, the State which endeavors to prosecute an alien offender may be obliged to establish to the satisfaction of that other whose national is concerned that the local law has in fact been violated, and that any penalties thereof which have been enforced against the offender are applicable to and cover the offense charged. In a word, the general right to exercise jurisdiction howsoever arising, does not excuse action that is locally illegal.

<sup>9</sup> Mr. Marcy, Secy. of State, to Chevalier Bertinatti, Sardinian Minister, Dec. 1, 1858, MS. notes to Italian States, VI, 178, Moore, Dig., I, 930; Mr. Fish, Secy. of State, to Gen. Schenck, Minister to England, Nov. 8, 1873, MS. Inst. Great Britain, XXIII, 431, Moore, Dig., I, 931; Opinion of Mr. Cushing, Atty.-Gen., 8 Ops. Attys.-Gen., 73; *Crapo v. Kelly*, 16 Wall., 610; *Wilson v. McNamee*, 102 U. S. 572, 574.

See also *United States v. Flores*, 289 U. S. 137.

alties as against those who defy them, regardless of the nationality of the actors or of that of the vessels from which they operate. When, however, the acts are committed on the high seas, difficulties arise if the attempt be made to exercise a preventive jurisdiction over foreign vessels or their occupants. This is attributable to the circumstance that the conduct sought to be thwarted is not likely to be regarded as itself proscribed by the law of nations. Thus it is that the unrestricted and wanton destruction of some forms of animal life, may, in the absence of appropriate agreement, proceed at times unchecked save by the State to which the actors or their ships are deemed to belong.

Commendable efforts to prevent some exploitations of riches of the sea have, however, increasingly engrossed the attention of marine biologists as well as of statesmen; and their cooperative labors have paved the way for the negotiation of multi-partite agreements designed to restrain nefarious practices in relation particularly to the hunting of whales and seals.<sup>1</sup>

The convention for the Regulation of Whaling, concluded at Geneva September 24, 1931, signed on the part of the United States March 31, 1932, and proclaimed by the President January 16, 1935, is illustrative of the character of a recent and significant coöperative effort.<sup>2</sup> The parties agree to take, "within the limits of their respective jurisdictions," appropriate measures to ensure the application of the provisions agreed upon and the "punishment of infractions."<sup>3</sup> There is specified the groups of whales of which the taking or killing is prohibited; there is acknowledged the inapplicability of the convention to aborigines dwelling on the coasts of the territories of the parties, under limitations that are specified; there are provisions for methods of pursuing the industry of whaling, as well as the remuneration of participants; there are requirements concerning the licensing of vessels engaged in taking or treating whales, and the uses of territorial areas; there are obligations imposed on the parties in relation to the obtaining of biological information, and to the communication of statistical information regarding all whaling operations under their jurisdiction to an "International Bureau for Whaling Statistics at Oslo."<sup>4</sup> An impressive feature of the convention is the fact that the geographical limits within which its provisions are to be applied "shall include all the waters of the world, in-

§ 227A.<sup>1</sup> See J. L. Suárez, Report on the Exploitation of the Products of the Sea, to the Committee of Experts for the Progressive Codification of International Law, Dec. 8, 1925, League of Nations Doc. No. C.49.M.26.1926.V, *Am. J., Special Supplement*, July and Oct. 1926, XX, 231; Arnold Ræstad, "La Chasse à la Baleine en Mer Libre," *Rev. Droit Int.* (de Lapradelle), II, 595; P. C. Jessup, "L'Exploitation des Richesses de la Mer," with bibliography, *Recueil des Cours*, 1929, IV, 401; Gilbert Gidel, *Le Droit International Public de la Mer*, I, 437-479.

See, also, A. P. Daggett, "The Regulation of Maritime Fisheries by Treaty," *Am. J.*, XXVIII, 693; L. Larry Leonard, "Recent Negotiations Toward the International Regulation of Whaling," *Am. J.*, XXXV, 90.

<sup>2</sup> U. S. Treaty Vol. IV, 5372.

See Act of Congress, approved May 1, 1936, 49 Stat. 1246, to give effect to the convention. Also L. Larry Leonard, "Recent Negotiations toward the International Regulation of Whaling," *Am. J.*, XXXV, 90, 100-102.

<sup>3</sup> Art. 1.

<sup>4</sup> Art. 12.

See in this connection, *International Whaling Statistics*, X, edited by the Committee for Whaling Statistics appointed by the Norwegian Government, Oslo, 1937.

cluding both the high seas and territorial and national waters.”<sup>6</sup> It is equally impressive, however, that the convention does not appear to clothe a contracting party with the right to exercise a preventive jurisdiction on the high seas with respect to vessels other than its own.<sup>6</sup>

The preservation and protection of fur seals frequenting particular areas of the high sea, such as the North Pacific Ocean, and including the Seas of Bering, Kamchatka, Okhotsk and Japan, has long been a matter of concern to particular countries, embracing the United States.<sup>7</sup> To that end, the United States, Great Britain, Russia and Japan concluded on July 7, 1911, a convention designed to serve such a purpose.<sup>8</sup> According to Article I:

The High Contracting Parties mutually and reciprocally agree that their citizens and subjects respectively, and all persons subject to their laws and treaties, and their vessels, shall be prohibited, while this Convention remains in force, from engaging in pelagic sealing in the waters of the North Pacific Ocean, north of the thirtieth parallel of north latitude and including the Seas of Bering, Kamchatka, Okhotsk and Japan, and that every such person and vessel offending against such prohibition may be seized, except within the territorial jurisdiction of one of the other Powers, and detained by the naval or other duly commissioned officers of any of the Parties to this Convention, to be delivered as soon as practicable to an authorized official of their own nation at the nearest point to the place of seizure, or elsewhere as may be mutually agreed upon; and that the authorities of the nation to which such person or vessel belongs alone shall have jurisdiction to try the

<sup>6</sup> Art. 9.

<sup>6</sup> See also Agreement concerning the Regulation of Whaling between the United States and certain other powers, signed at London, June 8, 1937, U. S. Treaty Vol. IV, 5573; also Report of the Delegates of the United States to the International Whaling Conference, held in London, May 24–June 8, 1937, *id.*, 5579. “This agreement supplements and extends but does not supplant the convention of 1931. It is applicable to factory ships and whale-catchers and to land stations under the jurisdiction of the contracting parties. It prohibits the taking of baleen whales, *inter alia*, in waters south of 40° south latitude except during certain specified seasons. It also limits the period during which whales may be taken or treated in any area to not more than six months in any period of twelve months. The agreement provides for the furnishing to the International Bureau for Whaling Statistics at Sandefjord, in Norway, of statistics regarding whaling operations. The agreement which came into force on May 7, 1938, was amended by a protocol concluded at London on June 24, 1938.” (Hackworth, *Dig.*, I, 792.) For the text of the protocol concluded at London on June 24, 1938, see U. S. Treaty Series, No. 944.

<sup>7</sup> A State whose coasts are regularly frequented by seals, despite their migratory character, may not unreasonably assert a special interest in the protection of such animals, and accordingly endeavor by treaty to establish safeguards against their destruction on the high seas adjacent to such coasts and which the law of nations might forbid it otherwise to erect.

See *infra*, § 564, concerning the controversy between the United States and Great Britain in relation to the claim asserted by the former to exercise jurisdiction in Bering Sea, and to protect fur seals frequenting the islands of the United States in that sea, when the seals were encountered outside of territorial limits. See, especially, *The Fur Seal Arbitration*, Proceedings of the Tribunal of Arbitration under Convention of Feb. 29, 1892, Washington: Government Printing Office, 1895.

Concerning the North Atlantic Coast Fisheries Arbitration under convention between the United States and Great Britain of Jan. 27, 1909, which was interpretative of Art. I of the convention between the same parties of Oct. 20, 1818, see *supra*, § 147, *infra*, §§ 533 and 565. It suffices here to observe that the issues before the tribunal did not concern the character or extent of the right of the United States to demand that American fishermen pursue their vocation on the high seas adjacent to British territorial waters.

<sup>8</sup> U. S. Treaty Vol. III, 2966. See also Hackworth, *Dig.*, I, § 110, and documents there cited.

offense and impose the penalties for the same; and that the witnesses and proofs necessary to establish the offense, so far as they are under the control of any of the Parties to this Convention, shall also be furnished with all reasonable promptitude to the proper authorities having jurisdiction to try the offense.<sup>9</sup>

Provision was made for the distribution of seal skins taken under the authority of the several parties on specified or other islands or shores within their respective jurisdiction (mentioned in Article I).<sup>10</sup>

Through a note of October 23, 1940, the American Ambassador at Tokyo was informed by the Japanese Government that it abrogated the convention in accordance with the provisions of Article XVI thereof.<sup>11</sup>

By various bi-partite treaties the United States has at times agreed to restraints upon the exercise of the fishing industry within specified areas, embracing some on the high seas, frequented by American fishermen. The convention concluded with Great Britain, March 2, 1923, for the preservation of the halibut fishery of the North Pacific Ocean including Bering Sea is illustrative.<sup>12</sup> It should be observed that "the authorities of the nation" to which a person, vessel or boat belonged, "alone" was to "have jurisdiction to conduct prosecutions for the violation of the provisions of the preceding Article or of the laws or regulations which either High Contracting Party may make to carry those provisions into effect, and to impose penalties for such violations."<sup>13</sup> This convention was supplanted by one concluded with Canada May 9, 1930,<sup>14</sup> which was revised by a convention concluded with Canada, January 29, 1937.<sup>15</sup>

<sup>9</sup> U. S. Treaty Vol. III, 2967.

<sup>10</sup> Arts. X-XIV. There were, for example, two hundred seal skins allotted to the United States as its share of the take on Robben Island belonging to Japan, in 1934. See Ward T. Bower, *Alaska Fishery and Fur-Seal Industries in 1934*, Appendix I to Report of Commissioner of Fisheries for the Fiscal Year 1935, 67.

Declared the Secretary of Commerce in his Annual Report for 1934, in relation to the Bureau of Fisheries, at p. 95: "For the first time since the fur-seal treaty of 1911 became effective, the Government of the Dominion of Canada in 1933 elected to take delivery of its share of the seal skins taken at the Pribilof Islands, instead of 15 per cent of the net proceeds of sale. The skins accordingly were delivered to a representative of that Government at Seattle in August 1933."

<sup>11</sup> Dept. of State Bulletin, Nov. 9, 1940, 412.

<sup>12</sup> U. S. Treaty Vol. IV, 3982.

<sup>13</sup> Art. II. It was here provided that: "Every national or inhabitant, vessel or boat of the United States or of the Dominion of Canada engaged in halibut fishing in violation of the preceding Article may be seized except within the jurisdiction of the other party by the duly authorized officers of either High Contracting Party and detained by the officers making such seizure and delivered as soon as practicable to an authorized official of the country to which such person, vessel or boat belongs, at the nearest point to the place of seizure, or elsewhere, as may be mutually agreed upon."

See, also, Art. III, in which provision was made for the establishment of an International Fisheries Commission designed to investigate and make recommendations as to the regulation of the halibut fishery of the North Pacific Ocean, including Bering Sea.

<sup>14</sup> U. S. Treaty Vol. IV, 3999.

<sup>15</sup> U. S. Treaty Vol. IV, 4014. According to Art. III: "The High Contracting Parties agree to continue under this Convention the Commission as at present constituted and known as the International Fisheries Commission, established by the Convention for the preservation of the halibut fishery, signed at Washington, March 2, 1923, and continued under the Convention signed at Ottawa, May 9, 1930, consisting of four members, two appointed by each Party, which Commission shall make such investigations as are necessary into the life history of the halibut in the convention waters and shall publish a report of its

By the convention between the United States and Mexico to prevent smuggling and for certain other objects, concluded December 23, 1925, arrangement was made in Section III, in relation to fisheries, to conserve and develop marine life resources in waters off the Pacific coast of California and Lower California, embracing territorial as well as extra-territorial areas.<sup>16</sup> With the aid of an International Fisheries Commission designed to make appropriate studies and recommendations, and established by the convention,<sup>17</sup> there was contemplated the making of such prohibitory regulations as might be approved "by each Government." Moreover, the parties agreed that authorities of their respective ports should refuse to permit any and all fish or marine products to enter port if brought therein from the waters specified in Article X, and if the port authorities had reasonable grounds to believe that the master had obtained his cargo in violation of the laws of either party, the regulations which might be adopted, or the provisions of the convention.<sup>18</sup>

The interests of maritime States in relation to the exploitation of riches of the sea greatly vary. Those of the United States, except possibly with respect to the matter of whales, are confined to particular areas, which are frequented by ships of nationals, and which are for the most part in relative geographical proximity to its coasts. As a party to relevant conventions, the United States has acted conservatively, as by withholding even from other contracting parties the privilege of penalizing American ships seized on the high seas on account of the violation of accepted restraints.<sup>19</sup>

(3)

§ 227B. **Pollution of the Seas as by Oil.** Pollution of the sea as by oil is found to be productive of the destruction of sea birds, fish and marine grasses, the pollution of beaches and accumulations of oil which may drift into harbors and create a danger of fire.<sup>1</sup> In so far as pollution is the consequence of the "voluntary discharge of oil and oily mixtures"<sup>2</sup> from ships outside of territorial waters, it is believed that a State whose domain is adjacent to the polluted area is not prevented by the law of nations from exercising a preventive jurisdiction on the high seas if it be capable of establishing a direct causal connection be-

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activities from time to time." The same article sets forth in detail the further powers and functions of the Commission. See Act of Congress of June 28, 1938, 50 Stat. 325, 328, designed to give effect to the Convention.

See also Convention with Great Britain for Canada for Protection, Preservation, and Extension of the Sockeye Salmon Fisheries of the Fraser River System, concluded May 26, 1930, U. S. Treaty Vol. IV, 4002.

<sup>16</sup> U. S. Treaty Vol. IV, 4448, 4450.

<sup>17</sup> Art. XI.

<sup>18</sup> Art. XII.

<sup>19</sup> Declares Mr. Hackworth: "While it will be seen from the preceding pages that steps have been taken to preserve fur-seals, whales, and certain other fisheries, these steps are by no means adequate, particularly with respect to food fish. If supplies of these fish are to be assured for future generations the nations should forthwith come to a more definite understanding on measures to be adopted by them to prevent the promiscuous depletion of these fish." (Hackworth, Dig., I, 803.)

§ 227B.<sup>1</sup> See Report on the Work of the League since the Fifteenth Session of the Assembly, Part I, July 6, 1935, Series of League of Nations Publications, General, 1935, 2, p. 84.

<sup>2</sup> *Id.*

tween discharges within a particular area of those seas and damages sustained within its adjacent territorial limits. As a matter of fact, it is the damage produced within those limits whether on water or land, by what occurs outside thereof, that is likely to be of chief concern to maritime States.<sup>3</sup> Acts of pollution at points remote from land are of relatively slight interest to them.<sup>4</sup> These circumstances do not detract from the importance of coöperative efforts to check pollutions within specified areas of the high seas; and they simplify, moreover, the task of effecting practical deterrents through the operation of multi-partite arrangements.

The failure of interested States to put into operation a draft convention prepared at an international conference held in Washington in 1926,<sup>5</sup> has not deterred the League of Nations from making valiant effort, through the Advisory Committee for Communications and Transit, to pave the way for the consummation of a convention responsive to the requirements of interested maritime States, and designed to be made effective partly through the acceptance of an obligation to cause oil-carrying and oil-burning ships of the contracting parties to be equipped with appliances for separating water from oil.<sup>6</sup>

Effluents from industrial or sanitary establishments on land in close proximity to interior waters flowing into the sea may possess a toxicity which is deleterious to aquatic life both within and without territorial waters. Obviously, in such a situation, the territorial sovereign which may be assumed to evince an interest in the matter of prevention is capable of applying adequate restrictions without external aid. In its practical aspects, the situation in such a case presents, therefore, a problem of domestic rather than of international concern.

#### (4)

§ 227C. **Aspects of Sedentary Fisheries.** Aquatic life may associate itself in varying degrees of intimacy with areas that are geographically appurtenant to particular coasts without as well as within the territorial limits of the sovereign thereof.<sup>1</sup> The association may not suffice to give to a State an exclusive

<sup>3</sup> Declared the Secretary of Commerce, in the course of his Annual Report for 1934, in relation to the Bureau of Fisheries, at p. 92: "It has been found that the presence of crude oil in the water decreases the rate of feeding of the oyster and adversely affects the propagation of diatoms which are used by the oyster as food." In making this statement, the Secretary had reference to the development of new oil fields in the inshore waters in the Gulf of Mexico which were creative of a new difficulty for the oyster industry.

<sup>4</sup> Declared Mr. Jackson, Acting Commissioner of Fisheries, in a communication to the author, Dec. 7, 1935: "We have no information showing that pollution of the high seas by oil or other pollutants has been destructive to aquatic life. Such a situation is conceivable since the dumping of a large quantity of oil would certainly injure, if not destroy, the pelagic fish eggs, larval fishes, and planktonic food in the immediate area. The effect, no doubt, would be temporary since the oil would be rapidly dispersed until it became harmless."

<sup>5</sup> See Preliminary Conference on Oil Pollution of Navigable Waters, Washington, June 8-16, 1926, Washington, Government Printing Office, 1926. For text of draft convention, see *id.*, 444.

See, also, Gilbert Gidel, *Le Droit International Public de la Mer*, I, 480-484.

<sup>6</sup> See Pollution of the Sea by Oil, Organisation for Communications and Transit, League of Nations Doc. No. A.20.1935.VIII.

§ 227C. <sup>1</sup> The Grand Banks of Newfoundland, long frequented by cod, have been properly so called because they are a natural appendage to the country or geographical entity whose name they bear.

right to enjoy and control the fruits of an area that is on the high seas in proximity and adjacent to its territorial waters.<sup>2</sup>

Before the conclusion of its first treaty with Great Britain, the United States evinced concern lest the inhabitants of its New England coast be in some way restrained from continuing to fish for the cod that frequented the Grand Bank;<sup>3</sup> and the acknowledgment in the treaty of September 3, 1783, that the "people of the United States" should "continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other banks of Newfoundland; also in the Gulph of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time heretofore to fish,"<sup>4</sup> was a source of immense satisfaction.

Some forms of submarine life possess a sedentary aspect attributable to the closeness of a physical connection established with lands or coasts on which there is found a favorable and constant abiding place.<sup>5</sup> The abiding place may prove to be a submerged area of land extending seaward from the territory of an adjacent State and one which it may or may not in fact claim as its own. Oysters have made their beds in such places.

"There are certain banks outside the three-mile limit off the coasts of various British dependencies on which sedentary fisheries of oysters, pearl oysters, chanks or *bêches-de-mer* on the sea bottom are practised," and which, according to the view of the British Government expressed December 6, 1928, "have by long usage come to be regarded as the subject of occupation and property."<sup>6</sup>

<sup>2</sup> See statement by J. B. Moore, in his Digest, I, 716; also, *supra*, § 143.

<sup>3</sup> See Instructions for Negotiating a Treaty of Commerce with Great Britain, Aug. 14, 1779, Secret Journals of Congress, II, 229, Freeman Snow, Treaties and Topics in American Diplomacy, 1894, 55; Report of Committee of Congress, Aug. 16, 1782, Secret Journals of Congress, III, 161, Freeman Snow, *id.*, 57. See statement by Freeman Snow, *id.*, 427-429.

<sup>4</sup> Art. III, Malloy's Treaties, I, 588.

<sup>5</sup> It should be noted that some species of non-migratory fish may form a close and abiding connection with a particular submerged coast in consequence of the character of its formation, and thereby attain a relationship therewith such as to inspire the sovereign of the territory to which such coast is appurtenant to claim as its own, or as under its exclusive control, this product of the sea. As a means, however, of fortifying its claim, that sovereign may prefer to seek acknowledgment that the area concerned, even when located more than three marine miles from low water mark, is within its territorial waters, rather than to base its pretensions on the theory that the character of the relationship between the fish and their habitat, and the connection between that habitat and adjacent territorial waters, create a special right to control the pursuit of the fish on the high seas. See The Special Case of Norway, *supra*, § 144B.

<sup>6</sup> British communication to the Preparatory Committee of the Conference for the Codification of International Law, at the Hague, 1930, Bases of Discussion, II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 162.

See, in this connection, Edgar Thurston, Pearl and Chank Fisheries of the Gulf of Manaar, Madras Government Museum, Bulletin No. 1, 1894; McNair's 4 ed. of Oppenheim, I, p. 507, note 1; Jessup, Law of Territorial Waters, 14-17; Report of the American Consul General at London, to Secy. Hughes, Aug. 23, 1923, Hackworth, Dig., II, 677; also proceedings in the House of Commons, May 2, 1923, as quoted in Hackworth, Dig., II, 679.

In the case of *Annakumar Pillai v. Muthupayal*, 27 Indian Reports, Madras Series, 551, at 572, it was declared that Palk's Bay, in which certain chank beds were located, was to be regarded "as an integral part of His Majesty's dominions." Declares Sir Cecil Hurst: "If the question arose a similar decision might possibly be given as to the Gulf of Manaar. Even if it were not, however, the claim to the ownership of the pearl and chank beds in that gulf could be based on long usage and uncontested enjoyment; and the right to legislate with regard to these beds could be rested on the ground of their ownership." He adds: "Wherever it can be shown that particular oyster beds, pearl banks, chank fisheries, sponge fisheries or whatever may be the particular form of sedentary fishery in question outside the



There are a few other instances where sponge or other forms of sedentary fisheries outside of territorial waters have been claimed by the adjacent territorial sovereign.<sup>7</sup> Inasmuch as such assertions have been respected by the outside world there is emphasized the fact that the character of the association of the oyster and certain other forms of aquatic life with lands subjacent to the high sea, and the relationship of such land to territory over which an adjacent State is the sovereign, are elements that unite to clothe that State with special equities to which deference should generally be paid. It may be observed that the United States is not known to have raised objection to the preferring of claims by other States to sedentary fisheries appurtenant to their coasts. "The American oyster fishery is domestic, since that fishery is confined to the coastal waters."<sup>8</sup> The point to be emphasized is that the character of the relationship between some forms of aquatic or piscatorial life to a submerged area of land appurtenant to the coastal domain of a State may under some circumstances suffice to clothe it with the right to claim for itself exclusive privileges in the maintenance and exploitation of the products of that life; and that the value of that claim is not necessarily diminished by the fact either that such area is subjacent to a portion of the high seas, or that it is or may not be claimed by such State as a part of its territory.<sup>9</sup>

## (5)

§ 227D. **The Alaska Salmon Fisheries.** In November, 1937, the Government of the United States made complaint to Japan that for some seven years Japanese fishing fleets made up of floating canneries and auxiliary vessels of various types had been present in the Bristol Bay area of western Alaska during the salmon fishing season and had engaged in salmon fishing therein, thus raising the question concerning the protection and perpetuation of the salmon resources in those and other Alaskan waters.<sup>1</sup> The regular appearance in Bristol

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three-mile limit have always been kept in occupation by the Sovereign of the adjacent land, ownership of the soil of the bed of the sea where the fishery was situated may be presumed, and the exclusive right to the produce to be obtained from these fisheries may be based on their being a produce of the soil." (*Brit. Y.B.*, 1923-1924, 41 and 40, respectively.)

<sup>7</sup> "The Bey of Tunis has, for instance, claimed the exclusive right to the sponges on a bank outside the three-mile limit off the coast of Tunis by the continuous and unquestioned enjoyment of the *fructus* of these banks. Such enjoyment would constitute a title to the bank which foreign States would no doubt recognise and would oblige their nationals to recognise. Similarly, Mexico is said to have legislated for regulating pearl fisheries off the Mexican coast though outside the three-mile limit." (*Id.*, 41.)

See, also, discussion in Gilbert Gidel, *Le Droit International Public de la Mer*, I, 488-501.

<sup>8</sup> Mr. Jackson, Acting Commissioner of Fisheries, to the author, Dec. 7, 1935.

See Lauterpacht's 5 ed. of Oppenheim, I, § 287bb.

<sup>9</sup> On Sept. 10, 1918, the Department of State informed Mr. Frank R. Newton that "the United States has no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters adjacent to the coast," and that, therefore, it did not appear to be possible for the United States to grant to him the leasehold or other property rights in the ocean bottom which he desired. Hackworth, *Dig.*, II, 680.

§ 227D. <sup>1</sup> See summary of statement made on Nov. 22, 1937, by the American Government, Dept. of State Press Releases, March 26, 1938, 413.

See P. C. Jessup, "The Pacific Coast Fisheries," *Am. J.*, XXXIII, 129; J. W. Bingham, Report on the International Law of Pacific Coastal Fisheries, Stanford University Press, California, 1939; E. W. Allen, "The North Pacific Fisheries," *Pacific Affairs*, X, 136.

Also Hackworth, *Dig.*, I, § 111, and documents there cited.

Bay of Japanese fishery survey vessels (said to be making a three-year fishing survey of the salmon resources of Bristol Bay), coupled with the operations of Japanese fishing fleets, were said to have caused deep concern among sections of the American public with regard to the object and significance of such activities. It was declared that salmon fishing on a substantial scale even without the authority of the Japanese Government by unlicensed Japanese craft was a matter of concern which affected American interests. Anxiety was expressed over the depletion of salmon resources of Alaska which had been developed and preserved primarily by the American Government in coöperation with private interests to promote propagation and permanency of supply. These measures of conservation were said to have raised the salmon pack to the highest levels in the history of the industry. Reference was also made to the growth of the industry, and to the revenues needed by Alaska. One aspect of the American claim which deserves special attention was thus referred to:

Large bodies of American citizens are of the opinion that the salmon runs of Bristol Bay and elsewhere in Alaskan waters are an American resource; that the salmon fisheries relate to and are linked with the American continent, particularly the northwest area; and that for all practical purposes the salmon industry is in fact a part of the economic life of the Pacific northwest coast. The fact that salmon taken from waters off the Alaskan coast are spawned and hatched in American inland waters, and when intercepted are returning to American waters, adds further to the conviction that there is in these resources a special and unmistakable American interest.

The Bristol Bay red salmon spawn in the tributary rivers and lakes of the adjacent region; the young hatch and remain in their fresh-water habitat for one or two years and then migrate to sea. After the seaward migration the salmon return in two or three years to their native streams where they spawn and die. It is during the spawning migration that salmon are exposed to commercial fishing, and the need for conservation measures arises.

In the principal Alaska fishing areas and particularly in Bristol Bay, salmon appear in runs near the surface of the water and, in large part because of the shallowness of these waters, are subject to capture chiefly after they have passed from the open ocean to the continental shelf. The continental shelf, extending for a considerable distance from shore, thus becomes a kind of bridge between the deep sea and the inland rivers and lakes where salmon spawn.<sup>2</sup>

The American Government declared that the safeguarding of these resources involved "important principles of equity and justice," and it appeared to conclude that the United States was possessed of the right to protect the Alaska salmon industries.<sup>3</sup>

<sup>2</sup> Dept. of State Press Releases, March 26, 1938, 412, 414-415.

<sup>3</sup> The Department of State said in this connection: "It must be taken as a sound principle of justice that an industry such as described which has been built up by the nationals of one country cannot in fairness be left to be destroyed by the nationals of other countries. The American Government believes that the right or obligation to protect the Alaska salmon

On March 25, 1938, the Department of State announced that as a result of discussions between the American and Japanese Governments, the Japanese Government had given, "without prejudice to the question of rights under international law," assurance that that Government was suspending the three-year salmon-fishing survey in the Bristol Bay area; and also that inasmuch as salmon-fishing by Japanese vessels was not permitted without licenses from the Japanese Government and as that Government had been refraining from issuing such licenses to those vessels which desired to proceed to the Bristol Bay area to fish for salmon, it would, on its own initiative continue to suspend the issuance of such licenses; and that in order to make effective this assurance, the Japanese Government was prepared to take, if and when conclusive evidence was presented that any Japanese vessels engaged in salmon-fishing on a commercial scale in the waters in question, necessary and proper measures to prevent any such further operations.<sup>4</sup> This arrangement or agreement left unsettled the question of international law that was involved.

The relationship of the salmon of the Bristol Bay area to American territory as revealed by the statement of the American Government quoted above is a fact which creates the special interest of the United States in preventing the depletion of these resources and which clothes it with a relatively superior equity when asserting that interest. Yet the habitual home-coming of the anadromous fish to their American inland-water domicile would hardly suffice to cause them to belong to the United States or to give them an American piscatorial nationality. Accordingly, under the existing law one encounters difficulty in maintaining that the sovereign of their domicile may legally prevent the taking or destruction of these migratory fish when they rove the seas and are outside of territorial waters.<sup>5</sup> To acknowledge this conclusion is not, however, to admit that the species should be left to destruction or that the American-bound pack should find no mercy in the course of its return to American waters; it signifies merely that vigorous effort should be made by the United States to provide by treaty for measures designed to preserve and perpetuate the salmon life on the Pacific coast of America.<sup>6</sup> Its demand that such measures be made the matter

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fisheries is not only overwhelmingly sustained by conditions of their development and perpetuation but that it is a matter which must be regarded as important in the comity of the nations concerned." (*Id.* 416-417.)

<sup>4</sup> Dept. of State Press Releases, March 26, 1938, 412.

<sup>5</sup> It may be that in point of fact some foreign fishing within Bristol Bay takes place in waters that may be fairly regarded as belonging to the United States as a part of the territory thereof. See Bays, *The General Principle, Certain Applications*, *supra*, § 146. The territorial claim of the United States as revealed by the statutory law is a broad one. According to an Act of Congress of April 7, 1938, in the area embracing Bristol Bay and its arms and tributaries, no person shall at any time fish for or take salmon with a stake net or set net for commercial purposes unless he be a citizen of the United States and shall have resided continuously theretofore for a period of at least two years within that area. (52 Stat. 208.) It is not assumed that the United States was by this enactment asserting a right to control the taking of salmon on the high seas.

See also Act of June 25, 1938 "to prevent aliens from fishing in the waters of Alaska," 52 Stat. 1174.

<sup>6</sup> See *Aspects of Sedentary Fisheries*, *supra*, § 227C; *The Exploitation of Riches of the Sea*, *supra*, § 227A; *The Special Case of Norway*, *supra*, § 144B.

of international agreement would be stronger and far less calculated to arouse opposition than one assertive of a claim that they were appurtenant to the exclusive jurisdiction of the United States as the sovereign of the area where the salmon found their habitat.

(6)

**§ 228. Aspects of Jurisdiction Resulting from Acts of Self-Defense.**

It has been observed that on grounds of self-defense a State may under certain circumstances not unreasonably exercise its strong arm outside of its own domain, both on sea and land, and in derogation of the normal rights of another power.<sup>1</sup> Such action may give rise to adjudications in a local court, and these may involve inquiry as to the nature of the acts which the territorial sovereign sought to prevent, and may contemplate the imposition of penalties upon the actors.

Inasmuch as the exercise of jurisdiction, involving a judicial proceeding, differs sharply in character from the taking of preventive measures, as by a military or naval force, in order to avert instant danger to the territory or inhabitants of a State, there may be cases where an adjudication in a local forum cannot well be regarded, from an international point of view, as necessarily incidental to the defense of the territorial sovereign. Thus it may be contended with force, that the grounds justifying interference with a foreign ship on the high seas failed wholly in the particular case to warrant the instigation of local criminal proceedings against the persons controlling the vessel after it had been seized. If such proceedings are not internationally illegal, it must be for the reason that the persons controlling the ship were not only guilty of conduct which the prosecuting State had the right to thwart, but also committed acts of such a kind and so affecting that State that in proceeding criminally against the offenders it might count on the definite acquiescence of maritime powers generally.

It should be observed that as an incident in the defense of itself from the commission of acts which it may assert the right to thwart on the high seas, a State may not unreasonably seek to impose penalties by judicial process upon the actors as a means of preventing the recurrence of illegal activities. In such event, the judicial department of the government becomes an instrumentality in safeguarding the State. It will be seen that the United States has been confronted with a situation where it felt obliged as a normal means of self-defense, applied in the first instance through its strong arm on the high seas, to exercise its judicial power as a subsidiary means of vindicating its rights.<sup>2</sup>

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See Convention with Great Britain for Canada for Protection, Preservation, and Extension of the Sockeye Salmon Fisheries of the Fraser River System, signed on May 26, 1930, U. S. Treaty Vol. IV, 4002.

§ 228. <sup>1</sup> Acts on the High Seas, Case of The *Virginus*, *supra*, § 68. See oral argument of Mr. Carter, in behalf of the United States, Fur Seal Arbitration, *Proceedings*, XII, 101-102, 246-249.

<sup>2</sup> See *infra*, § 235.

## (7)

## VISIT AND SEARCH

## (a)

§ 229. **In General.** The right to visit and search a foreign vessel on the high seas is regarded as pertaining to a belligerent as such,<sup>1</sup> and hence a privilege which, in time of peace, no State may justly exercise.<sup>2</sup> That the existence of the right depends upon that also of a state of war does not seem to be due to the belief that a State is deterred by any rule of law from defending itself in seasons of peace by the same means which it may employ when it is a belligerent.<sup>3</sup> The true reason would appear to be that what may be and usually is a frequent need of a belligerent, rarely, if ever, becomes a necessary mode of safeguarding the vessels of a State which is at peace.<sup>4</sup>

It is conceivable that on grounds of self-defense a State although not engaged in war might, under extraordinary circumstances, offer satisfactory excuse for the visit and search by a public vessel of a foreign ship. The contingency furnishing conditions necessary to justify such action would, however, appear to be unlikely to arise with any degree of frequency.<sup>5</sup> Even in special situations where visit and search may offer a highly useful means of ascertaining whether a foreign vessel on the high seas is engaged in an endeavor which a State may not unreasonably essay to thwart, such as an attempt unlawfully to introduce forbidden articles into its territory, recourse to such procedure is likely to await the consummation of an appropriate agreement manifesting acquiescence on the part of the State of the flag.<sup>6</sup> It is believed, therefore, to be neither unscientific,

§ 229. <sup>1</sup> Lord Stowell in the case of *Le Louis*, 2 Dodson, 210, 245; *The Antelope*, 10 Wheat. 66; *The Marianna Flora*, 11 Wheat. 1; Mr. Fish, Secy. of State, to Mr. Borie, Secy. of Navy, May 18, 1869, 81 Dom. Let., 124, Moore, Dig., I, 193.

See generally, Memorandum from the Office of the Solicitor for the Department of State, Dec. 19, 1908, Hackworth, Dig., II, 659.

*Cf.* Visit and Search, *infra*, § 724.

<sup>2</sup> President Fillmore, Annual Message, Dec. 2, 1851, Richardson's Messages, V, 117, Moore, Dig., II, 888; Mr. Marcy, Secy. of State, to Mr. Cueto, Spanish Minister, March 28, 1855, contained in Senate Ex. Doc. 1, 35 Cong., Special Sess., 4, Moore, Dig., II, 889; Mr. Cass, Secy. of State, to Mr. Osma, Peruvian Minister, May 22, 1858, Brit. and For. State Pap., L, 1145, Moore, Dig., II, 891; Mr. Fish, Secy. of State, to Mr. Adee, Chargé at Madrid, Dec. 31, 1873, For. Rel. 1874, 976, Moore, Dig., II, 899; Mr. Evarts, Secy. of State, to Mr. Fairchild, Minister to Spain, Aug. 11, 1880, For. Rel. 1880, 922, Moore, Dig., II, 903; Mr. Gresham, Secy. of State, to Mr. Taylor, Minister to Spain, March 14, 1895, For. Rel. 1895, II, 1177, Moore, Dig., II, 908.

<sup>3</sup> See oral argument of Mr. Carter, *Proceedings*, Fur Seal Arbitration, XII, 246; oral argument of Mr. Phelps, *id.*, XV, 206-207.

<sup>4</sup> See Opinion of the Solicitor for the Department of State, Jan. 9, 1924, Hackworth, Dig., II, 663.

<sup>5</sup> "If a piratical vessel were known to be cruising in certain latitudes, and a national armed ship should fall in with a vessel sailing in those regions, and answering the description given of the pirate, the visitation of a peaceable merchantman in such a case, with a view to ascertain her true character, would give no reasonable cause of offense to the nation to which she might belong, and whose flag she carried." Mr. Cass, Secy. of State, to Mr. Osma, Peruvian Minister, May 22, 1858, Brit. and For. State Pap., L, 1145, Moore, Dig., II, 891, 892.

See in this connection, *infra*, §§ 235, 235A, 235B, 235C.

<sup>6</sup> See, for example, convention between the United States and Great Britain for the Prevention of Smuggling of Intoxicating Liquors, of Jan. 23, 1924, U. S. Treaty Vol. IV, 4225. See *The American Liquor Treaties*, *infra*, § 235B.

nor unuseful to maritime commerce, for States generally to assert that unless conferred by special arrangement, the privilege of visit and search is the possession solely of a belligerent.<sup>7</sup>

## (b)

§ 230. **As a Means of Suppressing the Slave Trade.** It is said that the law of nations does not permit the visitation and search of foreign vessels in time of peace as a means of suppressing the slave trade.<sup>1</sup> The United States long adhered to that position.<sup>2</sup> Great Britain renounced, in 1858, claims which it had previously asserted in support of a contrary doctrine.<sup>3</sup> The United States, after having long declined to conclude an agreement yielding to foreign vessels a right to visit and search American ships suspected of being engaged in such traffic,<sup>4</sup> became, in 1862, a party to a convention with Great Britain providing that the vessels of war of the contracting parties, clothed with special instructions, might visit such merchant vessels as should, upon reasonable grounds, be suspected of participation in the African slave trade, or of having been fitted out for that purpose, and, upon well-founded suspicions, send them in for trial before mixed courts.<sup>5</sup> By an additional convention of June 3, 1870, the mixed courts

<sup>7</sup> "The fundamental principle of the international maritime law is that no nation can exercise a right of visitation and search over foreign vessels pursuing a lawful avocation on the high seas, except in time of war or by special agreement." (The *Wanderer*, American and British Claims Arbitration, under special agreement concluded between the United States and Great Britain, Aug. 18, 1910, Nielsen's Report, 459, 462.) See also Cases of The *Jessie*, Thomas F. Bayard, and Pescawha, *id.*, 479, 480.

§ 230. <sup>1</sup> *Le Louis*, 2 Dodson, 210; The *Antelope*, 10 Wheat. 66, 116-123.

"It was at first sought to found a right of visit and search in such cases on the theory that the trade constituted a violation of the law of nations, for which, as in the case of piracy, the offender might be seized on the high seas by the cruiser of any power. This theory was not accepted; but, while rejecting it, the British courts, in the early part of the nineteenth century, took the ground that, where a foreign vessel was captured on the high seas and was afterwards proceeded against in the British courts as a prize, the fact that she was engaged in the slave trade, if the act was forbidden by the laws of her own country as well as by those of Great Britain, would defeat a claim to restitution." Moore, Dig., II, 914, citing The *Amédée*, 1 Acton, 240; The *Fortuna*, 1 Dodson, 81; The *Diana*, 1 Dodson, 95.

<sup>2</sup> Mr. Adams, Secy. of State, to Messrs. Gallatin and Rush, Nov. 2, 1818, Am. State Pap. For. Rel. V, 72, 73, Moore, Dig., II, 918; Mr. Adams, Secy. of State, to Mr. Canning, British Minister, Aug. 15, 1821, MS. Notes to For. Leg., III, 22, Moore, Dig., II, 919; Mr. Adams, Secy. of State, to Mr. Hyde de Neuville, French Minister, Feb. 22, 1822, MS. Notes to For. Leg., III, 50, Moore, Dig., II, 920; Mr. Adams, Secy. of State, to Mr. Canning, British Minister, June 24, 1823, MS. Notes to For. Leg., III, 141, Moore, Dig., II, 921; Mr. Webster, Secy. of State, to Mr. Cass, Minister to France, April 5, 1842, MS. Inst. France, XIV, 272, Moore, Dig., II, 929; Mr. Webster, Secy. of State, to Mr. Everett, Minister to England, March 28, 1843, Webster's Works, VI, 331-342, Moore, Dig., II, 935; U. S. Senate Resolution, June 16, 1858, For. Rel. 1874, 963, Moore, Dig., II, 946.

<sup>3</sup> Mr. Cass, Secy. of State, to Mr. Dallas, Minister to England, Feb. 23, 1859, MS. Inst. Great Britain, XVII, 150, Moore, Dig., II, 941; Same to Same, June 30, 1859, MS. Inst. Great Britain, XVII, 115, Moore, Dig., II, 944; Lord Malmesbury, British For. Secy. to Lord Napier, British Minister, June 11, 1858, Brit. and For. State Pap., L, 737, 738-739, Moore, Dig., II, 943.

<sup>4</sup> See documents contained in Moore, Dig., II, 918 to 941, relating to the Treaty of Ghent of Dec. 24, 1814, and to subsequent discussion and negotiations between the United States and Great Britain.

According to Article VIII of the Webster-Ashburton treaty of Aug. 9, 1842, it was provided that the United States and Great Britain should each maintain on the African coast a sufficient squadron to enforce "separately and respectively" their own laws for the suppression of the slave trade. Malloy's Treaties, I, 655.

<sup>5</sup> Malloy's Treaties, I, 674, 676. See, also, additional Articles concluded Feb. 17, 1863, *id.*,

were abolished, and arrangement made that the jurisdiction formerly lodged in them should be exercised by courts of one or the other of the contracting parties. It was agreed also that upon the detention by a cruiser belonging to one party of a merchant vessel of the other, the ship should be sent in to a port of its own country for adjudication, or handed over to a cruiser of its nationality, if one should be available in the neighborhood.<sup>6</sup> The United States became a party of the General Act of Brussels of July 2, 1890, "permitting, for the purpose of repressing the slave-trade, a mutual search within a defined zone on the eastern coast of Africa of vessels of less than five hundred tons burden."<sup>7</sup> Some years after its signature, the United States ratified, subject to "an understanding," the Convention revising the General Act of Berlin of February 26, 1885, and the General Act and Declaration of Brussels of July 2, 1890, signed at Saint-Germain-en-Laye, September 10, 1919.<sup>8</sup> Through Article 11 thereof, the Signatory Powers, exercising sovereign rights or authority in African territory undertook to see to the preservation of the native populations and the improvement of their moral and material conditions. They agreed, moreover, in particular, to "secure the complete suppression of slavery in all its forms and of the black slave trade by land and sea."<sup>9</sup>

The so-called Slavery Convention signed at Geneva September 25, 1926, and to which the United States adhered, under reservation, in 1929,<sup>10</sup> embraced an undertaking on the part of the contracting parties to negotiate a general convention with regard to the slave trade which would give them "rights and impose upon them duties" of the same nature as those provided for in specified portions of the convention of June 17, 1925, relative to the Supervision of the International Trade in Arms and Ammunition and in Implements of War.<sup>11</sup> The provisions of the latter, to which reference was made,<sup>12</sup> permitted within a maritime zone, which included the Red Sea, the Gulf of Aden, the Persian Gulf and the Gulf of Oman, under specified geographical limits, the exercise of the right of visit and search, outside of territorial waters, of "presumed" native vessels of under five hundred tons burden flying the flag of one of the contracting parties or flying no flag. The penalization of a seized vessel or crew was to be yielded to the authority of the State whose flag the vessel was entitled to fly.<sup>13</sup>

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I, 687. Concerning the treaty of 1862, see Moore, Dig., II, 946-948, and documents there cited. See, in this connection, H. G. Soulsby, *The Right of Search and the Slave Trade in Anglo-American Relations (1814-1862)*, Baltimore, 1933.

<sup>6</sup> Arts. II and III, Malloy's Treaties, I, 694.

<sup>7</sup> For the text of the convention, see Malloy's Treaties, II, 1964.

<sup>8</sup> U. S. Treaty Vol. IV, 4849.

<sup>9</sup> *Id.*, 4853.

<sup>10</sup> U. S. Treaty Vol. IV, 5022.

<sup>11</sup> Art. 3. For text of the Convention of June 17, 1925, see U. S. Treaty Vol. IV, 4903.

<sup>12</sup> These were Arts. 12, 20, 21, 22, 23, 24, and paragraphs 3, 4 and 5 of Section II of Annex II.

<sup>13</sup> Section II of Annex II to the convention provided as an incident of maritime supervision, elaborate regulations for the visit and search and penalization of vessels engaged in the illicit conveyance of articles covered by specified categories.

According to Art. 308 of the de Bustamante Code of Private International Law, annexed to the Convention on Private International Law adopted at the Sixth International Conference of American States at Habana, Feb. 20, 1928, "trade in negroes and slave traffic" are

It may be noted that the convention concluded by the United States, Great Britain, Russia and Japan, July 7, 1911, for the preservation and protection of the fur seals frequenting the North Pacific Ocean contemplated the visit and search of ships under the flags of the contracting parties when suspected of being engaged in pelagic sealing within specified waters thereof, embracing Bering Sea.<sup>14</sup>

## (8)

## PIRACY

## (a)

§ 231. **In General.**<sup>1</sup> Piracy is primarily an offense of the high sea,<sup>2</sup> although it may also be an offense committed in the air over that sea. Inasmuch as an act of piracy must necessarily be committed within a place outside of the territory of a State,<sup>3</sup> there is no room for the commission of the offense on land

embraced within the category of "offenses" against international law which, when committed on the high sea, in the open air and on "territory not yet organized into a State," are declared to be punishable by the captor in accordance with its penal laws. Report of the Delegates of the United States of America to the Sixth International Conference of American States, Washington, 1928, Appendix 6, 143.

<sup>14</sup> Art. I, U. S. Treaty Vol. III, 2967.

The Convention for the Regulation of Whaling, concluded at Geneva, Sept. 24, 1931, and signed on behalf of the United States on March 31, 1932, did not provide for the exercise of visit and search as a mode of thwarting the commission of proscribed acts or of penalizing offending vessels or their crews. See U. S. Treaty Vol. IV, 5372.

§ 231.<sup>1</sup> See, generally, Hall, Higgins' 8 ed., §§ 81-82; Dana's Wheaton, 193-196; Dana's notes, *id.*, Nos. 83 and 84; Fauchille, 8 ed., §§ 483<sup>40-58</sup>; Calvo, 5 ed., 576-605; Rivier, I, 248-251; Woolsey, 6 ed., 233-239; McNair's 4 ed. of Oppenheim, §§ 272-280. See, also, Paul Stiel, *Der Tatbestand der Piraterie nach geltendem Völkerrecht*, Leipzig, 1905; G. Tambaro, *Pirateria*, Turin, 1910; D. A. Azuni, *Recherches pour Servir à l'Histoire de la Piraterie*, Genoa, 1816; Edwin D. Dickinson, "Is the Crime of Piracy Obsolete?," *Harvard L. R.*, XXXVIII, 334; L. V. Ledebor, *La recousse sur les pirates*, *Bibliotheca Visseriana*, IX, 137; V. V. Pella, "La Répression de la Piraterie," *Recueil des Cours*, 1926, V, 145; Gilbert Gidel, *Le Droit International Public de La Mer, Le Temps de Paix*, Paris, 1932, I, 303, with bibliography; James J. Lenoir, "Piracy Cases in the Supreme Court," *Journal of Criminal Law and Criminology*, XXV, 532.

See Charles M. Endicott, *Narrative of the Piracy and Plunder of the Ship Friendship*, of Salem, on the West Coast of Sumatra, 1831, Salem, 1859; J. Franklin Jameson, *Privateering and Piracy in the Colonial Period: Illustrative Documents*, New York, 1923.

See also Committee of Experts for the Progressive Codification of International Law, Jan. 29, 1926, with annexed Report by Messrs. Matsuda and Wang Chung-Hui, in relation to the matter of Piracy, League of Nations Doc. No. C.196.M.70.1927.V, 116, *Am. J.*, XX, 1926, *Supplement*, 222, 223; Draft Convention and Comment on Piracy, prepared by the Research in International Law of Harvard Law School, with a collection of Piracy Laws of various countries, *Am. J.*, XXVI, 1932, *Supplement*, 743. The Reporter was Joseph W. Bingham, and the Editor of the Collection of Piracy Laws was Stanley Morrison.

See also documents in Hackworth, Dig., II, §§ 203-204.

<sup>2</sup> See McNair's 4 ed. of Oppenheim, § 277. Cf., however, V. V. Pella, "La Répression de la Piraterie," *Recueil des Cours*, 1926, V, 145, 223.

"Whatever the definition of piracy may be, in my opinion piracy is a maritime offence, and what took place on this river, running partly in Brazil and partly in Bolivia, far up country, did not take place on the ocean at all. That distant place was not the theatre on which piracy could be committed." (Vaughan Williams, L. J., in *Republic of Bolivia v. Indemnity Mutual Marine Assurance Company, Limited* (1909), 1 K.B. 785, 799.)

"It would seem, therefore, that a tug, moored to a pier in New York Harbor, may not be said to be upon the high seas and that its theft was accordingly not an act of piracy." (Frankenthaler, J., in *Britannia Shipping Corporation v. Globe & Rutgers Fire Ins. Co.*, 244 N. Y. Supp. 720, 723.)

<sup>3</sup> See Art. 3, Harvard Draft Convention on Piracy, *Am. J.*, XXVI, *Supplement*, 743.



other than that which is *res nullius*. When pirates commit depredations within the domain of a particular State, the actors are, so long as they remain there, subject to the sole jurisdiction of the territorial sovereign.<sup>4</sup>

The offense of piracy derives its internationally illegal aspect from the will of the international society. That society, by common understanding reflected in the practice of States generally, yields to each of its members jurisdiction to penalize any individuals who, regardless of their nationality, commit certain acts within certain places.<sup>5</sup> This common yielding of a jurisdiction to punish, which the individual State could not itself otherwise lawfully exercise, with respect, for example, to the acts of aliens on foreign vessels on the high seas, has important implications.<sup>6</sup> It signifies that what is so punishable must be regarded as internationally illegal, in the sense that it defies what the law of the international society is deemed itself to forbid.<sup>7</sup> Of this fact, the legislation

<sup>4</sup> That sovereign may in fact describe the offenders who there commit offenses by way of continuation of piratical conduct on the high sea as pirates, and prosecute them accordingly. See 18 U.S.C.A. § 493 (Criminal Code, section 302.).

Obviously, a State may prosecute a national on account of acts which in disobedience to its commands he commits within the territorial limits of a foreign State; and the prosecuting State may go so far as to make its statutory law in relation to piracy applicable to offenses committed by nationals within those territorial limits. See *People v. Lol-lo and Saraw*, 43 Philippine Islands, 19, 22, where it was declared by Malcolm, J.: "The jurisdiction of piracy unlike all other crimes has no territorial limits. As it is against all so may it be punished by all. Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign State, 'for those limits, though neutral to war, are not neutral to crimes.' (U. S. vs. Furlong, 1820, 5 Wheat. 184.)."

<sup>5</sup> "Piracy by law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offense against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish." (Moore, J., dissenting opinion in the Case of the S.S. "Lotus," Judgment No. 9, Publications, Permanent Court of International Justice, Series A, No. 10, 70.)

It is "the rejection of all public rule" by the pirate which Westlake regards as the reason for "the universality of the authority and jurisdiction" over him. Int. Law, 2 ed., I, 181-183. Hall emphasizes the fact that as piratical acts are "done under conditions which render it impossible or unfair to hold any State responsible for their commission," and that as no recourse can, therefore, be had to any government for redress, the right of seizure and punishment is the possession of every State. Hall, Higgins' 8 ed., § 81.

See *In re Piracy Jure Gentium* [1934], A.C. 586, 589.

<sup>6</sup> In the course of the opinion of the Court in the case of *United States v. Smith*, Mr. Justice Story said: "And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment." 5 Wheat. 153, 162.

<sup>7</sup> "Merchandise is not confiscated, voyages are not broken up, ships are not condemned, for acts that are innocent; these severe and destructive inflictions are penalties imposed for acts that are unlawful. . . . Obviously, the determination of the question whether an act is lawful or unlawful depends not upon the circumstance that the right or duty to punish it is committed to one agency or another, but upon the fact that it is or is not punishable. The proof that it is unlawful is found in the fact that its commission is penalized. All acts for the commission of which international law prescribes a penalty are in the sense of that law unlawful." (J. B. Moore, "Contraband of War," Philadelphia, 1912, 19, 20.)

A contrasting view is seemingly expressed by the eminent reporter in the Introduction to the Harvard Draft Convention on Piracy, where he declares: "Since, then, pirates are not criminals by the law of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many States for punishing foreigners whose piratical offense was committed outside the State's ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offense by the law of nations, in

of some States, embracing the United States, appears to have taken cognizance in providing for the punishment of one who "commits the crime of piracy as defined by the law of nations."<sup>8</sup> Those States have thus borne testimony to their conclusion that there are forms of conduct that may be fitly so described. Accordingly, the exercise of jurisdiction by the individual State for the purpose of prosecuting one who is charged with the commission of such an offense appears to support in most realistic fashion the theory that international law may, as a means of preserving and improving an amicable and reasonable relationship between States, both address its injunctions to individuals as such, and also simultaneously enable the several members of the international society for sake of a common interest, to punish those who are contemptuous of what that law forbids.<sup>9</sup>

Local legislation, such as that of the United States, may provide for the punishment of persons committing acts described therein as piratical.<sup>10</sup> The object may be two-fold: first, to punish nationals who commit acts that are forbidden, as well as aliens who commit them on vessels under the flag of the State;<sup>11</sup> and secondly, to punish any persons of whatsoever nationality, who, on whatsoever

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a sense which a strict technical interpretation would give those terms." (*Am. J.*, XXVI, 1932, *Supplement*, 756.)

<sup>8</sup> 18 U.S.C.A. § 481 (Criminal Code, section 290.).

According to § 6 of The Territorial Waters Jurisdiction Act, of 1878, 41 & 42 Victoria, c. 73: "This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations." (Stanley Morrison's Collection of Piracy Laws, Harvard Research in International Law, *Am. J.*, XXVI, 1932, *Supplement*, 887, 928.)

Section 137 of the Canadian Criminal Code, 1927, announces that "Every one is guilty of an indictable offence who does any act which amounts to piracy by the law of the nations." (*Id.*, 938.)

The statutory law of the Republic of Liberia (Section 720A — Piracy, sub-section 6) includes in the category of persons guilty of piracy "Every person who, on the high seas, commits the crime of piracy as defined by the law of nations and is afterwards brought into this Republic." (*Id.*, 986.)

The Mexican Penal Code of Aug. 13, 1931, deals with the matter of piracy in Chapter I, Book II, Title III, of which the caption is "Crimes Against International Law." (*Id.*, 991.)

The Penal Code of Panama of Aug. 22, 1916 (Book I, Title I, Chapter I, Art. I, Section 6), declares that the jurisdiction of the Code extends "To crimes of piracy, and to such other acts as are denominated crimes against the Law of Nations." (*Id.*, 998.)

The Spanish Penal Law of the Mercantile Marine of June 21, 1923, makes provision for the matter of piracy in Title II, Chapter I, of which the caption is "Crimes Against the Law of Nations." (*Id.*, 1008.)

The Penal Code of Venezuela of July 15, 1926 (Book I, Title I, Art. 4, Section 9) declares that among the persons subject to prosecution in Venezuela and punishment in accordance with its penal law are: "Venezuelans or foreigners who have come to the Republic, who on the high sea commit acts of piracy or other crimes which International Law deems heinous and contrary to humanity." (*Id.*, 1013.)

<sup>9</sup> See The Relation of International Law to Private Individuals, In an Objective Sense, *supra*, § 11A.

<sup>10</sup> Moore, Dig., II, 951.

<sup>11</sup> When a State has sufficient grounds for the exercise of jurisdiction over an alien by reason of the circumstance that his acts were committed on board of one of its vessels or elsewhere within a place under its control, it becomes technically immaterial that his offensive conduct is described as piratical. That description may be designed in part to express the sense of outrage on the part of the legislator in the commission of particular acts and to excuse accordingly the severity of the penalty imposed upon one who is found guilty of them. Nevertheless, the policy of so labelling forms of conduct that oftentimes are not and cannot constitute piracy "as defined by the law of nations" obviously serves to breed confusion of thought concerning what the requirements of that law may be.

ships, commit what is deemed to be an offense against the law of nations. In interpreting the legislation of the United States in relation to piracy, the Supreme Court has been careful not to impute to the Congress an intention to assert a right of jurisdiction with respect to the acts of foreigners on board a foreign vessel on the high sea, save when those acts were to be fairly regarded as constituting piracy within the requirements of international law.<sup>12</sup> Acts of such a character there committed by foreigners on vessels not under the flag of any member of the international society have been deemed to be within the scope of the statutory law.<sup>13</sup> Under the existing statutory law whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.<sup>14</sup>

Pirates, by reason of their occupation, possess no authority which any civilized State is bound to respect. National authorization of the commission of piratical acts could not free them from their internationally illegal aspect.<sup>15</sup>

<sup>12</sup> Concerning Section 8 of the Act of April 30, 1790, 1 Stat. 113, 114, see *United States v. Palmer*, 3 Wheat. 610; *United States v. Klintock*, 5 Wheat. 144; *United States v. Holmes*, 5 Wheat. 412; *United States v. The Pirates*, 5 Wheat. 184. Cf. commentary on these decisions in Moore, Dig., II, 954-959.

See Chap. 12 of the Federal Criminal Code, with respect to "Piracy and Other Offenses upon Seas," 18 U.S.C.A. §§ 481-502. See Editor's Note on the Piracy Laws of the United States by Stanley Morrison in his Collection of Piracy Laws of Various Countries, Harvard Research in International Law, *Am. J.*, XXVI, 1932, Supplement, 887, 893.

It may be observed that piracy is frequently made an extraditable offense in extradition treaties of the United States. Concerning the interpretation of the term "piracy" in Art. X of the treaty with Great Britain of Aug. 9, 1842, see *In re Tivnan*, 5 Best & S. 645, Dip. Cor. 1864, II, 30; Case of *The Chesapeake*, Moore, Extradition, I, 316.

In Art. II in the extradition treaty with Venezuela, of Jan. 19, 1922, the extraditable offense is referred to as "Piracy, as commonly known and defined by the law of nations, or by statute." U. S. Treaty Vol. III, 2871. In Art. 3 of the extradition treaty with Great Britain of Dec. 22, 1931, the offense is described as "Piracy by the law of nations." U. S. Treaty Vol. IV, 4274.

<sup>13</sup> *United States v. Klintock*, 5 Wheat. 144, 152; *United States v. The Pirates*, 5 Wheat. 184; *United States v. Holmes*, 5 Wheat. 412.

<sup>14</sup> 18 U.S.C.A. § 481 (Criminal Code, Section 290.)

In his opinion in the case of *Palmer v. United States*, 3 Wheat. 610, at 641, Mr. Justice Johnson observed that "Congress cannot make that piracy, which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences." In 1825, Chief Justice Marshall, in the opinion of the Court in the case of *The Antelope*, 10 Wheat. 66, at 122, declared that if, as he appeared to conclude, the slave trade "is consistent with the law of nations, it cannot in itself be piracy." He added, "it can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the State which may enact it." The Act of May 15, 1820, 3 Stat. 600, denounced as a pirate a citizen of the United States being of the crew of any foreign ship engaged in the slave trade, or any person whatever being of the crew of an American vessel who was so engaged. In the Revised Statutes of the United States enacted at the First Session of the 43rd Congress, 1873-1874 (§§ 5375 and 5376), there was a significant amendment serving to denounce and penalize as a pirate every person who, being of the crew of any foreign vessel, engaged in the slave trade. The existing statutory law embraces this broader assertion of jurisdiction. 18 U.S.C.A. § 421 (Criminal Code, Section 246). The enlargement of the statute may have been due to a conviction by the Congress that the slave trade had ceased to be consistent with the law of nations and might fairly be embraced within the category of acts which by the law of nations were piratical.

<sup>15</sup> Sir William Scott, in the case of *The Helena*, 4 Ch. Rob. 3, 5-6. At the close of the eighteenth century, the Barbary powers had by no means abandoned their regular depredations under official authority on merchant vessels generally. Moore, *Am. Diplomacy*, 64-70. As late as 1853, Dr. Lushington, in the case of *The Magellan Pirates*, 1 Spinks' Eccl. & Adm. Rep. 81, 83, declared: "Even an independent State may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of olden times? What many of the African tribes at

## (b)

§ 232. **Piratical Acts.** Piratical acts may assume a variety of forms.<sup>1</sup> They may include, for example, homicide or robbery or burning,<sup>2</sup> and probably, at the present time, enslavement.<sup>3</sup> They may be directed against the ship or aircraft on which the actors are lodged, or against its officers, or against another vessel or aircraft and its occupants.<sup>4</sup> They may represent the united effort of persons controlling the vehicle of transportation so that it itself is transformed into a piratical craft.<sup>5</sup> Coincident in time with the birth of the United States, certain seas were infested with brigands whose regular occupation was the rob-

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this moment? It is, I believe, notorious that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not pirates because, perhaps, their sole livelihood may not depend on piratical acts? I am aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such *dictum* as a universal proposition."

§ 232. <sup>1</sup> Dana's Wheaton, 192 to 196; Dana's Note No. 83, *id.*

<sup>2</sup> Declared Chief Justice Marshall in *United States v. Klintock*, 5 Wheat. 144, 152: "The Court is satisfied, that general piracy, or murder or robbery, committed in the places described in the 8th section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations." See, also, Mr. Justice Story, in *United States v. Smith*, 5 Wheat. 153, 160-162.

See *In re Piracy Jure Gentium*, 1934 A.C. 586.

<sup>3</sup> See 18 U.S.C.A. § 421 (Criminal Code, Section 246.).

<sup>4</sup> *United States v. Holmes*, 5 Wheat. 412; Mr. Marcy, Secy. of State, to Mr. Starkweather, Sept. 18, 1854, MS. Inst. Chile, XV, 107, Moore, Dig., II, 965.

The capture of a vessel by native Africans unlawfully kidnapped, and to whom a status of slavery had not been validly attached, for the sole purpose of enabling the captors to regain their native country, and not for that of robbery or plunder, was held not to be piratical in the case of the *Amistad*, 15 Pet. 518, 593-594. See, also, Mr. Seward, Secy. of State, to Mr. Van Valkenburg, Minister to Japan, Feb. 19, 1869, MS. Inst., Japan, I, 316, Moore, Dig., II, 966.

The attempt of a mutinous crew to gain control of a vessel, or acts of violence of other persons on board, having the same end in view, do not constitute piracy. If, however, the actual control of the ship be displaced, and the mutineers or other persons thereon employ the ship for their own purposes, in total disregard of the authority of the country to which the vessel belongs, their action becomes clearly piratical. The piracy in such case is the consequence of the successful mutiny or overthrow of authority. See Dana's Wheaton, Dana's Note No. 83. Compare Opinion of Mr. Hill, Asst. Atty.-Gen., 14 Ops. Attys.-Gen., 589.

<sup>5</sup> According to Art. 3 of the Harvard Draft Convention on Piracy:

"Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any State:

"1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

"2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

"3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article." (*Am. J.*, XXVI, *Supplement*, 743.) The word "ship" is said to embrace water craft or aircraft. See Art. 1.

It is a naïve suggestion that an actor "for private ends" could be deemed to be possessed of a "bona fide purpose of asserting a claim of right" if he committed an act of violence or of depredation with intent to rob, rape, wound, enslave, or steal. It is a startling intimation that the making in fact of such a claim in respect to such conduct could or should save the actor from being regarded and dealt with as a pirate.

bbery and seizure of merchant vessels as a means of enriching the captors.<sup>6</sup> The purpose of their undertakings and their indifference as to the nationality of the victims may have been responsible for the belief that he was not a pirate whose acts were directed against the vessels of a single State.<sup>7</sup> It is now understood, however, that the sea-brigand cannot, by so limiting the scope of his operations, free himself from a piratical character.<sup>8</sup>

As piracy does not necessarily involve the taking of property, the absence of an intent to steal is not necessarily decisive of the character of what takes place. According to Dana, "the motive may be gratuitous malice, or the purpose may be to destroy, in private revenge for real or supposed injuries done by persons or classes of persons, or by a particular national authority."<sup>9</sup>

It seems to be distinctive of acts of piracy that they are committed in furtherance of private ends rather than for a public purpose as in behalf of a political community or a State.<sup>10</sup> For that reason, it is believed to be unfortunate to attempt through treaty to assimilate to acts of piracy, or to describe as piratical, forms of conduct undertaken for an essentially public end from which it is sought to prevent or dissuade the contracting parties from having recourse when engaged in war.<sup>11</sup> Nevertheless, as Mr. Hackworth has recently observed, "the

<sup>6</sup> "At the close of the eighteenth century, a merchantman built for long voyages still differed little in armament from a man-of-war. Whether it rounded the Horn or the Cape of Good Hope, it was exposed to the depredations of ferocious and well-armed marauders, and if it passed through the Straits of Gibraltar it was forced to encounter maritime blackmail in its most systematic and most authoritative form." J. B. Moore, *Principles of American Diplomacy*, 1918, p. 104.

<sup>7</sup> See, for example, the language of Mr. Justice Nelson in *United States v. Baker*, 5 Blatchford, 6, 12, cited with approval by Mr. Bayard, Secy. of State, in a communication to the Secy. of the Navy, July 14, 1885, 156 Dom. Lct., 691, Moore, Dig., II, 1097; also suggestion of Chief Justice Marshall in *United States v. Klintock*, 5 Wheat. 144, 152.

<sup>8</sup> Dana's Wheaton, Dana's Note No. 83.

<sup>9</sup> *Id.* Mr. Dana criticized the statement oftentimes made that an act of piracy must be committed by one possessed of an *animus furandi*. Inasmuch as the Latin verb *furari* refers to the taking of property, and the absence of an intention to steal is not necessarily proof that the actor is not possessed of a state of mind which may serve to give to his acts a piratical character, this objection seems well taken. If it be necessary to resort to a Latin phrase in order to describe the requisite or common mental state of a pirate, it might be well to consider the potentialities of the verb *furari*, signifying to rage, to be furious, to act like a madman, or, as Cicero employed it, to act against the welfare of one's own country. In view of the nature of his occupation and the contempt with which he is regarded by civilization, a pirate might be said to possess invariably an *animus furendi*.

<sup>10</sup> Declares Hall: "Though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends." Hall, Higgins' 8 ed., p. 312, § 81. See, also, *In re Tivnan*, 5 Best & S. 645, Dip. Cor. 1864, II, 30; Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Sept. 14, 1869, MS. Inst. Haiti, I, 150, Moore, Dig., II, 1085. Compare Smith's Case and statement of counsel for the prosecution published in Moore, Dig., II, 1079; also case of the *Chesapeake*, Moore, Extradition, I, 316; Burley's Case, *id.*, I, 319, Dip. Cor. 1864, II, 813.

<sup>11</sup> According to Art. III of the treaty between the United States, the British Empire, France, Italy, and Japan, Relative to the Protection of the Lives of Neutrals and Noncombatants at Sea in Time of War and to Prevent the Use in War of Noxious Gases and Chemicals, signed at Washington, Feb. 6, 1922, it was declared that any person in the service of any Power who should violate any of the rules that were prescribed with respect to attacks upon and the seizure and destruction of merchant ships "whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found." (U. S. Treaty Vol. III, 3118.) The treaty failed to be consummated.

See in this connection, Conventional Arrangements since the World War, *infra*, § 749A; Collective Measures against Attacks in the Mediterranean by Submarines in 1937, *infra*, § 751A.

perfection of such new military weapons as the submarine and the airplane and the generally unsettled political conditions in certain parts of the world have led to a movement to condemn as piratical unwarranted attacks on merchant vessels by submarines and airplanes."<sup>12</sup>

When an insurrection has been suppressed, persons who were associated with it cannot save the character of their acts, otherwise to be regarded as piratical, on the ground that the commission thereof was in aid of a public cause.<sup>13</sup>

It is always possible that persons participating in a public expedition involving the use of force on the high seas may, for their own purposes, commit depredations not in fact related to or necessitated by the political cause which they serve. Doubtless such acts are not necessarily stripped of a piratical quality (if they would otherwise attain it) by reason of the general purposes of the expedition. Difficulty may, however, arise in such a case to distinguish the particular act which could be fairly regarded as piratical from others necessarily attributable to and connected with the public cause.<sup>14</sup>

(c)

§ 233. **Acts of Unrecognized Insurgents.** The inquiry presents itself concerning the extent to which the particular operations of unrecognized insurgents are to be fairly regarded as both internationally illegal and possessed of a piratical character. The body of maritime States is not necessarily affected by the operations of insurgents directed solely against vessels of the State whose government it is sought to overthrow. For that reason, there has been at times a disposition on the part of such States to pay a certain degree of respect to the authority conferred upon insurgent vessels and their occupants, before formally according recognition to the insurgent movement.<sup>1</sup>

As the success of an insurgent movement produces a legal condition of affairs demanding recognition by foreign powers, the commission of acts of force on the high seas by means of which that result is accomplished, should not, as Hall declares, be treated as piratical merely on account of the lack of external recognition of the political power by whose authority they were committed.<sup>2</sup>

<sup>12</sup> Hackworth, Dig., II, 690, where he adds: "The background of this movement is to be found in the post-war treaties attempting to humanize submarine warfare. The problem assumed critical proportions in connection with the Spanish Civil War and was met by joint declarations by the European nations most directly affected and by joint action to stamp out the menace."

<sup>13</sup> "The Confederate cruiser Shenandoah continued her depredations on United States vessels in the seas around Cape Horn for several months after the fall of the Confederate government, but as it was in ignorance the British authorities, on her arrival at Liverpool, allowed the captain and crew to go free and delivered the ship to the United States." Westlake, 2 ed., I, 186. See, also, Moore, Arbitrations, IV, 4176.

<sup>14</sup> Compare the situation where, under an extradition treaty, the surrender is demanded of a person accused of robbery, and where it is contended by the accused that the act charged was incidental to a political movement rendering the offense itself political in character and hence one outside of the scope of the treaty. See Mr. Sherman, Secy. of State, to Mr. Romero, Mexican Minister, Dec. 17, 1897, relative to the case of Jesus Guerra, For. Rel. 1897, 408-414; also Case of Christian Rudovitz, whose extradition from the United States was sought by Russia in 1909. Extradition, Political Offenses, *infra*, §§ 315-316.

§ 233. <sup>1</sup> Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, June 15, 1885, For. Rel. 1885, 272, 273, Moore, Dig., II, 1094; Article by Dr. Francis Wharton, in *Albany Law J.*, Feb. 13, 1886, 125, Moore, Dig., II, 1100.

<sup>2</sup> Hall, Higgins' 8 ed., § 81, pp. 312-313.

It is not believed that the acts of insurgents when duly authorized by those in control of the insurgent movement, if committed in furtherance thereof, and directed solely against the vessels of the government sought to be overthrown, should be regarded as piratical. A Federal court, in 1885, appeared to reach a somewhat different conclusion in the case of the *Ambrose Light*.<sup>3</sup> In that case the brig *Ambrose Light*, commissioned by insurgent authorities opposing the government of Colombia, was seized in 1885, by the U.S.S. *Alliance*, in the Caribbean Sea about twenty miles to the westward of Cartagena. None of the officers or crew of the captured ship were American citizens. The vessel was engaged upon a hostile expedition against Cartagena, and designed to assist in the blockade and siege of that port by the rebels against the established government of Colombia. It did not appear that depredations or hostilities were contemplated by the persons controlling the vessel other than such as might be incidental to the struggle against that government and to the so-called blockade and siege. The ship was brought to New York and there condemned on the ground that she had been lawfully seized because "bound upon an expedition technically piratical." In reaching this conclusion, the court stated that as the seizure had been made by the Navy Department "under the regulations," and as the case was prosecuted by the Government itself claiming "its extreme rights," the court was bound to apply "the strict technical rules of international law."<sup>4</sup> It may be doubted, however, whether the practice of maritime States has established a rule of international law which would denounce as piratical an expedition such as that upon which the *Ambrose Light* was bound, under circumstances such as those of that case.<sup>5</sup> The United States has at various times expressed reluctance to treat as piratical the operations of insurgent vessels engaged in furthering a public end, and when directed solely against persons and property associated with governments sought to be overthrown. It has, moreover, properly declined to be guided in its decisions by declarations or requests emanating from such governments.<sup>6</sup> Thus, when in July, 1936, the Spanish Am-

<sup>3</sup> 25 Fed. 408.

<sup>4</sup> *Id.*, 443. Concerning the *Ambrose Light*, see Mr. Bayard, Secy. of State, to Secy. of Navy, July 14, 1885, 156 MS. Dom. Let. 691, Moore, Dig., II, 1097; Mr. Bayard, Secy. of State, to Mr. Garland, Atty.-Gen., July 15, 1885, 156 MS. Dom. Let., 263, Moore, Dig., II, 1099, note; Editorial comment, Scott, Cases, 350, note.

<sup>5</sup> Compare the attitude of Baron Cotejipe, Brazilian Minister of Foreign Affairs, in communication of Jan. 12, 1877, to the Spanish Chargé d'Affaires, regarding the steamer *Montezuma*, quoted by Calvo, 5 ed., I, 591; also position of the British, French and German governments, respecting certain Spanish ships taken by insurgents, near Cartagena in 1873, described in Calvo, 5 ed., I, 583-588.

See Gilbert Gidel, *Le Droit International Public de La Mer, Le Temps de Paix*, I, 320-323.

<sup>6</sup> Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Sept. 14, 1869, MS. Inst. Haiti, I, 150, Moore, Dig., II, 1085; Mr. Frelinghuysen, Secy. of State, to Mr. Langston, Minister to Haiti, Dec. 15, 1883, For. Rel. 1884, 297, Moore, Dig., II, 1087; Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, April 24, 1885, For. Rel. 1885, 254, Moore, Dig., II, 1089; Same to Same, June 15, 1885, For. Rel. 1885, 272, 273, Moore, Dig., II, 1094; Mr. Bayard, Secy. of State, to Mr. Whitney, Secy. of Navy, April 15, 1885, 155 MS. Dom. Let. 101, Moore, Dig., II, 1096, note.

On October 31, 1873, *The Virginius*, a vessel belonging to the Cuban insurgents and employed in aiding the insurrection, was captured by the Spanish cruiser *Tornado*, and taken to Santiago de Cuba, where fifty-three of the persons on board, American, British and Cuban, were charged with piracy, tried by court-martial, and shot. The vessel had been fraudulently registered in the United States, and when captured was displaying the American flag. Both

bassador at Washington, in accordance with instructions from his Government, informed the Department of State that that Government had been obliged to declare the *Almirante Cervera*, a cruiser of the Spanish navy, to be a "pirate vessel," in consequence of a rebellion which had taken place on board the ship, and to declare also that it was outside of the law and without the right to use the Spanish flag, and could be stopped and seized on the high seas or at any port, and its crew tried, in accordance with the rules of international law and in accordance with the laws of the country which effected capture, the Department of State merely acknowledged the communication without comment.<sup>7</sup>

In August 1929, the office of the Solicitor for the Department of State advised that "the question whether a vessel in the hands of insurgents is piratical depends upon its actions, that is, whether it confines itself to depredations against its own country or commits depredations against vessels of other countries."<sup>8</sup>

Whether the acts of unrecognized insurgents, directed against the ships of foreign States are to be deemed piratical should, on principle, depend upon the magnitude of the movement together with the relationship of those acts to the struggle for the reins of government. If the acts are incidental to the contest, and consist merely in the attempt to prevent an outside State or its nationals from rendering aid to the *de jure* government opposed, and in a struggle of such magnitude as would justify the recognition of the insurgents as belligerents by a foreign power, it is not believed that they should be treated as piratical.<sup>9</sup>

It must be clear that vessels belonging to the nationals of a foreign State,

the United States and Great Britain emphatically denied the right of Spain to treat the persons found on board *The Virginus* as pirates. To both States Spain paid substantial indemnities in satisfaction of personal claims, for distribution among the families of persons interested. See Mr. Fish, Secy. of State, to Admiral Polo de Bernabé, April 18, 1874, For. Rel. 1875, II, 1178, 1182; also *id.*, 1250, Moore, Dig., II, 967-968, and documents there cited; also Hall, Higgins' 8 ed., pp. 319-321, citing Parl. Papers, LXXVI, 1874. See Acts on the High Seas, The Case of *The Virginus*, *supra*, § 68.

According to Art. 2 of the convention concerning Duties and Rights of States in the Event of Civil Strife, concluded by the United States with other American Republics, signed at Habana, Feb. 20, 1928: "The declaration of piracy against vessels which have risen in arms, emanating from a government, is not binding upon the other States." U. S. Treaty Vol. IV, 4725, 4727.

<sup>7</sup> Ambassador Calderón to Secy. Hull, Nov. 28, 1936, Hackworth, Dig., II, 696.

Concerning the case of the S.S. *Falke*, a ship of German registry, which the Venezuelan Government by executive decree of Aug. 12, 1929, denounced as a pirate ship, see documents in Hackworth, Dig., II, 696-699.

<sup>8</sup> It was added: "Notwithstanding the decision of the United States District Court for the Southern District of New York in the *Ambrose Light*, 25 Fed. 408, the weight of opinion is clearly to the effect that an insurgent vessel cannot be treated as piratical merely because the insurgents have not been recognized as belligerents. (See Scott's Cases on International Law, 1st ed. p. 350, notes; II Moore's Int. Law. Dig. 1098, ff.; Hershey's Int. Law, 330-333 and notes; Wilson's Int. Law, 34-39.)" (Hackworth, Dig., II, 697.)

<sup>9</sup> Compare the case of the monitor, *Huascar*, which in 1877, after revolting from the public service of Peru, and having adhered to the insurgent movement, was denounced by the *de jure* government as a piratical vessel. The *Huascar*, while on the high seas, took coal from a British ship without agreeing to pay therefor, and also stopped another British ship, taking therefrom two persons bound for the public service of the Peruvian government. As these acts were considered piratical by the Commander-in-Chief of the British Naval force in the Pacific, the *Huascar* was attacked and partially disabled by a British cruiser. Upon the subsequent surrender of the *Huascar* to the Peruvian authorities, that Government demanded an indemnity of Great Britain, which the latter refused to pay. Hall, Higgins' 8 ed., p. 319, citing Parl. Papers, Peru, No. 1, 1877.



and which have been seized by unrecognized insurgents, may be lawfully retaken upon the high seas by the public ships of that State.<sup>10</sup> This right is not, however, based upon the theory that the original taking was essentially piratical, but rather on the ground that as the seizure was wrongful the rescue from the seizer is at least justifiable.<sup>11</sup> From this right of recapture there does not appear to be derived a right to regard the original seizure as piratical.<sup>12</sup> Whether that act is of such a character should be ascertained by reference to the general principles applicable to any case.<sup>13</sup>

(d)

§ 234. **Acts of Privateers.** At the time when privateering flourished, the courts of the United States declared that, according to the law of nations, the duly commissioned privateer, like the public armed vessel, was not to be regarded as piratical.<sup>1</sup> Furthermore, the political department of the Government asserted that privateering was not to be deemed to partake of the offense of piracy because of the circumstance that the commander and a majority of the crew of a privateer might not be nationals of the State issuing the commission.<sup>2</sup> The action, however, of Mexico in 1847, in issuing blank commissions for the use of privateers, and for indiscriminate sale by minor agents in Europe, who were empowered to insert the names of persons commissioned, was regarded by the United States as action conferring no authority entitled to respect.<sup>3</sup>

<sup>10</sup> Mr. Fish, Secy. of State, to Mr. Bassett, Minister to Haiti, Sept. 14, 1869, MS. Inst. Haiti, I, 150, Moore, Dig., II, 1085; Mr. Bayard, Secy. of State, to Mr. Scruggs, Minister to Colombia, May 19, 1885, For. Rel. 1885, 211, Moore, Dig., II, 1087-1088.

<sup>11</sup> Mr. Bayard, Secy. of State, to Mr. Whitney, Secy. of Navy, April 15, 1885, 155 MS. Dom. Let. 101, Moore, Dig., II, 1089, note.

<sup>12</sup> See Art. 16, Harvard Draft Convention on Piracy, *Am. J.*, XXVI, 1932, *Supplement*, 746.

<sup>13</sup> Mr. Bayard, Secy. of State, to Mr. Becerra, Colombian Minister, April 24, 1885, For. Rel. 1885, 254, Moore, Dig., II, 1089-1090.

<sup>13</sup> It must be obvious that insurgents may commit acts of piracy. Declared Dr. Lushington in the case of the Magellan pirates, "It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion." 1 Spinks, Eccl. & Adm. Rep. 81, 83.

§ 234. <sup>1</sup> The Neustra Señora de la Caridad, 4 Wheat. 497; The Santissima Trinidad, 7 Wheat. 283; *Ford v. Surget*, 97 U. S. 594, 618-620; *Dale v. Merchants' Mutual Marine Ins. Co.*, 6 Allen, 373; *Dale v. New England Mutual Marine Ins. Co.*, 2 Cliff. 394; *Fifield v. Ins. Co. of Penn.*, 47 Pa. St. 166.

See, also, memorandum of Mr. Buchanan, Minister at London, March 16, 1854, Geo. Ticknor Curtis, *Life of James Buchanan*, New York, 1883, II, 128, quoted in Moore, Dig., II, 976.

Certain of the early treaties to which the United States was a party contemplated the punishment as a "pirate" of a national of either of the contracting parties who should take from any power with which the other might be at war any commission or a letter of marque for arming any vessel to act as a privateer against the other. See, for example, Art. XXI of treaty of amity and commerce with France, Feb. 6, 1778, *Malloy's Treaties*, I, 475; Art. XIX of treaty of peace and commerce with The Netherlands, Oct. 8, 1782, *id.*, II, 1239; Art. XIV of treaty of friendship with Spain, Oct. 27, 1795, *id.*, II, 1645; Art. XX of treaty of amity and commerce with Prussia, July 11, 1799, *id.*, II, 1493.

<sup>2</sup> Mr. Adams, Secy. of State, to The Chev. Onis, Spanish Minister, April 7, 1819, MS. Notes to For. Leg. II, 355, Moore, Dig., II, 974.

<sup>3</sup> Mr. Buchanan, Secy. of State, to Mr. Saunders, June 13, 1847, MS. Inst. Spain, XIV, 224, Moore, Dig., II, 972.

See communication of the Roumanian Government, to Committee of Experts for the Progressive Codification of International Law, Nov. 20, 1926, League of Nations, Doc. No. C.196.M.70.1927.V., 196, 201, 206-208.

See Privateers, *infra*, § 704.

(e)

§ 234A. **The Cessation of Piracy as an International Menace.** Piracy has sunk into desuetude.<sup>1</sup> In 1926, the Government of the United States did not hesitate to declare "that piracy, as that term is known in international law, is so nearly extinct as to render of little importance consideration of that subject as one to be regulated by international agreement."<sup>2</sup> Hence, it is not to be dealt with as though it were a frequent occurrence still serving to perplex or harass the international society.<sup>3</sup> There has thus been little opportunity for the development of a practice attributable in special degree to the law pertaining to piracy which would establish a special procedure to be followed when pirates or their vehicles of transportation are encountered on the high seas or in the air superjacent to it, or when persons or ships are suspected of being engaged in piratical activities, or when either, after eluding pursuit, take refuge within the territorial limits of a foreign State. It suffices here to observe that in this last situation any relaxation of exclusive jurisdiction or control on the part of the territorial sovereign would, as in any kindred case, have to be duly manifested,<sup>4</sup> and any excuses for failure to respect that jurisdiction, as possibly on grounds of self defense, would need to be solidly established.<sup>5</sup>

(9)

§ 235. **Revenue or Hovering Laws.** Great Britain in 1736, and the United States in 1799, by means of revenue or so-called hovering laws, appeared to assert a right of jurisdiction with respect to certain acts committed on the high seas adjacent to their territorial waters and within four leagues of their coasts.<sup>1</sup>

§ 234A. <sup>1</sup> It is not suggested that in some areas within the territorial limits of States failure to maintain a government adequate for the protection of life and property may not in fact permit, and may even at the present time encourage, the commission of acts which, howsoever described, resemble those which if occurring on the high seas might well be regarded as piratical.

<sup>2</sup> Communication from the Department of State to the Committee of Experts for the Progressive Codification of International Law, Oct. 12, 1926, League of Nations Doc. No. C.196.M.70.1927.V., p. 160, 161.

<sup>3</sup> "The reason for the startling lack of international case authority and modern State practice is apparent, as soon as one remembers that large scale piracy disappeared long ago and that piracy of any sort on or over the high sea is sporadic except in limited areas bordered by States without the naval forces to combat it. Piracy lost its great importance in the law of nations before the modern principles of finely discriminated State jurisdictions and of freedom of the seas became thoroughly established." (Introduction to Harvard Draft Convention on Piracy, *Am. J.*, XXVI, 1932, *Supplement*, 764.)

<sup>4</sup> See, in this connection, provisional instructions for the commanders of German warships in regard to the suppression of piracy in Chinese waters, of Aug. 20, 1877, Stanley Morrison's Piracy Laws of Various Countries, Harvard Research in International Law, *Am. J.*, XXVI, 1932, *Supplement*, 969.

<sup>5</sup> See Certain Non-Political Acts of Self Defense, Invasion of Territory, *supra*, §§ 66-67.

§ 235. <sup>1</sup> The British Act of 1736 was that of 9 Geo. II, Chap. 35. See, especially, Sections XVIII and XXIII. Concerning the history and development of the English law and that of the British Empire, see W. E. Masterson, Jurisdiction in Marginal Seas with Special Reference to Smuggling, New York, 1929, Parts I and II. To quote that author: "In 1876, a new act was passed (39 and 40 Vict., c. 36, July 24, 1876, — 'An Act to Consolidate the Customs Laws'), repealing all the acts in force at that time, and considerably simplifying the law. This new Act has remained in force since the date of its passage." (*Id.*, 150.) Mr. Masterson adverts to the fact that by that Act complete or part ownership of a vessel by British subjects, or the circumstance that one-half of the persons on board a ship were British sub-

The Act of Congress of 1799 imposed a penalty upon the master of any vessel bound to a port within the United States who should, within that distance of the coasts thereof, not produce the requisite manifests of the cargo to be discharged within the United States, or fail to certify the same, and also in case of the unloading of the cargo before the ship should come to the proper place for the discharge of the same without authority, except in case of necessity.<sup>2</sup> The same act directed revenue officers to board all vessels which should arrive within the United States or within four leagues of the coasts thereof, if bound for the United States, and search and examine the same, demand, receive and certify the requisite manifests, affix proper seals, and remain on board until the vessels should arrive at their destination.<sup>3</sup> It is thus apparent that while the design of the statute was to prevent the commission of acts within the limits of the United States in violation of its revenue laws, the scheme of prevention contemplated the punishment of individuals on account of acts committed on the high seas, at least in case the ship concerned came into American waters.<sup>4</sup>

Notwithstanding conflicting opinions within a small group of cases, it is not to be concluded that the Supreme Court of the United States denounced such conduct as at variance with the requirements of international law.<sup>5</sup>

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jects, sufficed to subject such craft to forfeiture on account of conduct that was proscribed, at varying distances from the shore on the high sea, and that, accordingly, a ship of foreign nationality might well come within the purview of the Act. (*Id.*, 61 and 152-153.)

On July 14, 1923, in a memorandum for the Government of the United States, the British Government declared that through the Customs Consolidation Act of 1876 "British municipal legislation is made to conform with international law." (MS. records, Dept. of State, Jessup, Territorial Waters, 283.)

The Act of Congress is Chap. 22, March 2, 1799 (which was a re-enactment of an Act of Aug. 4, 1790, 1 Stat. 145, 164), to regulate the collection of duties on imports and tonnage, 1 Stat. 627, 647-648, 700. The date of this Act is sometimes inadvertently stated to be March 2, 1797.

*Cf.* Marginal Seas, *supra*, §§ 144 and 144A.

<sup>2</sup> Act of March 2, 1799, Section 26, Rev. Stat. § 2814. This Section of the Revised Statutes was repealed by Section 642 of Tariff Act of Sept. 21, 1922, 42 Stat. 858, 989. See also, Section 27 of the Act of March 2, 1799, Rev. Stat. § 2867, which was likewise repealed by Section 642 of the Tariff Act of 1922.

<sup>3</sup> Act of March 2, 1799, Section 99, Rev. Stat. § 2760. This Section was not repealed by Section 642 of the Tariff Act of 1922, nor by Section 581 thereof, which was based upon § 3059 of the Revised Statutes (repealed by Section 642 of the Tariff Act of 1922), and did not touch upon certain matters dealt with in § 2760 of the Revised Statutes. See 14 U.S.C.A. § 66.

See, also, Dana's Wheaton, Dana's Note No. 108.

<sup>4</sup> "All these offences, and all offences of the same class and character relating to revenue and to trade, are measures directed against a breach of the law contemplated to be consummated within the territory, to the prevention of an offence against the municipal law within the area to which the municipal law properly extends." Sir Charles Russell, oral argument, Fur Seal Arbitration, *Proceedings*, XIII, 1076.

<sup>5</sup> Chief Justice Marshall, in the case of *Church v. Hubbart*, 2 Cranch, 187, 234, in 1804 declared it to be the right of a State to seize vessels hovering upon its coasts and about to enter therein for the purpose of violating its revenue laws. "The result of the decision is," according to Mr. Dana, "that the Court did not undertake to pronounce judicially, in a suit on a private contract, that a seizure of an American vessel, made at four leagues, by a foreign power, was void and a mere trespass." Dana's Wheaton, Dana's Note No. 108. In 1808, in the case of *Rose v. Himely*, 4 Cranch, 241, 279, the learned Chief Justice expressed the view that the seizure of a foreign vessel on the high seas for the breach of a municipal regulation was an act "which the sovereign cannot authorize." Justices Livingston, Cushing and Chase, without expressing an opinion on the validity of a seizure on the high seas under a municipal regulation, if the property captured should be immediately taken into a port of the captor's country, concurred in denying the validity of the condemnation of the

In his oral argument before the Paris Tribunal, in the Fur Seal Arbitration, in 1893, Mr. Edward J. Phelps, in behalf of the United States, summarized the practice of his own country and Great Britain. He justified the position of both on the ground of self-defense, or, more broadly, of self-preservation.<sup>6</sup> Sir Charles Russell (then Attorney-General, subsequently Lord Chief Justice of England) asserted, on the other hand, that hovering laws rested upon the principle that

no civilized State will encourage offences against the laws of another State, the justice of which laws it recognizes. It willingly allows a foreign State to take reasonable measures of prevention within a moderate distance even outside territorial waters.<sup>7</sup>

He denied, however, that such acts would in all cases meet with assent, particularly if the attempt were made to enforce them at a considerable distance from land, or that in such case they could be asserted as of right as against an objecting State. In admitting the acquiescence of States in the exercise of such jurisdiction, however limited in scope, the learned advocate established the best possible foundation for the existence of a right under international law.<sup>8</sup> These statements are believed together to furnish significant evidence of the fact that

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vessel because she was condemned while lying in a foreign port. *Id.*, 281. Johnson, J., was of opinion that the capture was legal. *Id.*, 281; and Todd, J., subsequently stated that he had concurred in that view. See *Hudson v. Guestier*, 6 Cranch, 285, note. In the case of *Hudson v. Guestier*, 4 Cranch, 293, in an agreed statement of facts, it appeared that the capture was effected within territorial waters, hence the right to capture on the high seas was not considered. The judgment for the plaintiffs having been set aside, however, the case was remanded for a new trial, and, as a result, the defendant secured a verdict and judgment. The plaintiffs, thereupon, by writ of error, appealed to the Supreme Court, alleging as error an instruction to the effect that the capture was legal, "although such capture was made at a distance of six leagues from the said island of St. Domingo, or St. Heneague, its dependency, and beyond the territorial limits or jurisdiction of said island." *Hudson v. Guestier*, 6 Cranch, 281, 282. The Supreme Court, in affirming the judgment below, held that the allegation as to jurisdiction, "if it had been essential," might, for all that appeared, have been urged before the French court of condemnation, and decided by it in the negative; and that as that court had a right to dispose of every question raised in behalf of the owners of the property, relating to jurisdiction as well as to any other problem, the judgment thereon was not subject to review. Mr. Justice Livingston said, however, in the course of the opinion, "If the *res* can be proceeded against when not in the possession or under the control of the court, I am not able to perceive how it can be material whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she interfered with the jurisdiction of no other nation, the authority of each being there concurrent." *Id.*, 284. Chief Justice Marshall, who alone dissented, observed that "he had supposed that the former opinion delivered in this case upon the point had been concurred in by four judges. But in this he was mistaken"; and that the principle of *Rose v. Himely* "is now overruled." *Id.*, 285. The chief ground of disagreement in the foregoing cases concerned the right of a court to condemn a vessel when lying within a foreign port and hence outside of the control of the tribunal, rather than the right of a State to seize a vessel for any purpose outside of its own territorial waters.

See, also, Story, J., in *The Apollon*, 9 Wheat. 362, 371; Blatchford, J., in *Manchester v. Massachusetts*, 139 U. S., 240, 258; Memorandum by Mr. L. H. Woolsey of the Solicitor's office, Dept. of State, Dec. 28, 1910, on municipal seizures beyond the three-mile limit, *For. Rel.* 1912, 1289.

<sup>6</sup> Fur Seal Arbitration, *Proceedings*, XV, 128-135.

<sup>7</sup> Fur Seal Arbitration, *Proceedings*, XIII, 1076 and 1079.

<sup>8</sup> Declares Westlake in commenting upon a similar admission by Sir Charles Russell in the course of the same argument: "In our sense of that word there can be no such thing as international law, if it does not exist in a case in which a general consent to it on the part of nations is admitted." *Int. Law*, 2 ed., I, 177.

the exercise of jurisdiction for revenue purposes, within a close proximity to territorial waters, was not to be regarded as internationally wrongful.<sup>9</sup>

It has been authoritatively stated that "prior to the Eighteenth Amendment the United States had never attempted, in connection with the enforcement of our customs laws, to board foreign vessels beyond the three-mile limit except where consent was implied from the fact that the vessel, being hailed, answered that she was bound for the United States, or where a vessel had been discovered violating our laws within the three-mile limit and, while endeavoring to escape, was hotly pursued. Although Hovering Acts conferring authority to board and search vessels, foreign and domestic, 'within four leagues of the coast,' had existed since the foundation of our Government, see Act of August 4, 1790, c. 35, § 31, 1 Stat. 145, 164, the authority therein conferred had, prior to the Tariff Act of 1922, been in terms limited to inbound vessels; and no statute had purported to confer authority to seize foreign vessels beyond our territorial waters for violation of any of our laws, except in those few instances in which Congress acted pursuant to specific treaties."<sup>10</sup>

The efforts of States other than the United States to prevent smuggling by acts committed outside of territorial limits on the high sea have been numerous and long continued.<sup>11</sup>

(a)

§ 235A. Efforts to Prevent, without the Aid of Treaty, the Smuggling of Intoxicating Liquors into American Territory following the Adoption of the Eighteenth Amendment to the Constitution. The United States, upon the adoption of the Eighteenth Amendment to the Constitution, and the enactment of the National Prohibition Act<sup>1</sup> found itself confronted with the

<sup>9</sup> Blatchford, J., in *Manchester v. Mass.*, 139 U. S. 240, 258; Oral argument of Mr. Edward J. Phelps, Fur Seal Arbitration, *Proceedings*, XV, 128-135.

Said Mr. Fish, Secy. of State, in a communication to Sir E. Thornton, British Minister, Jan. 22, 1875: "It is believed, however, that in carrying into effect the authority conferred by the Act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the Act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign Government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations." For. Rel. 1875, I, 649-650, Moore, Dig., I, 731.

See, also, Sir W. Scott in *Le Louis*, 2 Dodson, 210, 245-246; Cockburn, C. J., in *Reg. v. Keyn*, 2 Exch. Div. 63, 216. Compare Mr. Evarts, Secy. of State, to Mr. Foster, April 19, 1879, MS. Inst. Mexico, XIX, 570, Moore, Dig., I, 731. See editorial comment on the case of the *Tatsu Maru*, *Am. J.*, II, 391.

<sup>10</sup> Mr. Justice Brandeis, in the opinion of the court, in *Cook v. United States*, 288 U. S. 102, 112-113.

According to Art. 20 of the Harvard Draft Convention on Territorial Waters: "The navigation of the high sea is free to all States. On the high sea adjacent to the marginal sea, however, a State may take such measures as may be necessary for the enforcement within its territory or territorial waters of its customs, navigation, sanitary or police laws or regulations, or for its immediate protection." (*Am. J.*, XXIII, *Supplement*, April, 1929, 245.)

<sup>11</sup> See some illustrative documents in Hackworth, Dig., I, § 99. In any endeavor to pass upon the propriety of these efforts as revealed in the enforcement of local statutes or regulations, it would of course be necessary as well as useful to observe whether, in the particular case, penalties were sought to be applied in cases other than those where the facts established an attempt on the part of the individual actors to introduce unlawfully their commodities into the territory of the prosecuting State.

§ 235A. <sup>1</sup> The National Prohibition Act became a law, with the approval of the President,

difficult task of frustrating endeavors by vessels under foreign flags to introduce unlawfully intoxicating liquors into its territory. Liquor laden ships approached and anchored off the coast of the United States outside of territorial waters. Cargoes were transferred to small and swift craft through which transit into the domain of the United States was effected. The United States undertook to thwart such transactions and to check smuggling by appropriate action on the high sea.<sup>2</sup>

This effort was, in a domestic sense, both simplified and fortified by the statutory law. The National Prohibition Act of October 28, 1919,<sup>3</sup> supplemented by an Act of November 23, 1921,<sup>4</sup> contained penal provisions applicable to the conduct of vessels or boats engaged in forbidden practices within territorial limits. The Tariff Act of September 21, 1922,<sup>5</sup> made broad provision for the boarding of vessels by Treasury officers "within four leagues of the coast of the United States . . . to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance." Moreover, if it should appear that any breach or violation of the laws of the United States had been committed, whereby or in consequence of which the vessel or vehicle, or the merchandise or any part thereof on board of or imported by the vessel or vehicle, was liable to forfeiture, it was made the duty of such officers "to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation." Penalties were imposed for the falsity of, or failure to produce, a manifest, and in case merchandise were found on board or after unloading, which was not included or described in the manifest;<sup>6</sup> also in case any vessel from a foreign port or place, arriving within the limits of any collection district should depart or attempt to depart "except from stress of weather or other necessity," without making a report or entry under the provisions of the Act, or in case any merchandise were unladen therefrom before such report or entry.<sup>7</sup> The master of any such vessel who allowed any merchandise (including sea stores) to be unladen from such vessel at any time after its arrival within four leagues of the coast of the United States and before the vessel had come to the proper place for the discharge of

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on Oct. 28, 1919, 41 Stat. 305. A supplemental provision, declaring that the Act should apply not only to the United States, "but to all territory subject to its jurisdiction," was enacted Nov. 23, 1921, 42 Stat. 222.

See, in this connection, *Cunard S.S. Co. v. Mellon*, 262 U. S. 100.

See also *supra*, § 185, in relation to certain correspondence had with interested foreign States following the decision of the Supreme Court of the United States in this case.

<sup>2</sup> See *supra*, § 145; also, *supra*, §§ 142A and 144.

See documents in Hackworth, Dig., I, § 99.

<sup>3</sup> 41 Stat. 305.

<sup>4</sup> 42 Stat. 222.

<sup>5</sup> 42 Stat. 858. See especially Part 5, Enforcement Provisions, beginning with Section 581, *id.*, 979. These provisions of the Tariff Act of Sept. 21, 1922, were re-enacted with slight modification (and Section 581 without change) in the Tariff Act of June 17, 1930, 46 Stat. 590, beginning at Section 581, *id.*, 747.

<sup>6</sup> Section 584.

<sup>7</sup> Section 585.

that merchandise, and before he received a permit to unlade, was subjected to a severe penalty and the merchandise and the vessel were subjected to seizure and forfeiture.<sup>8</sup> Again, if merchandise unladen in violation of the Act were transhipped or placed in or received on another vessel, the master of the latter was subjected to a penalty, and that vessel and such merchandise were made liable to seizure and forfeiture.<sup>9</sup> The Act also imposed penalties for smuggling and clandestine importation,<sup>10</sup> and provided for the seizure of vessels whenever the owner or master or person in charge thereof had become subject to a penalty for violation of the customs revenue laws.<sup>11</sup>

The enforcement of the statutory law against certain foreign vessels gave rise to numerous adjudications in the Federal courts.<sup>12</sup> The position taken by the Government of the United States as such was set forth succinctly by Secretary Hughes, on January 23, 1924.<sup>13</sup> He said in part:

In the Bering Sea arbitration it was held that the United States had no jurisdiction in the Bering Sea fisheries beyond the three-mile limit and in the case of the British schooner *Sayward* the United States was required to compensate Great Britain for interfering with its sealing operations outside the three-mile limit.<sup>14</sup> The American-British Claims Arbitration Tribunal in December, 1920, awarded damages against the United States on account of the interference by officers with the British vessel *Coquiltam* because of transfer of cargo off the Pacific coast outside the three-mile limit.<sup>15</sup>

It is quite apparent that this Government is not in a position to maintain that its territorial waters extend beyond the three-mile limit and in order to avoid liability to other governments, it is important that in the enforcement of the laws of the United States this limit should be appropriately recognized. It does not follow, however, that this Government is entirely without power to protect itself from the abuses committed by hovering vessels. There may be such a direct connection between the operation of

<sup>8</sup> Section 586. An exception was made, however, in the case of an unlading or transshipment because of accident, stress of weather, or other necessity, where the master, as soon as possible thereafter, notified the collector of the district or the collector within the district at which the vessel might first arrive thereafter, and satisfied certain conditions that were specified.

<sup>9</sup> Section 587.

<sup>10</sup> Section 593.

<sup>11</sup> Section 594. There were restrictions, however, as to common carriers. There were provisions also in relation to concealment (Section 597), false seals (Section 598), gratuities (Section 600), bribery (Section 601), seizure procedure (Section 602), prosecution (Section 604), custody (Section 605), and other incidental matters.

<sup>12</sup> See, especially, the *Grace and Ruby*, 283 F. 475; the *Henry L. Marshall*, 286 F. 260; the *Henry L. Marshall*, 292 F. 486.

For a good discussion of the several cases not arising under treaty, see Jessup, *Territorial Waters*, Chap. V.

<sup>13</sup> Address before the Council on Foreign Relations, New York City, entitled "Recent Questions and Negotiations," *Am. J.*, XVIII, 229, 231-233.

<sup>14</sup> See Declaration of James Douglas Warren, Dec. 9, 1887, concerning the seizure of the schooner "W. P. Sayward," July 9, 1887, *Fur Seal Arbitration, Case of Great Britain*, Proceedings, IV, 153; award of the Tribunal of Arbitration, Aug. 15, 1893, *id.*, I, 75; also award of the Bering Sea Claims Commission, under convention between the United States and Great Britain, of Feb. 8, 1896, *Brit. and For. St. Pap.*, XC, 1264.

<sup>15</sup> Nielsen's Report, American and British Pecuniary Claims Arbitration, under special agreement of August 18, 1910, 445.

the vessel and the violation of the laws prescribed by the territorial sovereign as to justify seizure even outside the three-mile limit. This may be illustrated by the case of "hot pursuit" where the vessel has committed an offense against those laws within territorial waters and is caught while trying to escape. The practice which permits the following and seizure of a foreign vessel which puts to sea in order to avoid detention for violation of the laws of the State whose waters it has entered, is based on the principle of necessity for the "effective administration of justice." (Westlake, Part I, p. 177.) And this extension of the right of the territorial State was voted unanimously by the Institute of International Law in 1894.

Another case is one where the hovering vessel, although lying outside the three-mile limit, communicates with the shore by its own boats in violation of the territorial law. Thus Lord Salisbury said, with respect to the British schooner *Araunah*, that Her Majesty's Government were "of opinion that, even if the *Araunah* at the time of the seizure were herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the principles of the municipal law regulating the use of those waters."<sup>16</sup> A case similar to this was that of the *Grace and Ruby* (283 Fed. 475).

It will be noted that in the case of the *Araunah* it was the vessel herself that was deemed subject to seizure outside the three-mile limit, and not simply her small boats, and this was manifestly because of the direct connection between the conduct of the vessel and the violation of the law of the territory. It may be urged with force that this principle should not be limited to the case of the use by the vessel of her own boats, where she is none the less effectively engaged, although using other boats, in the illegal introduction of her cargo into the commerce of the territory. Such a case was that of the *Henry L. Marshall*, recently decided by the Circuit Court of Appeals of the Second Circuit (292 Fed. 487-488). The *Marshall*, a vessel sailing under British registry, in 1921 obtained clearance from the Bahama Islands laden with a cargo of intoxicating liquors. She had two clearances, both dated the same date, signed by the same collector of revenue, one of which stated that she had cleared for Halifax with the cargo in question and the other that she had cleared for Gloucester, Mass., in ballast.

The same collector furnished two bills of health, simply differing as to destination. It was abundantly proved that the real object and only business of the *Marshall* was to peddle liquor along the coast of the United States and particularly did she pursue her vocation while lying from nine to ten miles off Atlantic City and sent liquor on shore pursuant to previous arrangements made in the United States by motor boats. She was seized outside the three-mile limit and condemned. Circuit Judge Hough, speaking for a unanimous court, after referring to the case of the *Grace and Ruby*, said: "The difference between the facts there presented and those at bar

<sup>16</sup> See The Marquess of Salisbury to Mr. Gosling, May 9, 1890, Brit. and For. St. Pap., LXXXII, 1057, 1058-1059. It may be noted that, according to the text of Lord Salisbury's note, as here given, he referred to the "provisions" of the municipal law and not to the "principles" thereof.



is that, instead of arranging to unload and deliver the cargo of the schooner by, through, or with some assistance from the schooner's crew or equipment (as in the case cited), the whole matter was performed by a previous arrangement with those controlling the *Marshall* but with small boats that did not belong to the schooner and were not even partially manned by men from her crew. But it is just as true in this case as it was in the case of the *Grace and Ruby*, that 'the act of unloading, although beginning beyond the three-mile limit, continued until the liquor was landed.'"

The vessel was thus found to be engaged, not in the exercise of her admitted rights upon the high seas, but in unlawfully unloading her cargo into the territory of the United States, in "an actual introduction of a part thereof into the commerce of the United States" contrary to its laws. It should be added that while the British Government originally made a protest in this case, it was finally withdrawn upon the ground that the vessel was not of *bona fide* British registry, and it should be said that in this withdrawal the British Government did not acquiesce in the principle of the ruling. In view, however, of the historic practice of nations in the protection of their territory from the violation of their laws by hovering vessels, the United States Government can not admit that the accepted rules of international law preclude such action as that taken in the circumstances of the *Marshall* case.<sup>17</sup>

While the Secretary of State did not, in the statement quoted, advert to the situation where a foreign vessel at time of seizure on the high sea had not by any process, as through the instrumentality of its own small boats or of others to be deemed to be associated with the vessel, introduced or attempted to introduce unlawfully intoxicating liquors into American territory or territorial waters, he did not hesitate to declare on December 8, 1923, that "This Government would find difficulty in justifying seizures of foreign vessels lying outside of American territorial waters where communication with the shore and unlawful unloading are not shown."<sup>18</sup> The Supreme Court of the United States, in 1933,

<sup>17</sup> Declared Secretary Hughes, in a communication to the British Chargé d'Affaires at Washington, July 16, 1923, in relation to the same case: "The foregoing conclusions are deemed by this Government to be self explanatory. They relate to the conduct of a vessel which was far from exercising the normal right of passage on the high seas adjacent to American waters in the course of a voyage between two British ports. They show that the vessel and those controlling it started upon its sinister voyage with connivance and aid of British authority in British territory; that its direct and single effort was by fraudulent means to introduce the cargo, and all of it, within the territory of the United States; and that the vessel prior to and at the time of its actual seizure, even though more than three miles from the shore, was hovering off the coasts of the United States and was engaged in an attempt to violate the laws of the United States by the introduction of the liquor within its territory. It should be added that adequate judicial procedure, as already noted, was available and used, in order to determine these facts, and in these circumstances the competent judicial authority of the United States has sustained the seizure of the vessel." (For. Rel. 1923, Vol. I, 165, 167.)

See also Mr. Hughes, Secy. of State, to Senator Sterling, Aug. 16, 1922, Hackworth, Dig., I, 672.

<sup>18</sup> In the course of his statement of Dec. 8, 1923 (which was given to the press), Secy. Hughes said also: "At the present time, in the absence of treaty, the United States is, in many instances, not permitted under international law to use its forces on the high seas to check the operation of foreign vessels from foreign ports engaged in the transportation and sale of liquor. Authority in such cases, with respect to the high seas, cannot be effectively conferred by Acts of Congress, if these are in contravention of international law, even

made the following pertinent statement of fact in relation to the matter through an opinion by Mr. Justice Brandeis. "Both before and after the passage of the Tariff Act of 1922 it was the consistent policy of our Government to release, upon protest, all British vessels seized beyond the three-mile limit and not bound to the United States, unless it appeared that the hovering vessel had, by means of her own small boats and crew, assisted in landing there contraband goods. Our Government deemed that exception an essential to the enforcement of our laws and consistent with the principles of international law."<sup>19</sup>

## (b)

§ 235B. **Treaties for the Prevention of Smuggling of Intoxicating Liquors.** The assertion by the United States of its right under international law to commit acts outside of its territorial waters for the prevention of smuggling intoxicating liquors into its domain was bound to produce friction and inspire protest by States whose vessels were subjected to interference.<sup>1</sup> The matter needed to be regulated by convention. A treaty designed to permit the bringing into American territorial waters of intoxicating liquors under seal (which the Volstead Act was construed to forbid, and which, nevertheless, the Eighteenth Amendment to the Constitution did not seemingly proscribe), offered an appropriate instrumentality also for the recognition by a foreign contracting power of the exercise by the United States of a protective jurisdiction on the high

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though such legislative acts as municipal law would govern the decisions of our own courts."

<sup>19</sup> Cook v. United States, 288 U. S. 102, 114-115, and documents there cited.

While the statutory law of the United States may have served to deter American tribunals from passing upon the question whether the enforcement of provisions thereof was in contravention of the requirements of international law, except in so far as a question might arise touching the interpretation of the statutory law when the scope of the operation thereof was a matter of dispute (see Thomas, J., in *The Over The Top*, 5 F. 2d, 838, 842), it is believed that the general assertion of protective jurisdiction which the United States sought to exercise in virtue of the Acts of Congress manifested no disposition to commit internationally illegal conduct.

§ 235B. <sup>1</sup> Declared Mr. Chilton, British Chargé d'Affaires *ad interim*, at Washington, in a communication to Secy. Hughes, July 10, 1923: "In order to avoid the possibility of any misunderstanding on the part of the United States Government as to His Majesty's Government's attitude in this matter I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform you that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by His Majesty's Government as creating a very serious situation." (Dept. of State, Press Release, Feb. 20, 1927, 3.)

Declared Secy. Hughes on Jan. 23, 1924: "But it is apparent that, whatever measures this Government may believe that it is free to adopt in accordance with the principles of international law, these, so far as they are practicable, are far from adequate to meet the exigency; and, further, the diplomatic history of the United States reveals the fact that maritime powers, including the United States itself, are highly sensitive to attempts by foreign authorities to seize their vessels on the high seas in time of peace. In each case of seizure there are likely to be serious questions of fact and law, and at any time there may be collisions of authority which would be embarrassing to friendly relations. It is precisely in matters of this description, where the sense of grievance and resentment are so easily aroused, that the effort should be made to reach an international agreement suited to the case. We need to put the measures that are required for the adequate enforcement of our laws on an impregnable basis and to invite and secure the friendly coöperation of the maritime powers." ("Recent Questions and Negotiations," address before the Council on Foreign Relations, New York City, *Am. J.*, XVIII, 229, 233.)

seas.<sup>2</sup> The United States, accordingly, in June, 1923, offered to Great Britain and to certain other maritime States the draft of a conventional scheme embodying this two-fold plan.<sup>3</sup> Late in 1923, the British Government submitted a counter-draft which was in the main responsive to the proposals from the United States and offered a basis of agreement. A convention with Great Britain was signed on January 23, 1924.<sup>4</sup> It was the precursor of a series of treaties concluded with other States, and in which like provision was made with respect to the matter of seizure and search on the high sea.<sup>5</sup>

The treaty with Great Britain provided that His Britannic Majesty would raise no objection to the boarding of private vessels under the British flag outside of territorial waters by the authorities of the United States, its territories or possessions, in order that enquiries might be addressed to those on board, and an examination be made for the purpose of ascertaining whether the vessel or those on board were endeavoring to import or had imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. It was declared that when such enquiries and examination showed a reasonable ground for suspicion, a search of the vessel might be instituted. If there was a reasonable cause of belief that the vessel had committed or was committing or attempting to commit an offense against the laws of the United States, its territories or possessions, prohibiting the importation of alcoholic beverages, it was provided that the vessel might be seized and taken into a port of the United States, its territories or possessions, for adjudication in accordance with such laws. It was declared that the rights conferred by the

<sup>2</sup> See "Treaties to Prevent the Smuggling of Intoxicating Liquors into the United States," American Secretaries of State and Their Diplomacy, New York, 1929, X, 289. Also, Jessup, Territorial Waters, Chap. VI; W. E. Masterson, Jurisdiction in Marginal Seas, New York, 1929, Chap. V.

<sup>3</sup> The author has had occasion to observe elsewhere: "The several recipients other than Great Britain were disposed to await the action of that country; and while Lord Curzon remained its Secretary for Foreign Affairs, Great Britain made no favourable response. In the United States, Secretary Hughes's proposal, in so far as it was known, evoked little enthusiasm. Practical difficulties with respect to seizures on the high seas were magnified, and the entire suggestion encountered at first a cool welcome. This circumstance was not calculated to hasten agreement. Simultaneously the increasing success of smuggling operations inspired the belief in certain quarters that the United States was not bent on suppressing the traffic. The sense of justice of the English people began, however, to manifest itself. There was an awakening to the abuses to which the British merchant flag was being put. The unwisdom and unreasonableness of attempting to shield British ships from the consequences of operations designed to violate the fundamental law of a friendly State became apparent. It was felt that the United States was entitled to a treaty which would simplify its efforts to defend itself against rumrunning." (American Secretaries of State and Their Diplomacy, New York, 1929, X, 295.)

See documents in Hackworth, Dig., I, § 99, in relation to the negotiation of the treaty that was signed in 1924.

<sup>4</sup> U. S. Treaty Vol. IV, 4225.

<sup>5</sup> See, for example, convention with Norway, of May 24, 1924, U. S. Treaty Series, No. 689; convention with Greece, of April 25, 1928, U. S. Treaty Series, No. 772; convention with Japan, of May 31, 1928, U. S. Treaty Series, No. 807; convention with Poland, of June 19, 1930, U. S. Treaty Series, No. 821; convention with Chile, of May 27, 1930, U. S. Treaty Series, No. 829.

See also, in this connection, convention for the Suppression of Contraband Traffic in Alcoholic Liquors, signed, at Helsingfors, Aug. 19, 1925, in behalf of Germany, Denmark, Estonia, Finland, Latvia, Lithuania, Norway, Poland and the Free City of Danzig, Sweden, and the Union of Socialist Soviet Republics, League of Nations Treaty Series, XLII, 73, Hudson. Int. Legislation, No. 144.

foregoing provisions should "not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense." In cases, however, in which the liquor was intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it was agreed that it should be the speed of such other vessel and not the speed of the vessel boarded, which should determine the distance from the coast at which the foregoing right could be exercised.<sup>6</sup>

In 1933, the Supreme Court of the United States had occasion to interpret the treaty with Great Britain of January 23, 1924, in a case growing out of the seizure on November 1, 1930, of the British motor screw *Mazel Tov*.<sup>7</sup> It was held, in brief, that the authority conferred by § 581 of the Tariff Act of 1922 to board, search and seize within the four league limit was, as respected British vessels, modified by the treaty which substituted for that distance one which could be traversed in one hour by the vessel suspected of endeavoring to commit the offense. After careful examination of the history of the treaty in the light of the conditions under which it was negotiated, the Court declared, through Mr. Justice Brandeis:

The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with" the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the

<sup>6</sup> See Art. II.

It should be noted that the plan which measured the distance from the shore for permitted search and seizure according to an hour's run by the vessel suspected of endeavoring to commit the specified offense was suggested by Great Britain which seemingly preferred it to a scheme of measurement based upon a specified geographical limit such as one of twelve miles.

See also Art. IV in relation to the treatment of any claim by a British vessel for compensation on the ground that it had suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Art. II.

According to Art. VI: "In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present Treaty the said Treaty shall automatically lapse, and, on such lapse or whenever this Treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this Treaty not been concluded."

See *supra*, § 185, in relation to the bringing into American territorial waters of intoxicating liquors under seal. See, in this connection, Art. III of the convention with Great Britain of Jan. 23, 1924.

<sup>7</sup> See *Cook v. United States*, 288 U. S. 102. "The *Mazel Tov*—a vessel of speed not exceeding 10 miles an hour—was discovered by officers of the Coast Guard within four leagues of the coast of Massachusetts and was boarded by them at a point 11½ miles from the nearest land. The manifest was demanded and exhibited. Search followed, which disclosed that the only cargo on board, other than ship stores, was unmanifested intoxicating liquor which had been cleared from St. Pierre, a French possession. The vessel ostensibly bound for Nassau, a British possession, had, when boarded, been cruising off our coast with the intent that ultimately the liquor should be taken to the United States by other boats. But the evidence indicated that she did not intend to approach nearer than four leagues to our coast; and, so far as appeared, she had not been in communication with our shores and had not unladen any part of her cargo. The boarding officers seized the *Mazel Tov* at a point more than 10 miles from our coast; took her to the Port of Providence; and there delivered the vessel and cargo to the customs officials." (*Id.*, 107–108.) See also cases cited *id.*, 109, footnote 1.

vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.<sup>8</sup>

He also found occasion to observe that in a strict sense the treaty was self-executing, in that no legislation was necessary to authorize executive action in pursuance of its provisions.<sup>9</sup>

In an earlier case, decided in 1927,<sup>10</sup> the Supreme Court, interpreting the convention with Great Britain, held that it was permissible thereunder to prosecute the persons seized and brought into the territory of the United States who had been found on board a vessel seized outside the limits thereof, for conspiracy to commit the offense of illegal importation.<sup>11</sup> Moreover, it was decided also that

<sup>8</sup> *Id.*, 121-122. The Court declared that as the *Mazel Tov* was seized without warrant of law, the libels were properly dismissed. The Government contended that the alleged illegality of the seizure was immaterial. It urged that the facts established a violation of the statutory law for which there was a prescribed penalty of forfeiture. It contended, to quote the Court, "that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the Port of Providence, the federal court for Rhode Island acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties." This argument rested, according to the Court, "upon misconceptions," and was based upon a doctrine that was inapplicable in the instant case. It pointed out that the objection to the seizure was not that it was wrongful "merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made." "That objection" was declared to be rather "that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority." (*Id.*, 121.)

See Edwin D. Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," *Am. J.*, XXVIII, 231.

<sup>9</sup> 288 U. S. 102, 119, citing *Ford v. United States*, 273 U. S. 593, as well as the view of the Secretary of State, expressed in a letter of March 3, 1924, to the Chairman of the House Committee on Foreign Affairs.

In a footnote on page 109 of the opinion, from which Mr. Justice Sutherland and Mr. Justice Butler dissented, Mr. Justice Brandeis cited the numerous decisions of the lower Federal courts, expressing divergent views concerning the liquor treaties. See discussion of the relevant cases prior to the date of its publication in 1927, in Jessup, *Territorial Waters*, Chap. VII.

According to Art. 16 of Harvard Draft Convention on Jurisdiction with Respect to Crime: "In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures." (*Am. J.*, XXIX, *Supplement*, 442.)

<sup>10</sup> *Ford v. United States*, 273 U. S. 593.

<sup>11</sup> Declared Chief Justice Taft in the opinion of the court: "The treaty provides for the disposition of the vessel after seizure. It has to be taken into port for adjudication. What is to be adjudicated? The vessel. What does that include? The inference that both ship and those on board are to be subjected to prosecution on incriminating evidence is fully justified by paragraph 1 of Article II, in specifically permitting examination of the ship papers and inquiries to those on board to ascertain whether, not only the ship, but also those on board, are endeavoring to import, or have imported, liquor into the United States. If those on board are to be excluded, then by the same narrow construction the cargo of liquor is to escape adjudication, though it is subject to search as the persons on board are to inquiry into their guilt. It is no straining of the language of the article therefore to interpret the phrase 'the vessel may be seized and taken into a port of the United States . . . for adjudication in accordance with such laws,' as intending that not only the vessel but that all and everything on board are to be adjudicated. The seizure and the taking into port necessarily include the cargo and persons on board. They can not be set adrift or thrown overboard. They must go with the ship—they are identified with it. Their immunity on the high seas from seizure or being taken into port came from the immunity of the vessel by reason of her British nationality. When the vessel lost this immunity, they lost it too, and when they were brought into a port of the United States and into the jurisdiction of its District Court, they were

one might be guilty as a party to such conspiracy, although he was and remained outside of the territorial jurisdiction of the United States.<sup>12</sup> Through these two decisions, the Supreme Court of the United States pointed to the latitude which the convention acknowledged or yielded, as well as to the restraints which it imposed.

It may be observed that on May 4, 1937, the Secretary of State, in response to an inquiry from the Department of Justice, informed the latter that the convention of 1924, between the United States and Great Britain "has not been terminated by reason of the repeal of the Eighteenth Amendment to the Constitution of the United States."<sup>13</sup>

(c)

§ 235C. **The Anti-Smuggling Act of 1935.** Through the so-called Anti-Smuggling Act approved August 5, 1935, the United States made fresh and, in a geographical sense, extended assertion of the right to exercise jurisdiction over foreign as well as domestic vessels on the high seas as a means of facilitating the prevention of the unlawful introduction of articles within its coastal domain.<sup>1</sup> In enacting the new law the Congress disclaimed the design to deviate from the requirements of any contractual obligation of the United States as laid down in any treaty.<sup>2</sup> Nor did it regard its action as violative of any obligation imposed by international law.<sup>3</sup> The Act expressed merely an attempt to exercise acknowledged privileges of jurisdiction in a way that the power of the smuggler and the prevalence of smuggling appeared in the circumstances to make reasonable.<sup>4</sup> Whether the Act constituted, nevertheless, an assertion which, if applied

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just as much subject to its adjudication as the ship. If they committed an offense against the United States and its liquor importation laws, they can not escape conviction, unless the treaty affirmatively confers on them immunity from prosecution." (*Id.*, 610-611.)

<sup>12</sup> Declared Chief Justice Taft, in this connection: "The overt acts charged in the conspiracy to justify indictment under § 37 of the Criminal Code were acts within the jurisdiction of the United States, and the conspiracy charged, although some of the conspirators were corporeally on the high seas, had for its object crime in the United States and was carried on partly in and partly out of this country, and so was within its jurisdiction under the principles above settled." (*Id.*, 624.)

See Edwin D. Dickinson, "The Supreme Court Interprets the Liquor Treaties," *Am. J.*, XXI, 505.

<sup>13</sup> Hackworth, Dig., I, 690. See also *The Ada M.*, 60 F. (2d) 449; 67 F. (2d) 333; *United States v. 5,870 Bags and 100 Keys*, 20 F. Supp. 331, 333.

§ 235C. <sup>1</sup> 49 Stat. 517, 19 U.S.C.A. §§ 1701-1711.

See Hearings before the Committee on Ways and Means, House of Representatives, 74 Cong., 1 Sess., on H. R. 5496, Govt. Printing Office, Washington, 1935, containing opinion by Dr. H. E. Yntema on The Validity of Hovering Legislation in International Law, submitted by the Treasury Department in support of H. R. 5496, p. 82. Also, Hackworth, Dig., I, 664-667.

See also Senate Report (by Mr. King, from the Committee on Finance) No. 1036, 74 Cong., 1 Sess., to accompany H. R. 7980.

<sup>2</sup> See Section 1 (b). Also *The Reidun*, 14 F. Supp. 771.

<sup>3</sup> See P. C. Jessup, "The Anti-Smuggling Act of 1935," *Am. J.*, XXXI, 101. See also Herbert W. Briggs, "*Les Etats-Unis et la Loi de 1935 sur la Contrebande. Etude de la Zone Contiguë et des Critères de 'Raisonnabilité'*," *Rev. Droit Int.*, 3 Sér., 217.

<sup>4</sup> "I need scarcely explain, in view of the character of the Anti-Smuggling Act, that, with reference to foreign vessels, it is basically founded upon the position which was taken in the negotiations with the British Government in 1922 and 1923 and which led to the conclusion of the liquor conventions. In fact, so far as I was responsible for the formulation of the Act,

to foreign shipping might be productive of abuse of the jurisdictional privileges of the United States presents a question of which the solution calls for close and impartial examination of various provisions.

Section 1 was as follows:

(a) Whenever the President finds and declares that at any place or within any area on the high seas adjacent to but outside customs waters any vessel or vessels hover or are being kept off the coast of the United States and that, by virtue of the presence of any such vessel or vessels at such place or within such area, the unlawful introduction or removal into or from the United States of any merchandise or person is being or may be occasioned, promoted, or threatened, the place or area so found and declared shall constitute a customs-enforcement area for the purposes of this Act. Only such waters on the high seas shall be within a customs-enforcement area as the President finds and declares are in such proximity to such vessel or vessels that such unlawful introduction or removal of merchandise or persons may be carried on by or to or from such vessel or vessels. No customs enforcement area shall include any waters more than one hundred nautical miles from the place or immediate area where the President declares such vessel or vessels are hovering or are being kept and, notwithstanding the foregoing provision, shall not include any waters more than fifty nautical miles outwards from the outer limit of customs waters. Whenever the President finds that, within any customs-enforcement area, the circumstances no longer exist which gave rise to the declaration of such area as a customs-enforcement area, he shall so declare, and thereafter, and until a further finding and declaration is made under this subsection with respect to waters within such area, no waters within such area shall constitute a part of such customs-enforcement area. The provisions of law applying to the high seas adjacent to customs waters of the United States shall be enforced in a customs-enforcement area upon any vessel, merchandise, or person found therein.

(b) At any place within a customs-enforcement area the several officers of the customs may go on board of any vessel and examine the vessel and any merchandise or person on board, and bring the same into port, and, subject to regulations of the Secretary of the Treasury, it shall be their duty to pursue and seize or arrest and otherwise enforce upon such vessel, merchandise, or person, the provisions of law which are made effective thereto in pursuance of subsection (a) in the same manner as such officers are or may be authorized or required to do in like case at any place in the United States by virtue of any law respecting the revenue: *Provided*, That nothing contained in this section or in any other provision of law respecting the revenue shall be construed to authorize or to require any officer of the United States to enforce any law thereof upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government

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it was consciously intended to supplement and to support the system of control inaugurated by these conventions, which have appeared to me to afford an admirable method of resolving and avoiding possible disputes but which also implicitly involve some sort of a residual right of self-defense against flagrant violation of revenue laws." (Dr. H. E. Yntema to the author, Oct. 15, 1935.)

enabling or permitting the authorities of the United States to board, examine, search, seize or otherwise to enforce upon such vessel upon the high seas the law of the United States except as such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government: *Provided further*, That none of the provisions of this Act shall be construed to relieve the Secretary of Commerce of any authority, responsibility, or jurisdiction now vested in or imposed on that officer.<sup>5</sup>

It is not apparent how the bare presence of a foreign ship in a particular position or area of the high seas within which it may advantageously initiate or participate in attempts unlawfully to introduce articles within the domain of a State justifies in time of peace interference with the vessel unless at the time of such action the ship is a participant in conduct which that State may then fairly restrain. Of this requirement calling for evidence of a causal connection between the action of the ship or persons controlling it and the domain of the prosecuting sovereign, the provisions above quoted failed to take due heed.<sup>6</sup>

Again, the bare construction or fitting out of a foreign ship within the territory of a State for the purpose of being employed to defraud its revenue or smuggling laws would hardly suffice to justify its seizure on the high seas, a consideration which was lost sight of in Section 3 (a) of the Act.<sup>7</sup> Through the same Section the finding of any vessel that had previously been employed within the domain of the United States to violate its smuggling laws was to suffice to cause its seizure and forfeiture; and a like result was to ensue in the case of a so-called "vessel of the United States," if found to have been so employed "at any place." Here was an assertion of a claim that the authorities of a State might go out on the high seas and bring in for the imposition of a penalty a previous violator of

<sup>5</sup> "The term 'customs waters' means, in the case of a foreign vessel subject to a treaty or other arrangement between a foreign government and the United States enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon such vessels upon the high seas the laws of the United States, the waters within such distance of the coast of the United States as the said authorities are or may be so enabled or permitted by such treaty or arrangement and, in the case of every other vessel, the waters within four leagues of the coast of the United States.

"The term 'hovering vessel' means any vessel which is found or kept off the coast of the United States within or without the customs waters, if, from the history, conduct, character, or location of the vessel, it is reasonable to believe that such vessel is being used or may be used to introduce or promote or facilitate the introduction or attempted introduction of merchandise into the United States in violation of the laws respecting the revenue." (Title IV, § 401, 49 Stat. 529, 19 U.S.C.A. § 1709.)

<sup>6</sup> See *Efforts to Prevent, Without the Aid of Treaty, the Smuggling of Intoxicating Liquors into American Territory Following the Adoption of the Eighteenth Amendment to the Constitution*, *supra*, § 235A.

See also Section 2 of the Act.

<sup>7</sup> It is not apparent how the construction or fitting out of a foreign ship to enable it to be the instrumentality for the commission of illegal acts within the national domain justifies the seizure of the vessel on the high seas unless it is shown that it has been or is at the time employed in fact for the purpose for which it was designed.

In *The Reidun*, a case involving a libel based upon section 3 of the Anti-Smuggling Act, Galston, J., declared: "Congress may very well have intended to mete out punishment to those who conspire outside of the territorial jurisdiction to violate laws of the nation by subjecting them to apprehension or punishment when found within the jurisdiction. If the *Reidun* was fitted out as alleged and did cause merchandise to be smuggled into the United States in defiance of its revenue law, it ran the hazard of punishment by coming within the customs enforcement areas." (15 F. Supp. 112, 113.)



the local law within territorial limits without regard to the customary requirements which characterize the practice as to hot pursuit. Moreover the larger claim in relation to "vessels of the United States," was not confined to ships of American nationality; for the Act made a sweeping definition of such vessels, in virtue of which American ownership or control was made the foundation of a jurisdictional claim over ships of foreign registry.<sup>8</sup> Accordingly, under the provisions of Section 3, a foreign registered ship which had previously or "at any place," been a participant in efforts to violate the local law might, if encountered within specified areas of the high seas, be subjected to penalties, provided there was the requisite American ownership or control.<sup>9</sup>

As a further and special means of preventing the smuggling of intoxicating liquors into American territory, the Act provided that every vessel not exceeding five hundred net tons "from a foreign port or place," or which had "visited a hovering vessel" should carry a certificate for importation into the United States of any spirits, wines, or other alcoholic liquors on board thereof (sea stores excepted), destined to the United States.<sup>10</sup> Any such articles found, or discovered to have been, upon any such vessel at any place in the United States, "or within the customs waters," without such certificate on board, and which were not shown to have a bona fide destination without the United States, were to be seized and forfeited; and in the case of any such merchandise so destined to a foreign port or place, a bond was to be required in double the amount of the duties to which such merchandise would be subject if imported into the United States, conditioned upon the delivery of such merchandise at such foreign port or place as might be certified by a consular officer of the United States or otherwise as provided in the regulations.<sup>11</sup> Here was a broad assertion of a right to impose conditions of transit in time of peace on foreign vessels *en route* on the high seas between foreign ports, when no entrance into American waters was contemplated.<sup>12</sup>

By provisions amendatory of the then existing statutory law,<sup>13</sup> the Act proceeded not only to clothe the appropriate officials with authority to board vessels of whatsoever nationality within specified areas of the high seas, but also to subject such vessels to penalties for failure to comply with signals to stop.<sup>14</sup>

<sup>8</sup> Thus, according to Section 3 (b): "Every vessel which is documented, owned, or controlled in the United States, and every vessel of foreign registry which is, directly or indirectly, substantially owned or controlled by any citizen of, or corporation incorporated, owned, or controlled in, the United States, shall, for the purposes of this section, be deemed a vessel of the United States."

<sup>9</sup> See Extraterritorial Crime, Offenses Committed on Vessels of the State, *infra*, § 239.

<sup>10</sup> Section 7. The certificate was to be issued by a consular officer of the United States or other authorized person pursuant to such regulations as the Secretary of State and the Secretary of the Treasury might jointly prescribe.

<sup>11</sup> Section 7. The section contained the proviso "that if the collector shall be satisfied that the certificate required for the importation of any spirits, wines, or other alcoholic liquors was issued and was lost or mislaid without fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake, said penalties shall not be incurred nor shall such bond be required."

<sup>12</sup> See P. C. Jessup, in *Am. J.*, XXXI, 101, 105.

See also Section 8 (a).

<sup>13</sup> Section 203 (a). Section 581 of the Tariff Act of 1930 was amended.

<sup>14</sup> Thus, according to the amended Section 581 (d) of the Tariff Act of 1930: "Any vessel

Heavy penalties were to be imposed upon the master of any vessel from a foreign port or place who should allow any merchandise to be unladen from such vessel after its arrival within customs waters and before it might reach the "proper place" for the discharge of such merchandise, and before the master should receive a permit to unlade.<sup>15</sup> The following provision merits attention:

The master of any vessel from a foreign port or place who allows any merchandise (including sea stores), the importation of which into the United States is prohibited, or which consists of any spirits, wines, or other alcoholic liquors, to be unladen from his vessel at any place upon the high seas adjacent to the customs waters of the United States to be transshipped to or placed in or received on any vessel of any description, with knowledge, or under circumstances indicating the purpose to render it possible, that such merchandise, or any part thereof, may be introduced, or attempted to be introduced, into the United States in violation of law, shall be liable to a penalty equal to twice the value of the merchandise but not less than \$1,000 and the vessel from which the merchandise is so unladen, and its cargo and such merchandise, shall be seized and forfeited.<sup>16</sup>

It will be observed that here the forbidden areas were extended to waters of the high seas "adjacent to the customs waters of the United States"; and also that the bare knowledge of the master that the transshipped merchandise *might be* introduced or attempted to be introduced into the United States in violation of law sufficed as the basis of the imposition of a penalty, despite the nationality of the ship.

With a view to simplifying the enforcement of the Act, certain rules of evidence were laid down that deserve attention. Thus it was provided that the fact that a vessel had become subject to pursuit (as provided in Section 581 of the Tariff Act of 1930, as amended), or was a hovering vessel, or that a vessel failed, at any place within the customs waters of the United States or within a customs-enforcement area, to display lights as required by law should be "prima facie evidence" that such vessel was being or had been, or was attempted to be employed to defraud the revenues of the United States.<sup>17</sup> Again, in the case of any hovering vessel, or any vessel which failed (except for unavoidable cause), at any place within the customs waters or within a customs-enforcement area established under the Act, to display lights as required by law, or which became subject to pursuit as provided in Section 581 of the Act, it was to be "presumed" that any merchandise (sea stores excepted), the importation of which into the United States was prohibited, or which consisted of any spirits, wines, or other

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or vehicles which, at any authorized place, is required to come to a stop by any officer of the customs, or is required to come to a stop by signal made by any vessel employed in the service of the customs displaying the ensign and pennant prescribed for such vessel by the President, shall come to a stop, and upon failure to comply, a vessel so required to come to a stop shall become subject to pursuit and the master thereof shall be liable to a fine of not more than \$5,000 nor less than \$1,000."

<sup>15</sup> Section 205, Section 586 of the Tariff Act of 1930, as amended, sub-section (a).

<sup>16</sup> *Id.*, sub-section (b).

<sup>17</sup> Section 3 (c).

alcoholic liquors, so found, or discovered to have been, on board the ship, was destined to the United States.<sup>18</sup> Other "rules of proof" were also laid down.<sup>19</sup>

In a word, the Anti-Smuggling Act of 1935 registered a broad claim of right on the part of the United States to exercise jurisdiction on the high seas at great distances from American territorial waters over foreign ships and their occupants even when not engaged in trade with the United States, and under circumstances when such vessels or those controlling them were not at the time of interference with their freedom shown to be in fact participating in an endeavor to introduce unlawfully merchandise into American territory. Moreover, as has been noted, requirements of proof of certain proscribed acts were relaxed for purposes of adjudication by presumptions laid down by the prospective prosecuting State. While the Act embodied what a group of maritime States, confronted with a common problem pertaining to smuggling, might possibly deem it expedient to agree upon, it proclaimed assertions which the individual legislating State might encounter difficulty in applying without violating the requirements of international law. A special danger to the United States from the enactment of the Act lay in the encouragement thereby given to other maritime powers unlawfully to interfere in divers ways in time of peace with legitimate foreign shipping on the high seas.

(10)

§ 236. **Hot Pursuit.** When a foreign vessel, after having violated the municipal laws of a State, within its territorial waters, puts to sea to avoid detention, conditions justifying immediate pursuit and capture on the high seas on grounds of self-defense are rarely present. Nevertheless, it may be necessary, as Westlake has pointed out, "for the effective administration of justice," that a State should be permitted to pursue and capture such a vessel on the high seas, and bring it back to the national domain for judicial prosecution.<sup>1</sup> This is obviously true if

<sup>18</sup> Section 206, Section 587 of the Tariff Act of 1930, as amended, sub-section (a).

According, however, to sub-section (c), nothing in this section was to be construed to render any vessel liable to forfeiture which was bona fide bound from one foreign port to another foreign port, and which was pursuing its course, wind and weather permitting.

<sup>19</sup> According to Section 207, Section 615 of the Tariff Act of 1930, as amended: "(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

"(2) Marks, labels, brands, or stamps indicative of foreign origin, upon or accompanying merchandise or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

"(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel."

§ 236. <sup>1</sup> Int. L., 2 ed., I, 177. See, also, Woolsey, 6 ed., 71.

See statement of Mr. Hughes, Secy. of State, of Jan. 23, 1924, quoted in the text, *supra*, § 235A; also opinion of the author, as the Solicitor for the Dept. of State, Jan. 9, 1924, Hackworth, Dig., II, 702.

See The Ship "North," 37 Canadian Supreme Court, 385.

the pursuit be commenced before the ship has actually escaped from the territorial waters, and is continued without interruption until the vessel is overtaken and seized.<sup>2</sup>

Maritime powers are reluctant to attempt to shield their own vessels from the just and natural consequences of illegal acts committed within the territorial waters of friendly States. Hence the practice to which Sir Charles Russell, in his argument in the Fur Seal Arbitration, bore striking testimony, reveals acquiescence on the part of maritime States in the hot pursuit and arrest on the high seas of a delinquent and fugitive vessel by the public ship of the territorial sovereign whose municipal laws have been violated. This acquiescence affords solid proof, therefore, that such action is not internationally illegal.<sup>3</sup>

The materials indicative of such acquiescence appear to establish that the pursuit and arrest of a foreign ship on the high seas should be conditioned upon some infringement of the local law, should be begun while the escaping vessel is within territorial waters, and should be continued without interruption until arrest is effected.<sup>4</sup> The privilege of pursuit doubtless ceases as soon as the ship enters the territorial waters of its own country or of a third State.<sup>5</sup> An agreement may in terms provide that pursuit may be begun in an area of the high seas in which the coastal State is entitled to exercise, in consequence of such agreement, special powers of control over the ships of the contracting parties.<sup>6</sup> Whether a convention yielding special powers of control over vessels within such

<sup>2</sup> "One condition is it must be a *hot* pursuit — that is to say, a nation cannot lie by for days or weeks and then say: 'You, weeks ago, committed an offence within the waters, we will follow you for miles, or hundreds of miles, and pursue you.' As to that, it must be a *hot* pursuit, it must be *immediate* and it must be *within limits of moderation*." Sir Charles Russell, oral argument, Fur Seal Arbitration, *Proceedings*, XIII, 1079.

<sup>3</sup> Fur Seal Arbitration, *Proceedings*, XIII, 1079.

Denying such a right, see Award of Mr. Asser, Arbitrator in the cases of the *James Hamilton Lewis*, and the *C. H. White* under Convention between the United States and Russia, Aug. 26–Sept. 8, 1900, For. Rel. 1902, Appendix, I, 454, 456, and 459, 462.

Concerning the case of the *Itata*, a vessel in the service of the Chilean Congressional Party, and which in 1891, after having escaped from the United States, and having eluded pursuit on the high seas, was surrendered, together with her cargo, to an American naval commander within Chilean waters, see Moore, *Arbitrations*, III, 3067–3071; Moore, *Dig.*, II, 985–986, and documents there cited.

<sup>4</sup> See responses to the Preparatory Committee for the Codification Conference of 1930 at The Hague, on Point XIV; also Basis of Discussion No. 26, Bases of Discussion, 1929, Vol. II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 92–96.

Also, Harvard Draft Convention on Territorial Waters, Art. 21 and Comment, *Am. J.*, XXIII, *Special Supplement* (April, 1929), 358–362.

<sup>5</sup> "If the vessel succeeds in entering the territorial waters of its own or of any third State, the pursuit must cease. It is not believed that States would readily accept the proposition that the pursuing vessel may hover outside the foreign territorial waters and resume the pursuit if the offending vessel again take to the high sea. Once the pursuit is interrupted, the right to pursue should cease." (Comment on Art. 21, Harvard Draft Convention on Territorial Waters, *Am. J.*, XXIII, *Special Supplement*, April, 1929, 358.)

<sup>6</sup> See Art. 9 of Convention for the Suppression of Contraband Traffic in Alcoholic Liquors, signed at Helsingfors, Aug. 19, 1925, in behalf of Germany, Denmark, Esthonia, Finland, Latvia, Lithuania, Norway, Poland and the Free City of Danzig, Sweden, and the Union of Socialist Soviet Republics, League of Nations, Treaty Series, XLII, 73, Hudson, *Int. Legislation*, No. 144.

The same idea finds approval in Art. 13 of the Project on the Régime relative to the Territorial Sea in Time of Peace adopted by the Institute of International Law at Stockholm in 1928, *Annuaire*, XXXIV, 759. Compare Art. VIII of the Rules on the Definition and Régime of the Territorial Sea, adopted by the Institute of International Law in 1894, *Annuaire*, XIII, 330, J. B. Scott, *Resolutions*, 115.

an area, like that between the United States and Great Britain of January 23, 1924, for the Prevention of Smuggling of Intoxicating Liquors,<sup>7</sup> serves by implication to permit pursuit to be begun when the escaping vessel is outside of territorial waters, yet within the treaty distance of one hour's sailing, raises a question of interpretation on which there may be divergent views.

That question arose in the controversy between the United States and Canada growing out of the sinking of the Canadian auxiliary schooner *I'm Alone* on the high seas in 1929. The *I'm Alone*, built and registered at Lunenburg, Nova Scotia, and owned by the Eugene Creaser Shipping Company Limited, a company incorporated under the laws of the Province of Nova Scotia, was sunk by the United States Coast Guard vessel *Dexter* on March 22, 1929, more than 200 miles from the coast of the United States. The master and crew were plunged into the sea. The boatswain, one Leon Mainguy, died from drowning. The captain and the remaining members of the crew survived and were taken on board American Coast Guard vessels. They sustained losses of instruments, tools and personal effects. The cargo, consisting of intoxicating liquors, and valued at \$125,457, was lost. The destruction of the vessel was the climax of the pursuit thereof initiated by the United States Coast Guard cutter *Wolcott* on March 20, 1929, when the *I'm Alone* was within one hour's sailing distance from the coast of the United States but outside of the territorial waters thereof. The *Dexter* joined in the pursuit on March 22. The schooner was fired upon and sunk because of the refusal of the commander to heave to.<sup>8</sup>

The Government of the United States contended that the convention of 1924 permitted pursuit to be begun throughout the limits of the area where search or seizure might be instituted.<sup>9</sup> In their Joint Final Report of January 5, 1935,

<sup>7</sup> U. S. Treaty Vol. IV, 4225.

<sup>8</sup> The statement in the text and the materials in this paragraph of this footnote are taken from an editorial comment by the author on "The Adjustment of the *I'm Alone* Case," in *Am. J.*, XXIX, 1935, 296. See "I'm Alone" Case: Diplomatic Correspondence between the Governments of the United States and Canada concerning the Sinking of the "I'm Alone," together with an Opinion of Attorney General William D. Mitchell and the Conventions of January 23 and June 6, 1924, for the Prevention of Smuggling of Intoxicating Liquors, Department of State Arbitration Series No. 2 (1); "I'm Alone" Case: Claim made by His Majesty's Government in Canada under the Provisions of Article IV of the Convention concluded January 23, 1924, between the United States and Great Britain, *id.*, No. 2 (2); "I'm Alone" Case: Answer of the Government of the United States of America to the Claim of His Majesty's Government in Canada in Respect of the Ship "I'm Alone," *id.*, No. 2 (3); "I'm Alone" Case: Brief Submitted on Behalf of His Majesty's Government in Canada in Respect of the Ship "I'm Alone," *id.*, No. 2 (4); "I'm Alone" Case: Answering Brief of the Government of the United States of America to the Claim of His Majesty's Government in Respect of the Ship "I'm Alone," *id.*, No. 2 (5); Claim of the British Ship "I'm Alone": Statement with Regard to the Claims for Compensation Submitted by the Canadian Agent Pursuant to Directions Given by the Commissioners, Dated the 30th June, 1933, Ottawa, 1933; Claim in Respect of the Ship "I'm Alone": Statements Submitted by the Agent for the United States Pursuant to the Directions Given by the Commissioners, Dated the 30th June, 1933, Government Printing Office, Washington, 1934; Joint Final Report, Jan. 5, 1935, Dept. of State Press Release, Jan. 9, 1935; Dept. of State Press Release of same date, descriptive of Joint Final Report; Mr. Hull, Secy. of State, to the Minister of the Dominion of Canada, Jan. 19, 1935, Dept. of State Press Release, Jan. 21, 1935. See also documents in Hackworth, Dig., II, 703-708.

See also Joint Interim Report of the Commissioners, of June 30, 1933, Ottawa, 1933, *Am. J.*, XXIX, 326.

See in this connection William C. Dennis, "The Sinking of the *I'm Alone*," *Am. J.*, XXIII, 351; G. G. Fitzmaurice, "The Case of the *I'm Alone*," *Brit. Y.B.*, 1936, 82; Glanville L. Williams, "The Juridical Basis of Hot Pursuit," *Brit. Y.B.*, 1939, 83.

<sup>9</sup> See "I'm Alone" Case, diplomatic correspondence between the Governments of the United

the two Commissioners to whom the Canadian claim was submitted, pursuant to the provisions of Article IV of that convention, did not find occasion to pass upon this precise question. They did, however, find that the sinking of the *I'm Alone* "could not be justified by any principle of international law."<sup>10</sup>

It is doubtless desirable that the seizure of a ship which has been pursued on the high seas should be notified without delay to the State whose flag it flies, even though no requirement of international law may impose such an obligation.<sup>11</sup>

## (11)

§ 237. **Impressment.** A State lacks the right to impress into its public service a person, whether a national or a former national, found on board of a foreign vessel on the high seas.<sup>1</sup> Although his presence there may indicate disobedience to a command forbidding a change of nationality, or prohibiting foreign service not specially authorized, neither circumstance appears, according to American opinion, to justify the assertion of control or jurisdiction over the individual or the ship. That right is necessarily the exclusive possession of the State to which the vessel belongs. For the ship's protection rather than that of a particular occupant, the law of nations denies the privilege to any other power.<sup>2</sup>

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States and Canada, and other documents, Publications of the Department of State, Arbitration Series No. 2(1), Washington, 1931. In Secretary Stimson's note to the Canadian Minister of April 17, 1929, he laid stress upon the three following cases: *Woitte v. United States*, 19 F.(2d) 506; *The Newton Bay*, 30 F. (2d) 444, and 36 F. (2d) 729; *The Vincennes*, 20 F. (2d) 164, affirmed in *Gillam v. United States*, 27 F. (2d) 296.

<sup>10</sup> Dept. of State Press Releases, Jan. 12, 1935, 18, *Am. J.*, XXIX, 329, 330, where it was also said: "By their interim report the Commissioners found that the sinking of the vessel was not justified by anything in the Convention."

In their Joint Final Report the Commissioners declared: "The act of sinking the ship, however, by officers of the United States Coast Guard, was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong the United States should pay the sum of \$25,000 to His Majesty's Canadian Government; and they recommend accordingly."

It may be observed that the item of \$25,000, which was duly paid, went far to reimburse the Canadian Government for its expenses incurred in repatriating the crew (\$6,109.41) and for "legal expenses" (\$27,701.02). See in this connection *Whiteman, Damages*, 150-157.

<sup>11</sup> According to Basis of Discussion No. 26, from the Preparatory Committee for the Codification Conference of 1930 at The Hague, Bases of Discussion, 1929, Vol. II, Territorial Waters, League of Nations Doc. No. C.74.M.39.1929.V, 96: "Any such capture of a ship on the high seas shall be notified without delay to the State whose flag it flies."

§ 237. <sup>1</sup> "Great Britain at one time claimed the right to impress into her navy British seamen found on board the vessels of other nations on the high seas. This claim was asserted, not as a peace-right, nor yet as an independent war-right, but as an incident of the admitted belligerent right of visit and search. . . . The claim of impressment seems at the present day to possess, however, even if it has never been formally renounced, only an historic interest as a phase of the struggle for the establishment of the principle of the freedom of the seas. This great principle, Great Britain now fully recognizes and maintains; she also permits the expatriation of her subjects, and acknowledges the qualified nationality derived by seamen from their services; and, in the case of *Mason and Slidell*, she impliedly affirmed that the taking of persons from a neutral vessel, under cover of the belligerent right of visit and search, could not be justified by a claim to their allegiance." *Moore, Dig.*, II, 987.

See, also, *Mr. Marshall, Secy. of State, to Mr. King, Minister to England*, Sept. 20, 1800, *Am. State Pap.*, For. Rel. II, 486, 489, *Moore, Dig.*, II, 989; *Moore, Dig.*, II, 987-1001 and documents there cited; *Woolsey*, 6 ed., 384-386; *Dana's Wheaton*, *Dana's Note No. 67*.

<sup>2</sup> *Indirect Unneutral Service, Persons Subject to Interception, The Trent Case, infra*, §§ 818.

e

## Extraterritorial Crime

(1)

§ 238. **Offenses Committed Outside of a State and Taking Effect Therein.** The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain.<sup>1</sup> As the Permanent Court of International Justice declared in the course of its judgment in the case of the S.S. "Lotus," September 7, 1927:

It is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there. . . . Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense.<sup>2</sup>

Instances of the recognition of this principle in American cases are numerous and varied.<sup>3</sup> Moreover, the judgment in the case of the S.S. "Lotus," sustains the proposition that if an act committed by an inmate of a ship on the high seas produces a direct and injurious effect upon an individual on board of a ship of different nationality, also on the high seas, the State to which the latter ship belongs may prosecute criminally the actor when he enters its territory if his conduct was in contravention of its criminal laws. In such a situation the prosecuting State is permitted to regard its own vessel on which the act took effect as assimilated to its territory.<sup>4</sup>

<sup>1</sup> The analysis and treatment of the general problem are based upon Professor Moore's masterly Report on Extraterritorial Crime, contained in For. Rel. 1887, 757.

<sup>2</sup> Publications, Permanent Court of International Justice, Series A, No. 10, 23.

<sup>3</sup> See, for example, *United States v. Davis*, 2 Sumner, 482; *Commonwealth v. White*, 123 Mass. 430; *State v. Hall*, 114 N. Car. 909; *Simpson v. State*, 92 Ga. 41.

See, also, *Ford v. United States*, 273 U. S. 593, 624.

See *supra*, § 235A.

See Harvard Draft Convention on Jurisdiction with respect to Crime, with bibliography and comment by Edwin D. Dickinson, Reporter, and ten appendices, *Am. J.*, XXIX, *Supplement*, 435-651. According to Art. 3: "A State has jurisdiction with respect to any crime committed in whole or in part within its territory. This jurisdiction extends to (a) Any participation outside its territory in a crime committed in whole or in part within its territory; and (b) Any attempt outside its territory to commit a crime in whole or in part within its territory."

<sup>4</sup> Declared the Court in that case: "It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as

It has been observed, that in both England and America, the courts have not assumed jurisdiction

even under Statutes couched in the most general language, to try and sentence a foreigner for acts done by him abroad, unless they were brought, either by an immediate effect or by direct and continuous causal relationship, within the territorial jurisdiction of the court.<sup>5</sup>

In 1910, the Department of State declared that "inasmuch as, under Anglo-Saxon legal theory, crime is territorial, not personal, and therefore the criminal jurisdiction of the United States does not, as a general rule, extend to crimes committed outside of its jurisdiction, whether by American citizens or aliens," it was not possible to meet the suggestion of a German note verbale that there be any American guarantee of the criminal prosecution in the United States of an American citizen charged with the commission of a crime in Germany.<sup>6</sup>

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having been committed in its territory and prosecuting, accordingly, the delinquent." (*Id.*, 25.)

The *Lotus*, a French mail steamer, proceeding to Constantinople, was on August 2, 1926, in collision with the Turkish collier *Boz-Kourt*, between five and six nautical miles to the north of Cape Sigri (Mitylene). The *Boz-Kourt*, which was cut in two, sank and eight Turkish nationals, who were on board, perished. The officer of the watch on board the *Lotus* was Monsieur Demons, a French national, while the movements of the *Boz-Kourt* were directed by its captain, Hassan Bey. The *Lotus* proceeded to Constantinople where both Lieutenant Demons and Hassan Bey were subjected to criminal prosecution. The Permanent Court of International Justice concluded (in a judgment in which the twelve judges participating in the case were evenly divided, causing the President thereof to give a "casting vote") that Turkey, by instituting criminal proceedings in pursuance of Turkish law, against Lieutenant Demons, had "not acted in conflict with the principles of international law, contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction." (*Id.*, 32.) In a dissenting opinion, Judge Moore seemingly acknowledged the right of Turkey under international law to punish the French officer, but disagreed with the judgment of the Court as to the issue for adjudication. He noted that the *compromis* asked the Court to find whether Turkey violated international law "by instituting . . . joint criminal proceedings in pursuance of Turkish legislation (*en vertu de la législation turque*) against the watch officer of the *Lotus*." (*Id.*, 90.) The Court, he declared, not being empowered by the *compromis* to enquire into the regularity of the proceedings under Turkish law, or into the question of the applicability of Article 6 of the Turkish Penal Code to the facts in the case, was obliged to take the Article and its jurisdictional claim simply as they stood. The substance of that claim was, he said, that Turkey had a right to try and punish foreigners for acts committed in foreign countries not only against Turkey herself, but also against Turks should such foreigners afterwards be found in Turkish territory. This claim he deemed to be "contrary to well-settled principles of international law." (*Id.*, 91.) Accordingly, he was of opinion that the criminal proceedings, in so far as they rested on Article 6, were in contravention of the principles of international law, one of which he stated to be "that a State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offence, in any wise subject." (*Id.*, 94.)

Concerning the case of the S.S. "*Lotus*," see W. E. Beckett, "Criminal Jurisdiction over Foreigners (The *Franconia* and the *Lotus*)," *British Y.B.*, 1927, 108; J. L. Brierly, "The '*Lotus*' Case," *Law Quar. Rev.* XLIV, 154; H. Donnedieu de Vabres, "*L'Affaire du 'Lotus' et le Droit Pénal International*," *Rev. Droit International* (Paris), II, 135; Noel Henry, "*Le 'Lotus' à la Cour de la Haye*," *id.*, II, 65; Robert Ruzé, "*L'Affaire du 'Lotus'*," *Rev. Droit Int.*, 3 sér., IX, 124; J. H. W. Verzijl, "*L'Affaire du 'Lotus' devant la Cour Permanente de Justice Internationale*," *id.*, 3 sér., IX, 1.

<sup>5</sup> Report on Extraterritorial Crime, For. Rel. 1887, 778, Moore, Dig., II, 255.

<sup>6</sup> Mr. Wilson (for Mr. Knox, Secy. of State) to Mr. Hill, Ambassador to Germany, Jan. 11, 1910, For. Rel. 1910, 518. See, also, *United States v. Nord Deutscher Lloyd*, 223 U. S. 512, 517-518, where Mr. Justice Lamar declared: "The statute, of course, has no extra-territorial operation, and the defendant cannot be indicted here for what he did in a foreign country. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347." Also in this connection, *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 318.



Again, in 1913, the Department of State announced that, as the territorial theory of crime obtained in the United States, it would not be practicable "for this Government to enter into a treaty arrangement with the Brazilian Government providing for the prosecution of persons for committing in Brazil the crimes of counterfeiting Brazilian money, securities, etc."<sup>7</sup> Responding to an inquiry in 1926, from the Danish Minister at Washington, whether American authorities would be willing to undertake the prosecution of a Chinese national who was alleged to have killed an officer on a Danish vessel while on the high seas, the Department of State declared that there appeared to be no law giving American courts jurisdiction in such a case.<sup>8</sup> It should be borne in mind, however, that the United States, like any other State, may, through the legislative department of the government, enact a law designed to be applicable to acts committed abroad and to penalize those who defy its prohibitions as a means of safeguarding itself against special injury.<sup>9</sup> When the United States pursues such a course, the fact of legislative design having been established, the question must always necessarily be whether the application of the particular statute is at variance with any requirements of international law. Those requirements are not violated when a State, in pursuance of its law penalizes the actor on account of an offense committed outside of the territorial limits when it proves to be the proximate cause of a public or private injury sustained within those limits.

(2)

§ 239. **Offenses Committed on Vessels of the State.** A State has the right to make reasonable application of its criminal code to its own vessels (private

<sup>7</sup> Mr. Moore, for the Secy. of State, to the Ambassador of Brazil, Nov. 8, 1913, For. Rel. 1913, 38.

<sup>8</sup> On April 9, 1937, the Department of State sent to the American Minister in Switzerland, for transmission to the Secretary General of the League of Nations, a memorandum setting forth the attitude of the Government of the United States in regard to a draft international convention for suppressing the exploitation of prostitution. With respect to an article in the proposed convention providing that any country which did not extradite its own nationals should try its nationals accused or convicted of an offense of the kind to which the convention related in the same manner as if the offense had been committed in its national territory, it was observed that to bring to trial and punishment in the United States a national who had committed a crime in another country or other countries was believed to be beyond the existing jurisdiction of the Federal Courts." (Mr. Hull, Secy. of State, to Minister Wilson, April 9, 1937, Hackworth, Dig., II, 184.)

See *Brandão & Company v. Francisco Canales*, Brazil, Supreme Federal Tribunal, Aug. 6, 1921, Williams and Lauterpacht, Annual Digest, 1921-1922, Case No. 71, where the tribunal, in a case involving the prosecution of a Spanish firm on account of the imitation of a trade-mark in Malaga, declared that the "jurisdiction of our penal law does not extend beyond the limits of the national territory, in the terms of Article 4 of the Penal Code."

<sup>9</sup> The vessel was, at the time of the inquiry, in an American port. See documents in Hackworth, Dig., II, 721.

<sup>9</sup> Declared the Supreme Court of the United States, however, in 1922, in the case of *United States v. Bowman*, 260 U. S. 94, at 98: "But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home."

or public) when they are on the high seas, and, therefore, to punish the occupants who violate it.<sup>1</sup> The relation of the State to the vessel when so circumstanced justifies the assertion of jurisdiction.<sup>2</sup> It has been observed, however, that when a merchant vessel (as distinct from a public ship) enters a foreign port, it is not exempt from the local jurisdiction, and that one who, while on board, commits a criminal act is ordinarily amenable to local process.<sup>3</sup> Nevertheless, the State to which the vessel belongs may also punish the offender, especially if he be an officer or member of the crew, in case the territorial sovereign of the port may not have exercised jurisdiction, and the offender enter the domain of the former.<sup>4</sup> This concurrent right of that State is based on the theory that its connection with the ship suffices to justify the punishment of persons officially attached to it who disobey the commands of the sovereign wherever the vessel may be, and regardless of the legal quality which acts of disobedience may attain in the place where they are committed.<sup>5</sup> The Supreme Court of the United States declared in 1933, through an opinion by Mr. Justice Stone, that while the criminal jurisdiction of the United States was in general based on the territorial principle, that principle had never been thought to be applicable "to a merchant vessel which, for purposes of the jurisdiction of the courts of the sovereignty whose flag it flies to punish crimes committed upon it, is deemed to be a part of the territory of that sovereignty, and not to lose that character when in navigable waters within the territorial limits of another sovereignty."<sup>6</sup>

A different situation presents itself when a State seeks to derive from the ownership or control of a ship by its nationals or corporations grounds for the exercise of jurisdiction over the vessel, or over individuals in consequence of acts committed thereon, when the ship, lawfully possessed of foreign registry, is on the high seas. The United States has, through a series of legislative enactments, relied upon the connection between itself and the American owners or controllers of ships, at times declaring the ships to be vessels of the United States, and

§ 239.<sup>1</sup> President Adams to Mr. Pickering, Secy. of State, May 21, 1799, John Adams' Works, VIII, 651, Moore, Dig., I, 930; Mr. Fish, Secy. of State, to Gen. Schenck, Minister to England, Nov. 8, 1873, MS. Inst. Gr. Br., XXIII, 431, Moore, Dig., I, 931; Mr. Blaine, Secy. of State, to Mr. Ryan, Minister to Mexico, Nov. 27, 1889, For. Rel. 1889, 614, Moore, Dig., I, 931; Opinion of Mr. Cushing, Atty.-Gen., Sept. 6, 1856, 8 Ops. Attys.-Gen., 73; Mr. Everts, Secy. of State, to Mr. Welsh, Minister to England, No. 328, July 11, 1879, For. Rel. 1879, 435, Moore, Dig., I, 932.

"A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character. This jurisdiction extends to (a) Any participation outside its territory in a crime committed in whole or in part upon its public or private ship or aircraft; and (b) Any attempt outside its territory to commit a crime in whole or in part upon its public or private ship or aircraft." (Art. 4, Harvard Draft Convention on Jurisdiction with Respect to Crime, *Am. J.*, XXIX, *Supplement*, 439.)

<sup>2</sup> *Crapo v. Kelly*, 16 Wall. 610, 624; *Wilson v. McNamee*, 102 U. S. 572.

<sup>3</sup> Rights of Jurisdiction, Ports and Bays; Foreign Merchant Vessels, Application of the Local Law, *supra*, § 221.

<sup>4</sup> Mr. Webster, Secy. of State, to Lord Ashburton, British Minister, Aug. 1, 1842, Webster's Works, VI, 306, 307, cited in *United States v. Rodgers*, 150 U. S. 249, 264, Moore, Dig., I, 936; *Reg. v. Anderson* (1868), 11 Cox C. C. 198.

<sup>5</sup> Nor would there seem to be any reason why the State to which the vessel belongs should be deterred from punishing a passenger, as distinct from a member of the crew, under the circumstances stated in the text, if he were guilty of conduct normally rendered criminal by the laws of States generally and by those of the country within whose territory he committed an offense, as well as by those of the prosecuting State.

<sup>6</sup> *United States v. Flores*, 289 U. S. 137, 155-156.

by such process claimed a right of jurisdiction over them or their occupants when on the high seas, regardless of the fact of foreign registration.<sup>7</sup> It may be greatly doubted whether such a legislative declaration, or the reasons responsible for it, could suffice to attach American "nationality" to a foreign enrolled ship.<sup>8</sup> Hence the legislative action of the United States has amounted in substance to a claim that American ownership or control of vessels under foreign registry may be creative of a right of jurisdiction over ships that must, in point of "nationality," be regarded as foreign to itself. The soundness of the American claim, which is not understood as yet to have been challenged in an international forum, may be fairly questioned, especially if applied to the conduct of alien occupants on account of acts committed when such vessels are on the high seas.

### (3)

**§ 240. Offenses Committed by Nationals of the State.** It is generally agreed that a State may punish its own nationals for disobeying its commands while within a foreign country, notwithstanding the legal quality which the ter-

<sup>7</sup> According to Section 3 (b) of the Anti-Smuggling Act of August 5, 1935: "Every vessel which is documented, owned or controlled in the United States, and every vessel of foreign registry which is, directly or indirectly, substantially owned or controlled by any citizen of, or corporation incorporated, owned, or controlled in, the United States, shall, for the purposes of this section, be deemed a vessel of the United States." (49 Stat. 518, 19 U.S.C.A. § 1703, b.)

See the Anti-Smuggling Act of 1935, *supra*, § 235C.

According to Section 310 of the Criminal Code of the United States: "The words 'vessel of the United States' wherever they occur in this chapter, shall be construed to mean a vessel belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof." (Act of March 4, 1909, 35 Stat. 1148, 18 U.S.C.A. § 501.) See also Section 272 of the same Code, 35 Stat. 1142, 18 U.S.C.A. § 451.

According to an Act of Sept. 21, 1922, 42 Stat. 1004, 1005, as amended Feb. 16, 1933, 47 Stat. 815, 48 U.S.C.A. § 1346, the District Court of the Canal Zone was given "jurisdiction of offenses under the criminal laws of the United States when such offenses are committed upon the high seas beyond the territorial limits of the Canal Zone, on vessels belonging in whole or in part to the United States, or any citizen thereof, or any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof, and the offenders are found in the Canal Zone or are brought into the Canal Zone after the commission of the offense."

See, also, W. E. Masterson, *Jurisdiction in Marginal Seas with Special Reference to Smuggling*, New York, 1929, 61, 78-79, in relation to the British Act of July 24, 1876, to Consolidate the Customs Laws. See, also, Sections 308 and 309 of U. S. Criminal Code (18 U.S.C.A. §§ 499 and 500, respectively) penalizing one who "being subject to the authority of the United States" makes certain disposition of specified articles embracing arms and intoxicants to aboriginal natives of specified islands of the Pacific, and which declare that offenses there committed "shall be deemed committed on the high seas on board a merchant ship or vessel belonging to the United States."

<sup>8</sup> One may fairly doubt whether in the enactment of the Anti-Smuggling Act of 1935, the announcement that under certain conditions a vessel of foreign registry should, for the purposes of the Section, be deemed "a vessel of the United States," marked an attempt by the Congress to clothe such a ship with American nationality.

Declares Westlake: "The nationality of a ship is that of the flag rightfully carried by her." (2 ed., I, 168.)

"Until the legal position of merchant ships is governed by special international regulations, a merchant ship in the course of a voyage—that is, on the high sea, or in the territorial waters of a foreign State—should be assimilated, for the purposes under consideration to the territory of the State whose flag it flies." (Communication from the German Government of Oct. 31, 1928, to the Preparatory Committee for the Codification Conference at The Hague, 1930, Bases of Discussion, II, Nationality, League of Nations Doc. No. C.73.M.38.1929.V, 124.)

See also Robert Rienow, *The Test of the Nationality of a Merchant Vessel*, New York, 1937, Chaps. IX and X, and documents there cited.

See Relationships Between Vessels and States, the "Nationality" of a Ship, *infra*, § 243A.

ritorial sovereign may have annexed to the acts of disobedience.<sup>1</sup> The unwillingness of the former to respect and yield to the law of the latter is a matter with which no foreign power has the right to interfere.<sup>2</sup> It is to be observed, however, that in practice the nationals of a State are infrequently called upon to observe the general provisions of its criminal code when they are within the territory of a foreign country.<sup>3</sup> If a State sees fit, for reasons of public policy, to prohibit the commission by its nationals of particular acts anywhere in the world, the scope of the prohibition should be definitely expressed.<sup>4</sup> The Supreme Court of the United States has recently declared through Chief Justice Hughes: "The United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."

§ 240. <sup>1</sup> Declared Chief Justice Hughes, in 1932, in the opinion of the court in *Blackmer v. United States*, 284 U. S. 421, 436-437: "While it appears that the petitioner removed his residence to France in the year 1924, it is undisputed that he was, and continued to be, a citizen of the United States. He continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad, the petitioner remained subject to the taxing power of the United States. *Cook v. Tait*, 265 U. S. 47, 54, 56. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. *United States v. Bowman*, 260 U. S. 94, 102. With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government."

<sup>2</sup> Mr. Bayard, Secy. of State, to Mr. Connery, Chargé at Mexico, Nov. 1, 1887, For. Rel. 1887, 751, 754, Moore, Dig., I, 933.

<sup>3</sup> "The subject has presented to publicists and legislators so many grave doubts on the score of expediency and justice that few countries have attempted to require of their citizens a general observance of their criminal law outside of the national territory, except in particular places. These exceptions are barbarous lands, in which local law does not exist, and to which the doctrine of the sovereignty of each nation over all persons within its territory does not completely apply; and Mohammedan and other non-Christian countries, in which the citizens of many states enjoy a conventional immunity from the local law." Report on Extra-territorial Crime, For. Rel. 1887, 779, Moore, Dig., II, 256.

Declared Mr. Justice Holmes in the case of *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 355-356: "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such countries may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive. See *The Hamilton*, 207 U. S. 398, 403; *Hart v. Gumpach*, L.R. 4 P. C. 439, 463, 464; *British South Africa Co. v. Companhia de Moçambique* [1893], A. C. 602. They go further, at times, and declare that they will punish any one, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute similar threats as to acts done within another recognized jurisdiction."

According to Art. 5 of the Harvard Draft Convention on Jurisdiction with respect to Crime: "A State has jurisdiction with respect to any crime committed outside its territory, (a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted or punished; or (b) By a corporation or other juristic person which had the national character of that State when the crime was committed." (*Am. J.*, XXIX, *Supplement*, 440.)

<sup>4</sup> *Van Voorhis v. Brintnall*, 86 N. Y. 18; *State v. Shattuck*, 69 Vt. 403, 407; *Commonwealth v. Lane*, 113 Mass. 458. Compare *Lanham v. Lanham*, 136 Wis. 360, 365-366. See, also, *Roth v. Roth*, 104 Ills. 35, 44.

See *State v. Fenn*, 47 Washington, 561, and *Commonwealth v. Lane*, 113 Mass. 458, relative to statutes expressly forbidding divorced citizens from contracting marriages, under certain circumstances, outside of, as well as within the State.

Declared Mr. Justice Day in *Sandberg v. McDonald*, 248 U. S. 185, 195: "Legislation is presumptively territorial and confined to limits over which the lawmaking power has jurisdiction."

With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government.”<sup>5</sup>

It has been observed that in the United States the courts are normally reluctant to impute to the legislature an intention to give extraterritorial application to a penal law containing no express provision respecting the territorial scope of its application.<sup>6</sup> The so-called Walsh Act of July 3, 1926, providing for the penalization under certain conditions of an American citizen residing in a foreign country and needed by the Government of the United States as a witness in a criminal case, on account of his failure after service of a subpoena upon him to return to the United States and attend the court to which he was duly summoned as a witness, is a significant illustration of a clear manifestation of legislative design.<sup>7</sup>

It is believed that a State may, for purposes of jurisdiction, with respect to a crime committed abroad, assimilate to a national “an alien while engaged as one of the personnel of a ship or aircraft having the national character of that State.”<sup>8</sup>

#### (4)

#### OFFENSES COMMITTED BY FOREIGNERS OUTSIDE THE STATE

##### (a)

§ 241. **In General.** In order to justify the criminal prosecution by a State of an alien on account of an act committed and consummated by him in a place outside of its territory or of a place fairly to be assimilated thereto, such as one of its own vessels on the high seas, it needs to be established that there is a close and definite connection between that act and the prosecutor, and one which is commonly acknowledged to excuse the exercise of jurisdiction. There are few situations where the requisite connection is deemed to exist.<sup>1</sup> The need of seeking it is perhaps removed when the State of which the alien is a national consents to his prosecution.<sup>2</sup> The connection is, however, apparent when the act

<sup>5</sup> *Skiriotes v. State of Florida*, April 28, 1941, 61 S. Ct. 924, 927.

<sup>6</sup> See *supra*, § 238.

See *United States v. Bowman*, 260 U. S. 94; *Blackmer v. United States*, 284 U. S. 421; 437; *United States v. Flores*, 289 U. S. 137, 155.

<sup>7</sup> 44 Stat. 835.

<sup>8</sup> Art. 6 of Harvard Draft Convention on Jurisdiction with respect to Crime, *Am. J., XXIX, Supplement*, 440. According to the same article a State may make a like jurisdictional assimilation when a crime is committed outside its territory “by an alien in connection with the discharge of a public function which he was engaged to perform for that State.”

Concerning the prosecution by certain countries of nationals by reason of their commission of crimes abroad, see Hackworth, II, § 138, and documents there cited.

§ 241. <sup>1</sup> Declared Mr. Justice Story, in *The Apollon*, 9 Wheat., 362, 370: “The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And however general and comprehensive the phrases used in municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the legislature have authority and jurisdiction.”

See Mr. Hughes, Secy. of State, to Ambassador Riddle, May 22, 1922, Hackworth, Dig., II, 187, challenging the right of Argentina to punish an American citizen who was a seaman on an American vessel on account of his wounding a fellow seaman while the vessel was on the high seas.

<sup>2</sup> See, for example, Art. III of treaty (which failed to be consummated) between the

of the individual is one which the law of nations itself renders internationally illegal or regards as one which any member of the international society is free to oppose and thwart.<sup>3</sup> It is again apparent when the act complained of is to be fairly regarded as directed against the safety of the prosecuting State.<sup>4</sup>

At the present time, there is some evidence of a tendency on the part of individual States to seek excuses for the criminal prosecution of aliens on looser grounds, and to make the tests of the requisite connection broader and other than those in which general acquiescence can be established. In the course of this effort to change the law by enlarging the latitude of the prosecuting State, international tribunals have been afforded little opportunity to proclaim what the law of nations demanded, and the extent to which local legislative enactments deviated therefrom.<sup>5</sup>

(b)

§ 242. **Offenses against the Safety of the State.** The statutory law of many States, and notably of continental Europe, has contemplated the prosecution of foreigners charged with the commission, while abroad, of acts directed against the safety of the State;<sup>1</sup> and the legislation of several of that number assimilate to acts of such character those embracing the counterfeiting of seals

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United States, the British Empire, France, Italy and Japan, concluded Feb. 6, 1922, relative to the Protection of the Lives of Neutrals and Non-combatants at Sea in Time of War, U. S. Treaty Vol. III, 3116, 3118.

<sup>3</sup> An act of piracy may be cited as an instance. See Piracy, In General, *supra*, § 231. Also, see Art. 308 of de Bustamante Code of Private International Law, adopted by Sixth International Conference of American States, Feb. 13, 1928, Report of Delegates of the United States, Appendix 6.

Attention is called also to the freedom of a belligerent to penalize neutral vessels engaged in the transportation on the high sea of contraband articles to a hostile destination. See *infra*, §§ 814-815; also, President Washington, Proclamation of Neutrality, April 22, 1793, Am. State Pap., For. Rel. I, 140.

<sup>4</sup> See Offenses Against the Safety of the State, *infra*, § 242.

<sup>5</sup> Cf. dissenting opinion of Judge Moore (in relation to Art. 6 of the Turkish Penal Code) in Case of the S.S. "Lotus," Judgment No. 9, Publications, Permanent Court of International Justice, Series A, No. 10, 65.

According to Art. 10 of Harvard Draft Convention on Jurisdiction with Respect to Crime: "A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in Articles 6, 7, 8 and 9, as follows:

(a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national.

(c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character.

(d) When committed in a place not subject to the authority of any State and the alien is not a national of any State."<sup>1</sup> (*Am. J.*, XXIX, *Supplement*, 440-441.)

§ 242. <sup>1</sup> Abundant evidence is seen in documents referred to in the Comment on Art. 7 of

of the State, as well as various forms of the national moneys.<sup>2</sup> Such legislation may be regarded as exceptional in character. Occasions for its application were formerly infrequent and attributable to circumstances indicative of great public need.<sup>3</sup>

When an offense directed against the safety of a State takes effect within its territory, the prosecution of the actor on account of what he initiated abroad finds obvious justification on other grounds that suffice in themselves to excuse prosecution.<sup>4</sup> Nevertheless, acts may be consummated or completed by an alien outside of the territory of the prosecuting State which are none the less directed against its safety. A conspiracy to injure through any one of a variety of processes may be perfected abroad; and when it is, the offended sovereign is believed to be justified in penalizing a conspirator despite the absence of any illegal achievement within its domain.<sup>5</sup> Doubtless a State may yield to caprice in determining what is injurious to its safety, and reach conclusions that are indicative of an abuse of power.<sup>6</sup> This circumstance does not, however, signify more than that a prosecuting State may always be called upon to exercise good faith in its various jurisdictional contacts with foreigners who come within its reach. Possibly the great development of forms of communication through numerous channels may serve to enlarge the opportunity for injury to the safety of a State by foreign conspirators on foreign soil, and may point to the recurrence with increasing frequency of cases where an endangered sovereign may become alert to prosecute the alien offender. Such a condition, however stimulating to the enactment of laws designed to facilitate the prosecution of such individuals, would afford in itself frail support for the contention that there was general acquiescence in the proposition that a State may normally apply its criminal code to aliens who outside of places subject to its control are guilty of conduct of which it disapproves.

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Harvard Draft Convention on Jurisdiction with Respect to Crime, *Am. J.*, XXIX, *Supplement*, 547-551.

<sup>2</sup> See Report on Extraterritorial Crime, *For. Rel.* 1887, 790-791.

See W. E. Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," *Brit. Y.B.*, VI, 1925, 44, 49.

See *In re Urios*, France, Court of Cassation (Criminal Chamber), Jan. 15, 1920, Williams and Lauterpacht, *Annual Dig.*, 1919-1922, Case No. 70.

<sup>3</sup> According to Art. VIII of the Resolutions adopted by the Institute of International Law, Sept. 7, 1883, with respect to the Conflict of Penal Laws: "Every State has the right to render punishable acts committed even outside of its territory and by foreigners in violation of its local laws, when they constitute an attack upon the social existence of the State and compromise its safety, and when they are not forbidden by the criminal law of the State on whose territory they have been committed." *Annuaire*, VII, 157. See A. Mercier, "*Le Conflit des Lois Pénales en Matière de Compétence: Revision des Résolutions de Munich* (1883)," *Rev. Droit Int.* 3 sér., XII, 439.

<sup>4</sup> See *supra*, § 238.

<sup>5</sup> In the case of *Ford v. United States*, 273 U. S. 593, the overt acts charged in the conspiracy to justify indictment were acts committed in part within the territory of the United States. (*Id.*, 624.)

See also in this connection, *United States v. Downing*, 51 F. (2d) 1030; *United States v. Linton*, 223 Fed. 677; *Horwitz v. United States*, 63 F. (2d) 706, 708, 709.

See case of Jacob L. Salas referred in Hackworth, *Dig.*, III, 552-553, footnote.

<sup>6</sup> See Report of Sub-Committee (Messrs. Brierly and De Visscher) on Criminal Competence of States in Respect of Offences Committed outside of their Territory, to Committee of Experts for the Progressive Codification of International Law, 1925, *Am. J.*, XX, *Special Supplement*, July and October, 1926, 253, 255-256.

Article 7 of the Harvard Draft Convention on Jurisdiction with Respect to Crime, while declaring that a State has jurisdiction in a situation where a crime committed outside its territory by an alien is "against the security, territorial integrity or political independence" of the prosecuting State, lays down the restriction that the act which constitutes the crime must not be one "committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed."<sup>7</sup>

## (c)

§ 243. **Offenses against Nationals of the State. Cutting's Case.** The attitude of the United States in Cutting's case is enlightening. On June 18, 1886, one A. T. Cutting, an American citizen, and a resident of Mexico, published in Texas a card commenting on certain proceedings of one Emigdio Medina, a Mexican citizen with whom Cutting had had a controversy. For that publication Cutting was, a few days later, arrested and imprisoned in Mexico. Proceedings were taken under Article 186 of the Mexican Penal Code providing for the prosecution of a foreigner committing in a foreign country an offense against a Mexican citizen, in case the breach of law should have the character of a penal offense in the country where it was committed as well as in Mexico.<sup>1</sup> The jurisdiction was sustained by the courts of that country and approved by its Executive. An appellate tribunal released Cutting by reason of the abandonment of the complaint by the aggrieved Mexican citizen, declaring also that justice had been satisfied by the enforcement of a small part of the original sentence.<sup>2</sup> The United States denied that, according to the principles of international law, an American citizen could be justly held to answer in Mexico for an offense committed in the United States, simply because the object of that offense happened to be a Mexican citizen.<sup>3</sup> Mexico, on the other hand, sought to sustain its action on two grounds: first, because such jurisdiction was believed to be justified by international law and the positive legislation of various states; and secondly, on the theory that as such a claim was made in the legislation of Mexico, the question became one solely for the decision of the Mexican courts. In response to the latter, Mr. Bayard, Secretary of State, had merely to advert to the principle maintained and admitted by the United States, that a country cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. In response to the former, he declared that according to the

<sup>7</sup> *Am. J.*, XXIX, *Supplement*, 440.

According to Art. 8: "A State has jurisdiction with respect to any crime committed outside its territory by an alien which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority." (*Id.*)

§ 243.<sup>1</sup> Concerning Cutting's case see *For. Rel.* 1886, 691-708; *id.* 1887, 751-849 (which contains the Report on Extraterritorial Crime, by Mr. Moore, Third Assist. Secy. of State, 757-840); documents in Moore, *Dig.*, II, 228-242; also A. Rolin, "*L'Affaire Cutting*," *Rev. Droit Int.*, 1 ser., XX, 559; J. M. Gamboa, "*L'Affaire Cutting*," *id.*, 1 ser., XXII, 234, both cited in Moore, *Dig.*, II, 269. See, also, Woolsey, 6 ed., 109-111; Westlake, 2 ed., I, 262-263.

<sup>2</sup> President Cleveland, Annual Message, Dec. 6, 1886, *For. Rel.* 1886, viii, Moore, *Dig.*, II, 231.

<sup>3</sup> Mr. Bayard, Secy. of State, to Mr. Connery, Chargé d'Affaires to Mexico, Nov. 1, 1887, *For. Rel.* 1887, 751, Moore, *Dig.*, II, 232.



principles of international law the penal laws of a State, save with respect to nationals thereof, had no extraterritorial force; and that the existing legislation of States indicated no general acquiescence in the assertion expressed in the Mexican code.<sup>4</sup> The Secretary protested also against the claim of a right on the part of a Mexican tribunal to pass upon the question whether an American citizen had in fact committed in Texas the offense of libel against its laws, when, according to the code of that State, no person could be convicted of such an offense except as a result of indictment and trial by jury.<sup>5</sup> The urgent representations of the United States to secure a modification by Mexico of its unusual claim apparently failed to receive favorable consideration.<sup>6</sup> It is believed that the position taken by the United States was sound.

While the precise question for adjudication in the case of the S.S. "Lotus" did not, according to the judgment of the Court, involve a determination of the question whether Turkey had a right to prosecute foreigners for acts committed in foreign countries against Turkish nationals should the actors subsequently be apprehended on Turkish soil,<sup>7</sup> the Turkish legislation embraced such a claim.<sup>8</sup> Moreover, the Turkish Government, in the presentation of its case, made that claim and took pains to marshal in impressive array the substantial number of States whose legislation was in varying degrees in harmony therewith.<sup>9</sup> It may

<sup>4</sup> *Id.* Proof of this fact was furnished by the data contained in Mr. Moore's Report on Extraterritorial Crime, enclosed in Mr. Bayard's note.

<sup>5</sup> Report on Extraterritorial Crime, For. Rel. 1887, 765.

<sup>6</sup> Mr. Bayard, Secy. of State, to Mr. Bragg, Minister to Mexico, May 4, 1888, For. Rel. 1888, II, 1189, Moore, Dig., II, 240.

In apparent harmony with the Mexican position, see *The Crown v. Yerizano*, District Court of Saghalien, Japan, 1926, McNair and Lauterpacht, Annual Dig., 1925-1926, Case No. 105.

<sup>7</sup> See *supra*, § 238, where it will be observed that Judge Moore, in his dissenting opinion, entertained a different view.

<sup>8</sup> See dissenting opinion by Judge Moore, Judgment No. 9, Publications, Permanent Court of International Justice, Series A, No. 10, 65, 91.

See, also, dissenting opinion of Lord Finlay, *id.*, 50, 55.

According to Art. 6 of the Turkish Penal Code, Law No. 765 of March 1, 1926 (*id.*, 14): "Any foreigner who, apart from the cases contemplated by Article 4, commits an offence abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.

"Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party.

"If the offence committed injures another foreigner, the guilty person shall be punished at the request of the Minister of Justice, in accordance with the provisions set out in the first paragraph of this article, provided however that:

"(1) the article in question is one for which Turkish law prescribes a penalty involving loss of freedom for a minimum period of three years;

"(2) there is no extradition treaty or that extradition has not been accepted either by the government of the locality where the guilty person has committed the offence or by the government of his own country."

See, also, W. E. Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," *Brit. Y.B.*, VI, 1925, 44, 47-49.

<sup>9</sup> See Turkish Counter Case, Publications, Permanent Court of International Justice, Series C, No. 13 — II, 300-302; also oral argument by Mahmoud Essat Bey, *id.*, 117.

It may be noted that in 1911 the Department of State was not willing to admit the propriety of the criminal prosecution by Dominican authorities of an American citizen on account of the commission of a criminal offense alleged to have been committed upon a Dominican citizen on board of an American vessel at sea. See documents in Hackworth, Dig., II, 714-715.

be that numerous States will become increasingly reluctant to make serious protest when their nationals are prosecuted abroad on account of the commission of acts directed against nationals of the prosecuting State beyond the limits of its territory. At the present time, the United States would not be disposed to admit that such reluctance to protest against such assertions of jurisdiction would serve to modify what it conceives to be the requirements of the existing law, or that it would suffice to confer upon a foreign State the privilege of prosecuting an American citizen on account of acts committed by him against one of its nationals outside of its territory or of a place to be assimilated thereto.

## f

§ 243A. **Relationships Between Vessels and States. The "Nationality" of a Ship.** Various relationships may subsist between a ship and a State; and in consequence of any one of them the latter may in fact proceed to exercise a measure of control or jurisdiction with respect to the vessel. Thus, the construction of a ship within the national domain may cause the sovereign thereof to claim special privileges in relation to the vessel while it remains within territorial waters. The ownership of a ship by its nationals may cause a State to claim the right to protect it, and also to exercise jurisdiction with respect to acts committed on board of it even when the vessel is on the high seas. If a ship not unlawfully flies the flag of a particular State, that bare circumstance may cause it to take special interest in the craft and to endeavor to protect it. When a ship is registered under the laws of a State that entity may be expected to regard the vessel as having an unique association with itself productive of privileges not enjoyed by any other country.<sup>1</sup> Thus, the inquiry constantly presents itself whether and to what extent the character of the particular relationship between a ship and a State is regarded in practice as justifying the treatment or control of the vessel by such State in desired ways.

It is frequently said that a ship is to be deemed to possess a "nationality." Such a statement implies the existence of a relationship between a vessel and a State of such distinctive closeness and intimacy that the latter may fairly regard the vessel as belonging to itself rather than to any other country.<sup>2</sup> Thus the term "nationality" seemingly has reference to a conclusion of law growing out of a set of facts which points to a special connection between vessel and State, and which somewhat resembles the connection between an individual and a State

§ 243A. <sup>1</sup>"The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license. The distinction between these two classes of vessels is kept up throughout the legislation of Congress on the subject, and the word register is invariably used in reference to the one class and enrolment, in reference to the other." (*Anderson v. Pacific Coast Steamship Company*, 225 U. S. 187, 199.)

See also Mr. Messersmith, Assist. Secy. of State, to Consul General Gauss, Dec. 28, 1938, Hackworth, Dig., II, 737.

<sup>2</sup>"To what does this widely used phrase — 'nationality of a ship' — refer in international law? It is evidently descriptive of a relationship existing between a State and a ship, a relationship more intimate than that between the same ship and any other State." (*Robert Rienow, The Test of the Nationality of a Merchant Vessel*, New York, 1937. 12.)

which serves to enable the latter to claim him as a national. The quest for the "nationality" of a ship is thus, in a broad sense, a fact-finding endeavor designed to ascertain the existence of conditions that must unite in order to justify the conclusion that a particular ship belongs to or is to be associated with, one State rather than another. It is perhaps not unreasonable to contend that a combination of factors may suffice to produce such a conclusion, and that when they are found to exist it is appropriate to refer to the vessel as one possessed of the "nationality" of such State.<sup>3</sup> When, however, effort is made to test the right of a State to deal with a ship in a particular way by the "nationality" with which the vessel is said to be clothed, a legal superstructure is permitted to intervene between cause and effect, and a label descriptive of a conclusion is substituted for a fact in ascertaining the propriety of State action.

Again, the assertion that a ship is possessed of the "nationality" of a particular State may be confronted by the claim of another, whose nationality the ship is not acknowledged to possess, of a right to exercise a measure of control over the vessel in consequence of a distinctive relationship between itself and the ship, which causes the latter State to regard it for some purposes as not foreign to itself.<sup>4</sup>

It is probably a sound proposition that a vessel registered under the laws of a State and possessed of a certificate of registry may be deemed in an international sense to belong to that State, and to justify it in giving it the privilege of flying its flag, regardless of the nationality of the owners of the ship. The United States has, nevertheless, appeared to attach much significance to American ownership, regarding that fact as sufficient to justify the yielding to the American-owned ship the privilege of flying the American flag.<sup>5</sup> Moreover, as is noted elsewhere,

<sup>3</sup> "The jurisdiction which it is intended to describe arises out of the nationality of the ship, as established by her domicile, registry and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty." (*Cunard Steamship Company, Ltd. v. Mellon*, 262 U. S. 100, 123.)

According to Art. X of the treaty between the United States and Germany of Dec. 8, 1923: "Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown." (U. S. Treaty Vol. IV, 4194.) "Like or similar provisions appear in numerous other treaties to which the United States is a party." (Hackworth, Dig., II, 725, footnote.)

"The certificate of registry of a vessel under the laws of the United States and proof that she carries an American flag are competent evidence and *prima facie* sufficient to establish her nationality without direct proof of the citizenship of her owners." (U. S. Consular Regulations, § 176.)

<sup>4</sup> Such a claim suggests that the term "nationality," as applied to a ship must be either narrowly construed or challenged as inept.

<sup>5</sup> "Inasmuch as Congress, whatever may have been its intention, has not seen fit to restrict the right to carry the American flag to regularly documented American vessels, an American citizen owning a nondocumented vessel has the right to fly the American flag to protect his property and indicate the nationality of its owner." (Opinion of the Solicitor for the Dept. of State, June 26, 1906, Hackworth, Dig., II, 729.)

Declared Secy. Hull in a communication to the American Consul at Malta, May 29, 1936: "The attention of the Consul is invited to Sections 176 and 347 of the Consular Regulations, from which he may note that there is no law which prohibits the display of the American flag on vessels owned by citizens of the United States." (Hackworth, Dig., II, 731.)

See also Mr. Carr, Assist. Secy. of State, to Mr. Nick Fotes, Feb. 9, 1931, Hackworth, Dig., II, 731.

certain provisions of the statutory law declare that a vessel owned by an American citizen is to be deemed a "vessel of the United States."<sup>6</sup> The constant and perhaps increasing effort of a State such as the United States to seek to utilize every possible connection between a vessel and itself, even though it be one not attributable to registration as a means of justifying the assertion of various forms of control or of jurisdiction speaks for itself, and has to be reckoned with. It may be the cause of the confusion of thought that manifests itself in loose statements concerning the "nationality" of a vessel,<sup>7</sup> and it may inspire doubt as to the usefulness of that term in the nomenclature of the law.

A State enjoys latitude in exercising the right to register ships. It is not obliged to abstain from registering those of foreign ownership; and, on the other hand, its own statutory law may preclude registration of such craft.<sup>8</sup> At the present time, a State is not likely to abuse its privilege by endeavoring to register as one of its own vessels a ship that is at the time registered under the laws of a foreign State by the sovereign thereof. The chief problem growing out of the registration of a ship in pursuance of the requirements of the domestic law pertains to the proper appraisal of the incidents of such action. Does it, for example, serve to forbid a foreign State whose nationals may own the vessel from exercising under certain circumstances a jurisdiction growing out of acts committed on board the ship on the high seas by persons who are not its nationals? As has been noted, the United States would appear to answer this question in the negative.<sup>9</sup>

No rule of international law restrains a State from endeavoring to protect the property of its nationals in foreign ships, whether ownership be direct or indirect.<sup>10</sup> A State may, however, for reasons of policy, be reluctant to interpose in behalf of the owner of a ship where the vessel is possessed of a foreign national

<sup>6</sup> See *supra*, § 239, and excerpts from the statutory law there quoted in footnotes.

<sup>7</sup> "The flag under which a merchant ship sails is prima facie proof of her nationality. If she is not properly registered, her nationality is still that of her owner. Moore, *International Law*, vol. 2, pp. 1002-1009." (*The Chiquita, Hartwig v. United States*, 19 F. (2d) 417, 418.)

<sup>8</sup> "Section 4190 of the Revised Statutes provides that no sea-letter or other document certifying or proving any vessel to be the property of a citizen of the United States shall be issued except to vessels which shall be wholly owned by citizens of the United States. Reference is also made to Section 4132 of the Revised Statutes as amended, providing for the registration of vessels, which states that only those which are 'wholly owned' by citizens of the United States or by corporations organized or chartered under the laws of the United States or of any State thereof, 'the president and managing directors of which shall be citizens of the United States,' shall be registered." (Mr. Carr, Director of the Consular Service, to the American consular officers in China and Hong Kong, May 13, 1926, Hackworth, Dig., II, 740-741.) The provisions of the statutory law here referred to are contained in 46 U.S.C.A. §§ 61 and 11, respectively. See amendment of § 11, May 24, 1938, 52 Stat. 437.

To the effect that a vessel sold to an American corporation by a Rumanian corporation was entitled to American registry "without regard to who owned the stock either directly or indirectly," see *Steaua Romana Societate, etc. v. Woodman*, 2 F. Supp. 303, 310, quoted at length in Hackworth, Dig., II, 744-747.

On January 8, 1925, Secy. Hughes informed the American Consul at Hong Kong that American documentation (form 35) could not be granted to a vessel owned by a foreign corporation even though the controlling interest in the company was owned by an American citizen. Hackworth, Dig., II, 715.

<sup>9</sup> See *supra*, § 239.

<sup>10</sup> "The right of citizens of the United States to acquire property in foreign ships has been held to be a natural right, independent of statutory law, and such property is as much entitled to protection by the United States as any other property of a citizen of the United States." (Consular Regulations of the United States, No. 341, as of February, 1931.)

character revealed through its registry and flag.<sup>11</sup> It may evince like reluctance where the property interests of its nationals manifest themselves in the ownership of shares of stock in a foreign corporation possessed of title to the particular vessel concerned.<sup>12</sup> Again, proof of the improper uses of a ship in contravention, for example, of the laws of a foreign State pertaining to smuggling, may be expected to cause a withdrawal of protection and also the cancellation of the use of the national flag of the country which may have yielded it to the vessel concerned.<sup>13</sup> It may be recalled that on July 16, 1923, Secretary Hughes, in the course of a note to the British Embassy at Washington, declared: "My Government hopes that it may be advised that His Majesty's Government does not consider, even in the case of a vessel admittedly of valid British registry, that such a vessel pursuing the course of conduct followed by the schooner *Henry L. Marshall* is making proper use of the British flag and that His Majesty's Government would not be disposed to espouse the cause of a British merchant vessel in an effort unlawfully to introduce intoxicating liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall*, or in such a case to oppose the enforcement of the laws of the United States by means of the procedure taken in the case of that vessel and judicially approved."<sup>14</sup>

The United States may be expected "to scrutinize with the utmost care every transfer of vessels to the American flag" and to "recognize only such as may be of a *bona fide* character and actually owned by American citizens."<sup>15</sup> The Department of State has declared that "inasmuch as the laws of the United States appear to contemplate that American owned vessels only shall be admitted to American registry," it might be inadvisable to grant an American register to a ship so long as there was any question regarding the validity of the transfer to American interests.<sup>16</sup> The Department has, moreover, at least on one occasion instructed a consul to issue a provisional register to a vessel on condition that the former foreign register was closed;<sup>17</sup> and it has announced that it does not authorize the documenting as a vessel of the United States of any vessel under a foreign flag without the consent of the Government whose flag she car-

<sup>11</sup> See Mr. Grew, Under Secy. of State, to Vogelsang, Brown, Cram, and Feely, July 2, 1924, in relation to the vessel *Elena Valdez*, Hackworth, Dig., II, 755.

<sup>12</sup> See correspondence between the Dept. of State, and Pierce Oil Corporation, April 17 and 18, 1914, Hackworth, Dig., II, 756-757.

<sup>13</sup> Declared the Dept. of State in a communication to the American Minister in Morocco, June 28, 1906: "It is believed that no right to cancel the consular registration of the vessel exists because the owner of the *Manolita* has been engaged in smuggling or has committed any other crime, but that if it should appear that the boat is not a bona fide American vessel the right to cancel the consular registration and withdraw American protection exists. The fact that the *Manolita* was formerly owned by one Pinto, a reputed smuggler, and is now managed by him, and other facts which you report, lend color to the suspicion that the vessel is not in fact of American ownership. If it should be so found, and not otherwise, it would be proper to withdraw American protection and cancel the consular registration of the *Manolita*." (For. Rel. 1906, Part II, 1159-1160.)

<sup>14</sup> For. Rel. 1923, Vol. I, 165, 167.

<sup>15</sup> Mr. Carr, Director of the Consular Service, to the Commissioner of Navigation, May 16, 1911, Hackworth, Dig., II, 762.

<sup>16</sup> Mr. Polk, Counselor of the Dept. of State, to the Secy. of Commerce, Nov. 8, 1915, Hackworth, Dig., II, 763.

<sup>17</sup> See Mr. Lansing, Counselor of the Dept. of State, to the Secy. of Commerce, April 1, 1915, Hackworth, Dig., II, 762.

ries, provided that such Government has laws prohibiting the transfer of its national vessels to foreign flags.<sup>18</sup>

In 1924 the Department of Commerce expressed the opinion that if a consular officer is satisfied as to the bona fides of a transfer of a ship and as to the citizenship of the purchaser, "there would seem to be no just grounds for withholding authentication of the title unless there is reason to believe that the vessel if transferred will be used for illegal purposes such as smuggling."<sup>19</sup> It may be observed that the question concerning the validity of the transfer of title to a ship is not identical with that concerning the transfer of registry, despite the effect which a valid transfer of title may have upon continuity of registry where the transferee is an alien.

A State is doubtless free to control as it may see fit the transfer of title or of registry of vessels owned by its nationals or documented under its laws. The statutory law of the United States, reflected in the Merchant Marine Act of 1936, as amended in 1938, and which renders unlawful such transfers without the approval of the United States Maritime Commission, is illustrative.<sup>20</sup>

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### Exemptions from Territorial Jurisdiction

#### (1)

§ 244. **In General.** It is accepted doctrine that a State is exempt from the jurisdiction of any other, and is not to be subjected, without its consent, to process issuing from the courts of such other.<sup>1</sup> It may be contended with reason

<sup>18</sup> Mr. Polk, Acting Secy. of State, to the Mexican Ambassador at Washington, March 18, 1919, Hackworth, Dig., II, 764.

<sup>19</sup> See communication of Mr. Harrison, Assist. Secy. of State, to Consul General Gale, Aug. 27, 1924, Hackworth, Dig., II, 765.

<sup>20</sup> 46 U.S.C.A. § 808. See exceptional provision in 48 U.S.C.A. § 1181, in relation to the transfer of vessels to foreign registry on default of the United States.

See in this connection, opinion of Mr. Hackworth, Legal Adviser of the Dept. of State, March 10, 1939, Hackworth, Dig., II, 767.

Concerning the effects of transfer by judicial sale, see discussion in documents contained in Hackworth, Dig., II, 768-769.

§ 244. <sup>1</sup> Declared Mr. Stimson, Secy. of State, to the Governor of New York, on April 27, 1931: "It hardly seems necessary to point out that a foreign government may not be sued in the United States in the absence of an applicable treaty without the expressed consent of that government. It is assumed from the Ambassador's note of April 16, 1931, that the Mexican Government does not consent to be sued in the present case. Moreover, it seems to be well established that neither the Ambassador nor the Consular Officer of the country concerned has any authority to accept service on behalf of their Government." (Hackworth, Dig., II, 395.)

See also *Hassard v. United States of Mexico*, 61 N. Y. Supp. 939, affirmed in 173 N. Y. 645 (commented on by John W. Foster, in *Yale Law J.*, IX, 283-286); *Annie B. Mason v. Intercolonial Railway of Canada*, 197 Mass. 349 (commented on in *Mich. Law Rev.*, VI, 575); *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 341; also *De Haber v. Queen of Portugal*, 17 Q. B. 196; *The Parlement Belge*, L.R. 5 P. D. 197; *French Republic v. Board of Sup'rs of Jefferson County*, 252 S. W. 124, 200 Ky. 18; *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N. Y. 372; *Bradford v. Director General of Railroads of Mexico (Texas)*, 278 S. W. 251; *Oliver American Trading Co. v. Government of the U. S. of Mexico*, 5 F. (2) 659. See, also, *Matsuyama and Sano v. The Republic of China*, Supreme Court of Japan, 1928, *McNair and Lauterpacht*, Annual Dig., 1927-1928, Case No. 107; *Vahan Cardashian v. Edgar C. Snyder*, 57 Wash. L. Rep. 738.

"The general proposition that a State may not be made a respondent in the courts of another State is widely accepted." (Comment on Art. 7 of Harvard Draft Convention on

that the claim to immunity as so enunciated need not be accorded political subdivisions of a foreign government engaging in ordinary commercial transactions.<sup>2</sup> It has been properly observed, moreover, by Professor Reeves that "a State is under no duty to another State to open its courts to suits against its political subdivisions," and that "international law does not appear to confer a right upon a State to sue a political subdivision of another State in the courts of the latter."<sup>3</sup> In 1934, the Supreme Court of the United States denied leave to the Principality of Monaco to bring suit in that tribunal against the State of Mississippi on the ground that provisions of the Constitution of the United States, as properly construed, failed to confer the requisite jurisdiction.<sup>4</sup>

When a suit against an entity or commission or agency is in substance a suit against a foreign State on whose behalf and by whose authority it acts, a reason for exemption from the local jurisdiction is seen.<sup>5</sup> The principle is, moreover, applicable regardless of whether the particular régime functioning as the government of the interested foreign State is locally recognized as the government thereof.<sup>6</sup> In a case where property sought to be reached in the United States was movable public property belonging to Mexico, and which the Government of that country held "for public purposes," the United States Circuit Court of Appeals, Second Circuit, concluded in 1924, that there was ground for exemption declaring that "the exercise of such jurisdiction by the courts of this country is inconsistent with the independence and sovereignty of Mexico."<sup>7</sup> During that year the American Ambassador at London was informed that certain instructions of the previous year referred in no sense to "a waiver of the immunity of the United States Shipping Board from suits *in personam*, and that he should certify that the United States Shipping Board was an agency of the United States Government and therefore not subject to suit in a foreign court."<sup>8</sup> It may be

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Competence of Courts in Regard to Foreign States, *Am. J.*, XXVI, *Special Supplement*, July, 1932, 527; also, excerpts from foreign cases there quoted, *id.*, 529-540.

<sup>2</sup> See Ricardo Molina v. Comisión Reguladora Del Mercado de Henequen, 91 N. J. L. 382; State of Ceara v. Dorr, *Cour de Cassation*, France, 1932, Hudson, Cases, 2 ed., 510; Coale v. Société Co-operative Suisse des Charbons, Basle, 21 F.(2) 180; United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.(2) 199.

In the case of *Holzer v. Deutsche Reichsbahn Gesellschaft*, 289 N. Y. S. 943, McCook, J., declared that the claim of sovereign immunity "must be properly and explicitly raised" in order to merit judicial recognition, and that in the instant case it was not so raised through the affidavit of a German Consul General.

<sup>3</sup> "The Principality of Monaco v. The State of Mississippi," *Am. J.*, XXVIII, 739, 741, where he adds: "Whether or not such a right exists is purely a matter of the constitutional law of the State and is, therefore, wholly permissive."

<sup>4</sup> *Principality of Monaco v. Mississippi*, 292 U. S. 313.

<sup>5</sup> See Mr. Stimson, Secy. of State, to the French Ambassador at Washington, Dec. 12, 1932, Hackworth, Dig., II, 471, where he declared: "A suit against the [American Battle Monuments] Commission would in substance be a suit against the United States Government."

<sup>6</sup> See communication from the Secretary of State to the Attorney General, May 15, 1923, For. Rel. 1923, Vol. II, 571, emphasizing the fact that the United States had not ceased to recognize Mexico as an international person, notwithstanding the fact that the Government of the United States had not accorded recognition to the administration then functioning in Mexico.

<sup>7</sup> See *Oliver American Trading Co. v. Government of the United States of Mexico*, 5 F. (2d) 659, 667. See also in this connection, documents in Hackworth, Dig., II, § 175.

See, also, *Other Foreign Public Property*, *infra*, § 258.

<sup>8</sup> Statement in Hackworth, Dig., II, 476, and documents there cited.

observed that in 1924, the British Court of Appeal concluded that from the certificate furnished by the Ambassador the Shipping Board was seemingly "just as much a representative of the United States Government as the Ambassador himself," and that "there is no authority anywhere to be found that the mere fact that a Sovereign is engaging in some private trading business subjects him to the processes in the Courts of a foreign country."<sup>9</sup>

A foreigner is exempt from the jurisdiction of the State which he has entered when the lawfulness of his acts and the consequences resulting from their commission, as well as the process to which he is amenable, are left to the determination of an outside power, such as his own country. It is always by virtue of the consent of the territorial sovereign that the exemption arises.<sup>10</sup> Such consent may be derived from a treaty willingly concluded by friendly powers. It may result from the long-continued and insistent demand of several States, and may not be fully expressed in any series of agreements. Again, the whole family of nations may unite in requiring each of its members to consent to a particular exemption, and so create a general duty of acquiescence. Regardless of the process by which the consent is obtained, the exemption, when once established, becomes necessarily a part of the local law. It is local because it is applied within the territory of a State; and it is a law because it is sanctioned by the supreme power within a State.<sup>11</sup> Thus, it is the law of China, pursuant to treaty, that the American citizen who commits murder within the territory of that country shall be punished according to the laws of the United States, and by an American tribunal exercising judicial functions on Chinese soil.<sup>12</sup> It may be regarded as the local law of every State that the heads of foreign powers shall be exempt from its jurisdiction whenever they enter its domain.<sup>13</sup>

Because the exercise of exclusive jurisdiction throughout the national domain is essential to the maintenance of the supremacy of the territorial sovereign, the most solid grounds of international necessity must be shown in order to justify a demand that a State consent to an exemption; convincing evidence of usage

<sup>9</sup> *Compania Mercantil Argentina v. United States Shipping Board*, 40 T.L.R. 601-602, referred to also in Hackworth, Dig., II, 477.

<sup>10</sup> Marshall, C. J., in *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 137.

<sup>11</sup> *Mather v. Cunningham*, 105 Maine, 326, 338.

Declared Finlay, L. C., in the case of *Casdagli v. Casdagli* [1919], A. C. 145: "The jurisdiction exercised by His Majesty in Egypt is indeed extraterritorial, but it is exercised with the consent of the Egyptian Government, and its jurisdiction is therefore, for this purpose, really part of the law of Egypt affecting foreigners there resident. . . . In Egypt it is part of the law of the governing community or supreme Power; in other words, it is part of the law of Egypt that English residents are governed by English law." (156 and 161.) It was said in this connection by Prof. Beale that "The acceptance by the House of Lords of the doctrine that the law administered in the consular courts is so administered because it is part of the territorial law of the sovereign, means its universal acceptance." (*Harvard Law Rev.*, XXXIII, 3.)

See, also, Lord Hobhouse, in *Secretary of State v. Charlesworth, Pilling & Co.* [1901], A. C. 373, 385, quoted by Sir Francis Piggott, *Extraterritoriality*, new ed., Hong Kong, 1907, 5-6. See statement by Mr. Hackworth, in Hackworth, Dig., II, 393.

<sup>12</sup> Art. XI of treaty of June 18, 1858, Malloy's Treaties, I, 215; also Art. XVII of treaty of Oct. 8, 1903, *id.*, 269.

<sup>13</sup> *Mighell v. Sultan of Johore*, Court of Appeal, L.R. 1894, Q. B. Div., I, 149, Moore, Dig., II, 558.

See *infra*, § 246.

See Steps towards the Relinquishment of Extraterritorial Jurisdiction, *infra*, § 265.



must be furnished in order to prove that, in the absence of treaty, the sovereign is to be deemed to have agreed to yield it. It becomes important, therefore, to examine the reasons urged in behalf of exemptions habitually demanded, as well as the processes by which they are conceded, and the extent to which they are admitted to exist. It is important also to observe the nature and purpose of particular exemptions; whether, for example, they are due to the official character of an individual, or to the function which he is supposed to fulfill; or to the relation between himself and some person or thing that is exempt; or to his method of entering the territory of a State, or to the inapplicability of certain laws to him.

(a)

§ 245. **The Same.** Exemption from local jurisdiction does not imply exemption also from all local control. It will be found that persons or things regarded as exempt from the former are frequently, under normal conditions, subjected to varying degrees of the latter. Although a particular individual may not be amenable to local process, he may, nevertheless, be prevented from committing acts regarded as detrimental to the public welfare, and rendered illegal by local enactment.<sup>1</sup> The foreign diplomat may be prevented from committing acts on account of which he might fairly claim immunity from prosecution.<sup>2</sup>

The term extraterritoriality, or exterritoriality, has frequently been employed not only to describe the character, but also to indicate the reason for the existence of various exemptions;<sup>3</sup> and in the latter connection, to signify that persons or things are immune from local process because they are to be regarded as "detached portions of the State to which they belong, moving about on the surface of foreign territory and remaining separate from it."<sup>4</sup> Even when confined to its descriptive function, the term is employed to refer to immunities accorded to entities or things which are essentially different. The foreign vessel of war which, for example, enjoys exemption from local jurisdiction, bears no resemblance to the parcel of land occupied by a foreign legation which, although the habitat of a diplomatic officer himself exempt from the local jurisdiction, is, nevertheless, subject to certain applications of the local criminal code with respect to offenses there committed by non-diplomatic persons.<sup>5</sup>

To assert the theory of exterritoriality as the reason for the existence of an

§ 245. <sup>1</sup> See excellent statement in Moore, Dig., IV, 678; also Mr. Hay, Secy. of State, to Mr. Wight, Feb. 17, 1900, 243 MS. Dom Let. 104, Moore, Dig., IV, 679.

<sup>2</sup> See, *infra*, § 442.

<sup>3</sup> See, for example, language of Mr. Cushing, Atty.-Gen., in the course of an opinion addressed to Mr. Marcy, Secy. of State, April 28, 1855, 7 Ops. Attys.-Gen., 122, 130, 131, Moore, Dig., II, 578.

<sup>4</sup> Hall, Higgins' 8 ed., § 48, p. 218. A different view was expressed by Mr. Kellogg, Secy. of State, in a communication to the Estonian Minister at Washington, April 15, 1925, when he said: "I find myself unable to agree with your view that since the offenses charged against T— were committed in the Estonian Legation at London they were committed within the territorial jurisdiction of Estonia. On the contrary, I am of the opinion that they were committed within the territorial jurisdiction of Great Britain."

<sup>5</sup> See, for example, case of Nitchencoff, a Russian subject, who committed an assault in the house of the Russian Ambassador at Paris, described in Moore, Dig., II, 778 citing *Solic. Journal*, X, 56, Nov. 18, 1865; also Mr. Jackson, Chargé, to Mr. Hay, Secy. of State, July 5, 1899, For. Rel. 1899, 318, Moore, Dig., II, 778-779.

exemption, is to contend that a foreign political power may penetrate the territory of a State, and there lawfully assert a will in derogation of that of its territorial sovereign.<sup>6</sup> Such an occurrence would mark the defiance of the supremacy of that sovereign within its own domain, and thereby ignore a principle which States have acted upon, and have utilized as the basis of their system of international justice.<sup>7</sup>

## (2)

§ 246. **Heads of Foreign States.** According to Chief Justice Marshall, the equality and independence of "sovereigns," and the common interest impelling them to mutual intercourse, have given rise to a waiver of jurisdiction over the persons of the heads of foreign States, as well as over certain other agencies thereof.<sup>1</sup> It must be clear that whatever is closely identified with or symbolic of the political power of members of the society of nations should not be treated with the disrespect necessarily implied by the assertion of jurisdiction by a territorial sovereign. What Hall refers to as the "ground of practical necessity" affords at the present time an equally cogent reason for exemption.<sup>2</sup> That necessity demands that the interests of a foreign State should not be injured or embarrassed by subjecting to local process such a national representative as a president or a king.

As a matter of practice, the head of a foreign State, who, as such, enters the territory of any other, enjoys, together with his personal suite, exemption from local jurisdiction. If he enters *incognito*, he does not forfeit the privilege of claiming exemption in case he makes known his official character.<sup>3</sup>

It is not believed that the form of the government of a State is decisive of the existence or extent of the exemption of the individual who is its official

<sup>6</sup> "Exterritoriality has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law outside the State in which they are. In this form there is evidently a danger lest the significance of the conception should be exaggerated. If exterritoriality is taken, not merely as a rough way of describing the effect of certain immunities, but as a principle of law, it becomes, or at any rate it is ready to become, an independent source of legal rule, displacing the principle of the exclusiveness of territorial sovereignty within the range of its possible operation in all cases in which practice is unsettled or contested. This of course is conceivably its actual position. But the exclusiveness of territorial sovereignty is so important to international law and lies so near its root, that no doctrine which rests upon a mere fiction can be lightly assumed to have been accepted as controlling it." Hall, *Higgins'* 7 ed., § 48, pp. 218-219. Also *Scharrenberg v. Dollar S.S. Co.*, 245 U. S. 122.

<sup>7</sup> Professor Diena has expressed himself thus: "It is perfectly clear that ex-territoriality is a fiction which has no foundation either in law or in fact, and no effort of legal construction will ever succeed in proving that the person and the legation buildings of a diplomatic agent situated in the capital of a State X are on territory which is foreign from the point of view of the State in question. There are sound practical as well as theoretical reasons for abandoning the term 'ex-territoriality,' for the mere employment of this unfortunate expression is liable to lead to errors and to legal consequences which are absolutely inadmissible." (*As Rapporteur* of Sub-Committee, in Report on Diplomatic Privileges and Immunities to League of Nations Committee of Experts for the Progressive Codification of International Law, *Am. J.*, XX, *Special Supplement*, July and October, 1926, 151, 153.)

See also *Chung Chi Cheung v. The King*, [1939] A. C. 160, 175.

§ 246. <sup>1</sup> *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 137.

<sup>2</sup> Hall, *Higgins'* 8 ed., § 48, p. 219.

<sup>3</sup> *Mighell v. Sultan of Johore*, Court of Appeal, L. R. 1894, Q. B. Div., I, 149, Moore, Dig., II, 558.

head.<sup>4</sup> It is highly improbable that the United States, within whose territory the heads of foreign countries are not infrequent visitors, would allow itself to be influenced by the matter of form. The attempt to assert jurisdiction over the President of the United States while within the domain of a foreign power would be regarded by his country as a grave violation of international law.<sup>5</sup>

The requirement that would exempt the head of a State from the local jurisdiction of another within whose territory he may be a sojourner, and thus render him immune from personal service while therein does not, however, imply that property owned by him within a foreign State may not, under certain circumstances, be made the object of adjudication at the suit of a private party claiming an interest therein. The State within whose limits such property may be located or may belong is not, by reason of the character of the owner, deprived of the right to dispose, through judicial process, of adverse claims asserted in relation to it. The territorial sovereign may not unreasonably fix the conditions upon which title to property within its limits may be lawfully acquired and preserved; and those conditions may fairly include the waiver by an alien owner of immunity from personal service (even though he be the head of a foreign State), or a waiver of the necessity of such service, or appropriate acknowledgment that under certain conditions interests in the property adverse to his may be subjected to, and adjudicated upon, by the local tribunals.

The head of a foreign State is not permitted to exercise judicial functions within the national domain, with respect to persons even of his own suite. Nor can he properly afford asylum within his residence to fugitives from local justice. By attempting thus to thwart the authorities of the State, or by otherwise abusing the privileges necessarily accorded him, he would incur the danger of compelling the territorial sovereign to expel him from its domain.

One who by any process ceases to be the head of a State, at once loses the privilege of exemption from jurisdiction.

The reasons which support the yielding of an exemption from the local jurisdiction to the head of a foreign State are believed to be applicable also in the case of the head of a foreign government, when embarked upon an official mission in behalf of his country, even though he be not technically transformed,

<sup>4</sup> See Fauchille, 8 ed., § 639; McNair's 4 ed. of Oppenheim, I, § 356; Sir E. Satow, A Guide to Diplomatic Practice, 3 ed., London, 1932, §§ 6-14.

Cf. Baron A. Heyking, "*L'Exterritorialité et ses Applications en Extrême-Orient, Recueil des Cours*," 1925, II, 237, 283-286.

Concerning the exemption of diplomatic officers from judicial process, see *infra*, § 435.

<sup>5</sup> No European country which he visited in 1918 and 1919 would have been inclined under any circumstances to deny complete exemption from local jurisdiction to President Wilson. The Presidents of the United States are not indisposed at the present time to become brief sojourners on foreign soil. President Franklin D. Roosevelt visited New Brunswick in 1933, and Colombia, Haiti, the Dominican Republic and Panama, in 1934. In later years he was to visit Canada, Africa, Brazil and Mexico.

The Archduke Charles Francis Joseph, the defendant in a case based upon contract and acts of a private nature which arose in Italy, became the Emperor of Austria during the course of the adjudication. This circumstance was not deemed to suffice to produce for him immunity from the Italian jurisdiction. See *Nobili v. Emperor Charles I of Austria*, Court of Cassation of Rome, March 11, 1921, Williams and Lauterpacht, Annual Dig., 1919-1922, Case No. 90.

by appropriate documents, into a diplomatic officer during the period of sojourn abroad.<sup>6</sup>

## (3)

## FOREIGN MILITARY FORCES

## (a)

§ 247. **Entering the Territory of a State With Its Consent.** Strong grounds of convenience and necessity prevent the exercise of jurisdiction over a foreign organized military force which, with the consent of the territorial sovereign, enters its domain. Members of the force who there commit offenses are dealt with by the military or other authorities of the State to whose service they belong, unless the offenders are voluntarily given up.<sup>1</sup> This was recognized in the terms of an agreement between the United States and France, concluded in January, 1918.<sup>2</sup> It may be observed that in the course of discussions with the British Government in 1918, in relation to the conclusion of an arrangement (that was not consummated) pertaining in part to the American jurisdiction over members of American military forces in England, the Department of State found occasion to observe that "the competent authorities of this Government are of the opinion that the result of entering into an agreement such as that proposed in the above-mentioned note would be a partial surrender by the American forces to the British Government of jurisdiction over the military forces of the United States located within British territorial limits for offenses committed on American warships or in American camps and would involve the lack of proper recognition of the character and competency of the existing American military tribunals. In view of the foregoing and since the British Government has already entered into an agreement upon this subject with the Government of France dated December 15, 1915, which agreement is substantially the same as was entered into between the Governments of the United States and France, it is respectfully suggested that the British Government may desire to submit a proposal embodying the same terms as those contained in the French-American

<sup>6</sup> When the Prime Minister of Great Britain, in 1929, and again in 1933, and likewise, the President of the Council of Ministers of the French Republic, in 1931, visited the United States for official conference with the President of the latter, their exemption from the local jurisdiction, had the question arisen, would doubtless have been yielded.

§ 247. <sup>1</sup> Declared Marshall, C. J., in the case of *Schooner Exchange v. McFaddon*: "The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments, which the government of his army may require." 7 Cranch, 116, 139. See, also, *Tucker v. Alexandroff*, 183 U. S. 424.

"It is a principle of international law that the armed force of one State, when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign, but to that of the officers and superior authorities of its own command." (*The Republic of Panama v. Wilbert L. Schwartziger*, Supreme Court of Justice of Panama, Aug. 11, 1925, *Am. J.*, XXI, 182, *McNair and Lauterpacht*, Annual Digest, 1927-1928, Case No. 114.)

Also, in this connection, see Mr. Fish, Secy. of State, to Mr. Cameron, Secy. of War, Dec. 7, 1876, 116 MS. Dom. Let. 166, Moore, Dig., II, 400.

<sup>2</sup> For. Rel. 1918, Supplement 2, 735. See documents *id.*, 733-760, concerning "Legal Status of Members of American Forces in Europe."

note dated January 14, 1918, which would receive the favorable consideration of the United States Government."<sup>3</sup>

Through Article IV of the agreement with Great Britain of March 27, 1941, for the use and operation of naval and air bases by American authority in Newfoundland, Bermuda, Jamaica, St. Lucia, Antigua, Trinidad and British Guiana, there was a yielding to the United States of jurisdiction over members of its forces charged with the commission of offenses of a military nature, punishable under the law of the United States.<sup>4</sup> There was, however, no specific concession of jurisdiction with respect to non-military offenses committed outside of the limits of such bases. The agreement did not purport to go the whole way and grant or acknowledge the full and exclusive privilege to which the United States appeared to be entitled when its forces, with the consent of the territorial sovereign, were on British soil which might be outside of the leased areas.<sup>5</sup>

If a member of a military force seeking to break his connection therewith succeeds in fact in escaping from its control, or from the area under its control, it is not believed that the military authority possesses the right to pursue, arrest and punish him. The jurisdiction of the military authority would seem to depend upon retention of actual control over the individual, or the area where he acts and is found. The territorial sovereign may, of course, on grounds of expediency or courtesy, consent to pursuit and arrest, and even to the infliction of punishment.<sup>6</sup>

It is highly desirable that agreements between interested States be of wide scope, and purport to arrange not merely for penal cases, but also for the immunities of members of foreign military forces from the local jurisdiction in civil matters. It is desirable also that understanding be had as to the effect of separation from the actual control of their own military forces at the time of, and following, the commission of particular acts, upon any immunities from that jurisdiction which may be conceded or acknowledged.

### (b)

**§ 248. Entering the Territory of a State Without Its Consent.** When a foreign military force enters the territory of a State without its consent, it is believed that the exemption of any member from local jurisdiction should, on principle, depend solely upon whether there is solid justification for the expedition itself. If, for example, there are present those extraordinary circumstances which, on grounds of self-defense, excuse the violation of the national domain, the participants would seem to be entitled to such exemptions as they might

<sup>3</sup> *Id.*, 748-749. See also *id.*, 759-760.

<sup>4</sup> U. S. Executive Agreement Series, No. 235.

<sup>5</sup> [It was not to be until well after the United States became a belligerent in World War II that Britain was to make full relinquishment of jurisdiction in criminal proceedings against members of American military or naval forces.]

<sup>6</sup> In the case of *Tucker v. Alexandroff*, 183 U. S. 424, 435, the Supreme Court of the United States expressed doubt whether, in the absence of positive legislation by Congress, the President possessed the power to authorize a foreign officer to apprehend deserters within the United States. Compare situation in *Casablanca Case*, J. B. Scott, *Hague Court Reports*, 110.

See Consuls, Reclamation of Deserting Seamen, *infra*, § 484.

claim had the territorial sovereign permitted the force to enter the country. Again, if the entrance or landing of a foreign force is excusable in a particular case as a necessary means of protecting the lives and property of nationals, the claim to like exemptions would appear to be equally well grounded.<sup>1</sup> If, however, for any reason the movement or expedition constitutes an essentially illegal invasion of the territory of a friendly State, in time of peace, it is difficult to see how any member of the force derives exemption from the local jurisdiction by reason of the fact that his acts as a participant are in obedience to the commands of a foreign sovereign. Inasmuch as no duty is imposed upon the State to permit the entrance of the force, there would seem to be no duty to consent to the surrender of jurisdiction with respect to a member of it.<sup>2</sup> For that reason it is to be regretted that Mr. Webster, as Secretary of State, in the case of McLeod, whose acts of participation in the *Caroline* expedition in 1837 within the State of New York were ratified by the British Government, declared that while he deemed the expedition to be without justification, the action of the Crown sufficed to exempt the individual from local prosecution in New York.<sup>3</sup>

§ 248.<sup>1</sup> This is because the violation of territory is, as has been seen, for the purpose of fulfilling a necessary function of government which the State lacks, for the time being, the power or disposition to perform, and when non-performance would be productive of grave and irreparable injury to the rights of the foreign State whose military force is engaged in the expedition. In such case the territorial sovereign is not in a position to claim that the absence of its own consent is proof of the illegality of the penetration of its domain.

See certain Non-political Acts of Self-Defense, *supra*, §§ 65-67; The Landing of Foreign Forces, *supra*, § 202.

<sup>2</sup> It must be acknowledged that a practical difficulty may stand in the way of the application of the principle enunciated in the text. A State whose force enters foreign territory will always be reluctant, if not wholly unwilling, to admit that the expedition lacked justification. On the other hand the State whose territory is invaded may be equally unwilling to admit that there was reasonable excuse for what took place.

<sup>3</sup> See communication to Mr. Crittenden, Atty.-Gen., March 15, 1841, Webster's Works, VI, 262, 264, Moore, Dig., II, 25. *Contra*, statement of Mr. Calhoun, in the Senate, June 11, 1841, Calhoun's Works, III, 618, Moore, Dig., II, 26.

Concerning the case of the *Caroline*, see *supra*, § 66.

"In November, 1840, Alexander McLeod was arrested by the authorities of the State of New York and held for trial on a charge of murder committed at the time of the destruction of the steamer *Caroline*, December 29, 1837, within the territorial jurisdiction of that State. On the 13th December, 1840, Mr. Fox, the British Minister at Washington, on his own responsibility asked for his immediate release, on the ground that the destruction of the *Caroline* was 'a public act of persons in Her Majesty's service, obeying the order of their superior authorities'; that it could, therefore, 'only be the subject of discussion between the two national Governments,' and could 'not justly be made the ground of legal proceedings in the United States against the persons concerned.' Mr. Forsyth, Secretary of State, replied on the 28th of December, with the declaration that no warrant for the interposition called for could be found in the powers with which the Federal Executive was invested, but at the same time denying that the demand was well founded. On the 12th of March, 1841, Mr. Fox, in behalf of his Government, presented a formal demand for McLeod's immediate release, on the ground which he had previously stated. Mr. Webster, who had then become Secretary of State, made answer on the 24th of April, and, while admitting the grounds of the demand, declared that the Federal Government was unable then to comply with it. In May McLeod was taken down to the city of New York, and was there brought before a justice of the supreme court of the State on a writ of *habeas corpus*. After a full argument, that tribunal, in July, refused to discharge him; and in the ensuing October, ten months after the first demand and seven months after the second, he was tried at Utica, and acquitted on proof of an *alibi*. This case led to the adoption by Congress, in August, 1842, of an act to provide for the removal of cases involving international relations from the State to the Federal Courts." Moore, Dig., II, 24-25, *citing* message of Dec. 28, 1840, H. Ex. Doc. 33, 26 Cong., 2 Sess.; report of Feb. 13, 1841, H. Report 162, 26 Cong., 2 Sess.; message of June 1, 1841, S. Doc. 1, 27 Cong., 1 Sess.; message of March 8, 1842, H. Ex. Doc. 128, 27 Cong., 2 Sess.; message of Aug. 11, 1842, H. Ex. Doc. 2, 27 Cong., 3 Sess.; message of Jan. 23, 1843, S. Ex. Doc. 99.

If McLeod was, according to the law of nations, exempt from the jurisdiction of that State, it was because the violation of its territory by a British force had been justified on grounds of self-defense, and the attending circumstances had satisfied the demands of the legal principle which Mr. Webster had himself tersely enunciated.<sup>4</sup>

(c)

§ 249. **Individual Members of Foreign Military Forces.** The reasons of necessity and convenience which give rise to exemptions accorded foreign organized military forces permitted to enter the national domain are not applicable in the case of detached individuals belonging to foreign services. Notwithstanding the right of the territorial sovereign to prosecute them for the commission of offenses against its laws, it may be requested to surrender such offenders, on grounds of courtesy, to the authorities of their own State. The United States has made such a request.<sup>1</sup>

It is believed to be important to observe that in time of peace no individual gains immunity from local prosecution by reason of the fact that he is a member of an absent foreign military force, and that the act charged against him was committed in obedience to a military or other command emanating from a foreign State.<sup>2</sup>

27 Cong., 3 Sess.; Brit. and For. State Pap., XXIX, 1126, and *id.*, XXX, 193; *People v. McLeod*, 25 Wend. 483; 26 Wend. 663, Appendix; Mr. Fox, British Minister, to Mr. Webster, Secy. of State, March 12, 1841, Webster's Works, VI, 247; Mr. Webster, Secy. of State, to Mr. Fox, British Minister, April 24, 1841, *id.*, 250; correspondence between Mr. Forsyth and Mr. Fox, H. Ex. Doc. 33, 26 Cong., 2 Sess.

<sup>4</sup> Mr. Webster, Secy. of State, to Lord Ashburton, Aug. 6, 1842. Webster's Works, VI, 301-302, Moore, Dig., II, 412. See, also, *Arce v. State*, 202 S. W. (Texas Court of Crim. Appeal) 951. In this case it was held that the courts of Texas were without jurisdiction to punish Mexican soldiers who, while attached to forces of Gen. Carranza, killed American soldiers in the course of a battle in Texas. The decision was based on the theory that while at the time of the killing there was no "public or complete war" existing between the United States and Mexico, the battle was an act of war and technically within the limited meaning of the word "war."

§ 249. <sup>1</sup> Mr. Seward, Secy. of State, to Gen. Salgar, Colombian Minister, March 30, 1865, MS. Notes to Colombia, VI, 182, Moore, Dig., II, 561.

<sup>2</sup> See, in this connection, *Horn v. Mitchell*, 223 Fed. 549. In this case one Horn was held in custody by the United States Marshal for the District of Massachusetts to answer to an indictment charging the prisoner with illegal transportation of explosives interstate, from New York to Boston, and from Boston to Vanceboro, Maine, and alleging that such transportation was necessarily connected with and a part of the destruction of a bridge which was (near Vanceboro and in British territory) in the possession of the British Government. The prisoner sought release by *habeas corpus*, contending in part, that he was not subject to prosecution on the indictment found against him in the District of Massachusetts, because he was an officer of the German army and had committed the acts alleged to be a violation of American law in connection with an attack upon British territory. The petitioner relied upon Section 753 of the Revised Statutes, by virtue of which he contended that he was entitled to have the question of his immunity from prosecution on account of his alleged connection with the German army determined upon *habeas corpus* proceedings. On the assumption that the statute should be given such construction, the United States District Court was not of opinion that the petitioner brought himself within its provisions, for the reason that while he was a subject of a foreign State, it did not appear that he was domiciled within its territory, or that the acts in question were authorized or commanded by the foreign State whose commission he held. In the absence of such authorization it was declared that the prisoner could not invoke the law of nations or his foreign commission in his defense. The court was unwilling to yield to the contention that the petitioner had presumptive authority to act for his government in a foreign country and to bind it by what he did there.













